

The Roles of The Indonesian National Arbitration Board (BANI) in Resolving Intellectual Property Disputes

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Abstract— Intellectual property disputes may arise from intellectual property violations and they afflict the intellectual property owners. The disputes can be due to violations of the owner's economic or moral rights. Intellectual property rights disputes that occur in Indonesia are generally resolved in the Commercial Court. However, Indonesia's government has established the Indonesian National Arbitration Board (BANI) to resolve intellectual property rights disputes. There is a need of an in-depth study on the board's authority in resolving the disputes, especially intellectual property disputes. The study is necessary since BANI's role in resolving intellectual property disputes in Indonesia is considered a novelty. It is necessary to find out the effectiveness of the body and what obstacles it encounters in its line of duty to resolve intellectual property disputes. This innovation does not raise only pros and cons but also various problems regarding its establishment in Indonesia. This paper not only describes the roles of the Indonesian National Arbitration Board (BANI) in resolving intellectual property rights disputes but also provides solutions for the disputing parties and the board (BANI) to resolve intellectual property rights disputes with a win-win solution.

Keywords— Intellectual Property Disputes, Arbitration, Indonesia

I. INTRODUCTION

Intellectual property is a work of human intellects for which the owners can give protection. The legal protection is necessary to guarantee its legal certainty for the owner from harmful actions taken by other parties against the owner of the intellectual property. There are many violation cases of intellectual property ownership in Indonesia and these violations turn into disputes which are settled whether in court or outside the court.

Intellectual property disputes occur because of some violations and they harm the owner of the intellectual property. They can include the economic right violations or moral right violations against the owner of the intellectual property. Therefore, the owner may file a lawsuit for those alleged violations.

Generally, the intellectual property disputes are carried out and filed in the commercial court as stated in the intellectual property laws. The first level of judicial body which is given to settle cases of intellectual property violations is a commercial court. This court serves as a special court which is under the general court. Any appeal against the commercial court's verdict can only be submitted through a cassation to the Supreme Court as the final judicial body in the intellectual property dispute resolutions. There is another alternative to settle any intellectual property disputes which does not involve any lawsuit to the commercial court. This is carried out through an arbitration or alternative dispute

resolution. There is always another way to settle this dispute beside going through a litigation process, i.e. a court. This condition is an improvement for settling disputes in Indonesia by using an alternative dispute resolution.

Arbitration is a process outside a court in which both parties wishing to settle their disputes discuss the matter with a third party to plan and to make decision that is mutually agreed so that all of the rights, interests of the disputes can be settled immediately and fairly from the discussion in front of the third party[1]. Formal juridically, the dispute resolution outside the court mentioned in the law is optimizing the role of regulations which include provisions governing alternative uses of dispute resolutions (as in Act Number 30 of 1999 and Supreme Court regulation number 1 of 2008) which mention that courts will respect decisions made by alternative dispute resolution institutions.

Article 95 paragraph (1) of Act No. 28 of 2014 concerning Copyright, emphasizes that Copyright disputes can be resolved using alternative dispute resolutions, arbitration, or courts. Article 93 of Act No. 20 of 2016 concerning Trademarks and Geographical Indications states that besides being able to be settled through a commercial court, both parties in dispute can resolve the dispute through an arbitration or alternative dispute resolution. Article 153 paragraph (1) of Act No. 13 of 2016 concerning Patents provides an opportunity for parties to settle patent disputes through an arbitration or alternative dispute resolution.

Initially, the resolution of disputes through the ADS was only limited to the resolution of trade disputes, but at

present, dispute resolutions through the ADS have been used to resolve civil disputes, both general and special civil disputes. And at this time, disputes in the field of IPRs including patent, trademark, and copyright disputes have also been resolved through the APS. However, in reality IPR dispute resolutions through the ADS is still constrained so that many