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THE USE OF MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION IN THE RESOLUTION OF INTELLECTUAL PROPERTY RIGHTS DISPUTES

Sabela Gayo[1],

[1] *Faculty of Law, Universitas Bhayangara Jakarta Raya, Indonesia. E-mail: sabela.gayo@gmail.com*

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ABSTRACT

In the world of digitization where human ability in business has penetrated into the virtual world, the development of this business needs legal protection of intellectual property is growing very rapidly. Various forms of dispute resolution in the field of intellectual property are then present in supporting the creation of legal protection of intellectual property rights holders in Indonesia. The exclusive rights of these creators, inventors and designers are often abused without rights by others for personal gain. This journal aims to determine the arrangement of dispute resolution in the field of intellectual property and to determine the forms of mediation that can be chosen or used in the resolution of intellectual property disputes. The writing of this journal uses normative legal research methods. The results showed that the arrangement of dispute resolution in court was made by filing a civil lawsuit in the Commercial Court and conducting criminal prosecution in the General Court. Arbitration may also be chosen as a medium for resolving intellectual property disputes. In addition, negotiation, conciliation and mediation are some alternative forms of dispute resolution that can be chosen in the resolution of intellectual property disputes. The forms of mediation referred to here are voluntary mediation (out of court) and penal mediation in criminal charges.

INTRODUCTION

During the covid 19 pandemic and National Economic Recovery, national development in the economic field became one of Indonesia's mainstays and developed in line with the rapid pace of Science and technology demanding the need to meet the elements of protection and development of the creative economy through the birth of new and original creations as the embodiment of the results of human intellectual thinking, so it is expected that contributions to the country's economy can be more optimal. Intellectual property rights (hereinafter referred to as IPR) can contribute financially because it has a high economic value, so it can have a positive impact on national economic growth. Complex and competitive economic growth has the potential for disputes or conflicts that require quick, easy, and low-cost solutions.

In general, the solution of disputes is conventionally done through the court (litigation), but subsequent

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developments arise outside the court settlement of disputes due to dissatisfaction with the dispute resolution efforts through the court. Settlement of disputes outside the court can be done through arbitration and Alternative Dispute Resolution (APS), namely consultation, negotiation, mediation, conciliation, or expert judgment as stipulated in law (UU) number (No) 30 year 1999. However, that can be resolved is a dispute in the field of trade or business, so that the disputes that arise are not related to business and can not be held peace is not the object of settlement of the act.

In Law No. 30 of 1999 based on the implementation of judicial power submitted to the judicial body with reference to Law No. 14 of 1970 on the basic provisions of judicial power. It is the parent and general framework that lays the foundation and principles of justice and guidelines for the environment of General justice, religious Justice, military justice and administrative justice, each of which is regulated in a separate law. In the explanation of Article 3 Paragraph (1) of Law No. 14 of 1970 mentioned, among others, that the settlement of cases outside the court on the basis of peace or through Permanent Arbitration it is permissible, but the arbitrator's decision only has executorial power after obtaining permission or an order to be executed (executoir) from the court. So far that is used as the basis for arbitration examination in Indonesia is Article 615 sd article 651 Civil Procedure Reglemen (Reglement op de Rechtsvordering, Staatsblad 1847. 52) and Article 377 updated Indonesian Reglemen (Het Herzeiene Indonesisch Reglement, Staatsblad 1941:44) and Article 705 Reglemen events for areas outside Java and Madura (Rechtsreglement Buitengewesten, Staatsblad 1917 No. 127).

The development of the business world and traffic in the field of trade both nationally and internationally as well as the development of law in general, the regulations contained in the Reglemen of Civil Procedure (Reglementop de Rechtvordefing) used as arbitration guidelines are no longer appropriate so that it needs to be adjusted because the international regulation is a requirement condido sine qua non while it is not regulated in the Reglementop de Rechtvordefing). Starting from this condition, a fundamental change to the regulation of Civil Procedure both philosophically and substantively has been implemented. The international protection of intellectual property is regulated in the Berne Convention for the Protection of Literary and Artistic Works of 1886 for the protection of copyright; and the Paris Convention for the Protection of Industrial Property for industrial property. Then, international provisions in the field of copyright and other industrial property were born that refer to the 2 (two) international agreements. One of the issues of the Uruguay Round agreement is the aspects of trade related to KI, as outlined in the TRIPs Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights) as an Annex of the agreement Establishing the World Trade Organization (WTO). Before the birth of the WTO already had a special body that deals with intellectual property issues, namely the World Intellectual Property Organization (WIPO), but the existence of WIPO is considered less powerful in protecting intellectual property.

Indonesia as a country that has ratified TRIPs through Law No. 7 of 1994 on the ratification of the establishment of the World Trade Organization (WTO), Indonesia has an attachment to implement the provisions of KI contained in TRIPs.

Indonesia has ratified and updated the provisions relating to IPR, namely: Law No. 28 of 2014 on Copyright; Law No. 13 of 2016 on patents; Law No. 20 of 2016 on brands and Geographical Indications; Law No. 29 of 2000 on Plant Variety Protection, Law No. 30 of 2000 on trade secrets; law No. 31 of 2000 on Industrial Design; Law No. 32 of 2000 on integrated circuit layout design. The provisions of Law No. 30 of 1999 on arbitration and APS can be applied to disputes outside the court relating to KI. APS according to the law includes, among others, mediation. However, it is also known as mediation in court as stipulated in PERMA no. 1 of 2008 on the procedure for mediation in court. This means that mediation can be categorized into 2 (two) parts, namely mediation outside the court; and mediation in court.

Mediation in court is regulated by law no. 48 of 2009 on the judicial authority, that" the provisions referred to in Paragraph (1) do not close the business of settlement of civil cases in a peaceful manner " (Article 10 paragraph (2). While mediation outside the court, in law no. 48 of 2009 is regulated in Chapter XII of Article 58 to Article 61. These four articles refer to law no. 30 of 1999 on arbitration and APS. According to law no. 48 of 2009, mediation through the court is further regulated in PERMA no. 1 of 2008 on the procedure for mediation in court, which was established on July 31, 2008. PERMA No. 1 year 2008 which consists of Chapter VIII and Article 27, does not refer and does not refer to law no. 30 of 1999 as no. 30 of 1999 in Konsiderans "remember" the PERMA intended it. Thus, mediation according to PERMA no. 1 of 2008 is different from mediation in Law No. 30 of 1999. Mediation in PERMA no. 1 year 2008 is intended as

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mediation in court (litigation) while mediation according to Law No. 30 year 1999 is intended for settlement of disputes outside the court (non litigation).

The mechanism of dispute resolution outside the court according to Law No. 30 of 1999 there are several forms, but this study will discuss the resolution of disputes related to intellectual property through a mediation mechanism. Based on that, the identification of the problem is:" how to alternative the resolution of intellectual property rights disputes through mediation ."

METHOD

The research method used in this paper is normative jurisi research method. Normative research requires the implementation of statutory approach and conceptual approach. Data collection techniques used are through the study of documents and literature on secondary data in the form of primary, secondary and tertiary legal materials. The analysis used is descriptive.

RESULTS AND DISCUSSION

A. Alternative Dispute Resolution in resolving intellectual property rights disputes.

Intellectual property in legal science is classified as part of the law of wealth (property). The legal protection provided is separate between the right to intellectual property and the physical form of the right. Intellectual property rights are rights obtained because of the ability to use the ratio of his brain to think creatively and reason to produce an intellectual work, so that intellectual property rights are intangible and classified as individual property rights. HKI in his right is a right given to someone because of his ability to produce a work by using his intellect that provides benefits for the welfare of mankind. These works have a high economic value and are produced from such a great effort to sacrifice the mind, time, energy and family, so that those who have produced works in the field of intellectual property get exclusive rights as a form of legal protection.

It is known that intellectual property is grouped into 2 (two) large parts, namely copyright (copy rights) that provide protection to works of science, art and literature. And the second is the industrial property rights (industrial property rights) which consists of, patents, brands, geographical indications, trade secrets, and integrated circuit layout design. The works produced from these fields have different rights although they are both intellectual property that gives exclusive rights to those who have given birth to an intellectual work, but to obtain exclusive rights in these areas of property is different. As in the field of copyright, exclusive rights are obtained directly once an intellectual work has been realized in the form of a real work or get automatic protection (automaaticelly protection).9 as for intellectual property in the field of industry such as patents, brands, and industrial designs adhere to the first to file system that is who registers his work first then is the one who will get exclusive rights. The period of granting legal protection also varies due to the characteristics of each.

The regulation of each field of intellectual property in Indonesia is manifested in the form of: law no. 28 Of 2014 On Copyright; Law No. 13 Of 2016 On Patents; Law No. 20 of 2016 on brands and Geographical Indications; law no. 29 Of 2000 On The Protection Of Plant Varieties; Law No. 30 Of 2000 On Trade Secrets; Law No. 31 Of 2000 On Industrial Design; Law No.32 Year 2000 On Integrated Circuit Layout Design. This regulation of intellectual property in Indonesia has comprehensively regulated and accommodated the need to protect the exclusive rights of creators, inventors or designers. Legal protection for people who have produced works that benefit society is very important means to encourage everyone to create and generate new ideas that provide financial for him so that it will help the economic development of the country.

Regulation in the field of IPR must apply the principles contained in TRIPs-agreements and international conventions IPR must also be in line with the development of society. To realize the legal protection of certainty and justice, against people or groups of people who commit fraud for personal purposes using the works of others without rights must be given legal action. Related to this, the provisions of the IPR law as mentioned above have regulated how to resolve IPR disputes. Provisions governing dispute resolution in the Indonesian IPR law are regulated in different articles, namely copyright regulated from Article 95 to Article 120 of the Copyright Law; patents in articles 145, 153 and 154 of the patent law; brands and geographical indications regulated in Articles 83 to 93; Industrial Design, contained in articles 46 to 48; trade secrets regulated in Articles 11 and 12; for the protection of plant varieties settlement of disputes regulated from articles 66 to 69; and for the design of integrated circuit layout regulated in Article 38, 39, and 40. In addition to civilly regulated, in the law in the field of intellectual property also regulated provisions against HKI violations.

From these provisions, it can be known that to solve the problem of intellectual property infringement can be resolved through several types of

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settlements, including: judicial (litigation), arbitration and alterantive Dispute Resolution.

1. Litigation, in the practice of public life, if there is a violation of applicable laws and regulations, then the party who feels that it has been harmed due to the violation can prosecute and file a lawsuit against the party who has committed the violation. This process is known as court proceedings. The judiciary is actually the last step taken by justice seekers if the problems faced cannot be solved on their own. The judicial process in Indonesia that is directly related to public justice in general is carried out by the Supreme Court in 4 (four) judicial environments, namely the General, Military, Religious and state administration courts as determined by Article 24 paragraph (2) of the 1945 NRI Constitution. Each of these courts has a special court under it except military courts and Commercial Courts are one form of special courts under the General Court environment. Related to the settlement of disputes in the field of intellectual property is the absolute authority of the Commercial Court, therefore it will be examined and decided by a judge at the commercial court based on the laws in the field of intellectual property and Civil Procedure Law in force. For criminal charges against intellectual property infringement cases are carried out in the General Court under the intellectual property law, the Code of Criminal Law and the code of Criminal Procedure.
2. Arbitration is a way to resolve disputes outside the court based on the arbitration clause contained in the written agreement of the parties, where the arbitration process is conducted with the help of an arbitrator who has the authority to decide the dispute faced by the parties. The implementation of Arbitration for KI disputes is carried out based on the legal basis of arbitration, namely law no. 30 of 1999 on Alternative Dispute Resolution.
3. Alternative Dispute Resolution is a form of settlement of disputes outside the court that is done lawfully according to the law based on the consent of the parties.14 this form of dispute resolution is not a new thing for the people of Indonesia, because since ancient times it has been known the existence of consensus which is the basis of PSA. The forms of PSA described in the elucidation of the respective article of the KI law governing the settlement alternative disputes consist of: 1)negotiation, which is a way of dividing the problem voluntarily carried out by the litigants only; 2) conciliation is done by bringing together the litigants to resolve the dispute faced by submitting the dispute to the conciliator in order to achieve an agreement of Will between the parties. These parties are not obliged to agree who is the conciliator, so this conciliation is not absolute; 3) mediation, is a form of dispute resolution involving an impartial third party (mediator) to help resolve disputes between the parties, but the final decision is still determined by the parties only, the mediator in this case does not have the authority to decide the dispute.

B. Alternative Dispute Resolution in the settlement of Intellectual Property Rights disputes

Mediation is one form of dispute resolution that can be chosen in resolving disputes in the field of IPR. Mediation is a form of application of the principle of the judicial trilogy that is not applied in the litigation process in court. The emergence of this nonlitigation institution is due to the disappointment of the litigation process in the courts that never found the end point of resolution. Litigation path in essence only aims to fulfilling the emotional desire of one of the parties by seeing the opposing party lose to the judge's decision, continued again with the available legal remedies, so that on the rightet this dispute never ends and instead backfires for the parties them selves.

Unlike mediation, which is carried out with the principle of win-win solution and deceives the parties to negotiate cooperatively in order to resolve the dispute independently by being brokered by a mediator. In the mediation process the decision is entirely decided by the parties, the mediator only helps to give suggestions and helps them to be able to immediately resolve the dispute and convince them to carry out the outcome of the peace. With the discovery of the benefits of mediation psoses in solving the problem of different interests and desires, then the Supreme Court then integrated mediation in the form of Perma no. 1 of 2016 on the mediation procedure in court, which is basically a further implementation of the provisions of articles 130 HIR and 154 Rbg which have determined that

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the judge is obliged to reconcile the parties to the dispute first.

After the enactment of the perma, all civil disputes submitted to the court must be sought for resolution through mediation procedures and if this effort is unsuccessful, then proceed with an examination on the subject of the dispute. The juridical reason for the regulation of such provisions is none other than to reduce the accumulation of cases in court and break the tangle of disputes that occur by conveying the wishes of each so that they remain in a harmonious relationship with each other. However, in the provisions of Article 4 paragraph (2), it is determined that there is an exception of the obligation for cases that have a time limit for examination such as commercial courts. Thus, the settlement of IPR disputes through mediation cannot be done based on Perma no.1 year 2016.

However, it should be borne in mind that the implementation of mediation is not only in the courts but also known as out-of-court mediation or voluntary mediation. The implementation of this mediation process is not regulated and determined by the state through its law enforcement,

unless it is the will of the parties to resolve the dispute nonlitigated through mediation. The procedure of mediation is in principle done the same as the mediation process in court. The juridical basis for the implementation of mediation outside the court is law no.30 years. 1999 and measures in the generally applicable mediation process. So the choice of mediation as a form of Alternative Dispute Resolution in the field of IPR is voluntary mediation.

The criminal provisions contained in some intellectual property laws such as copyright, patent, trademark and geographical indications expressly regulate the obligation to mediate first before the criminal prosecution process is carried out. This shows that mediation in the provisions of the IPR law is not only aimed at civil disputes, but also on cases of violations that are criminal offenses. The mediation process is conducted by mediating by the police as a mediator who mediates the meeting of victims and perpetrators to resolve their cases.20 the implementation of this mediation is known as penal mediation. Penal mediation is taken in case of minor criminal offenses and cases related to complaints such as cases of violations in the field of IPR. This mediation is carried out because of the discretionary authority of the police and is regulated in the Circular Letter of the Chief of Police No. Pol: B/3022/XXII / 2009 / SDEOPS on the handling of cases through Alternative Dispute Resolution which emphasizes the resolution of criminal cases with alternative dispute resolution procedures as long as agreed by the parties. This is based on the fact that the legal relationship between the inventor/creator and the perpetrator is a private to private relationship that causes harm to the right holder so that in this case no state interest is violated. Thus, the settlement of KI disputes through penal mediation has applied the concept of restroactive justice, namely putting the victim back in his original position compared to dropping the criminal to the perpetrator. So in this case for the holder of exclusive rights that have been violated will get compensation.

CONCLUSION

Alternative Dispute Resolution in resolving intellectual property rights (IPR) disputes. the Ki law is regulated in different articles and consists of dispute resolution through litigation and non - litigation channels, namely through formal mechanisms in court and outside the court with arbitration mechanisms and Alternative Dispute Resolution in the form of negotiation, conciliation, and mediation. Legal steps that can be taken for it is to file a civil lawsuit in the Commercial Court and conduct criminal prosecution in the General Court.

Mediation as an Alternative Dispute Resolution in the resolution of intellectual property rights disputes (IPR) the implementation of which is determined in the Intellectual Property Law in Indonesia is not a form of mediation in court as regulated in Perma no.1 year. 2016, but voluntary mediation by the parties outside the court and also a form of penal mediation in criminal law with the police acting as a mediator.

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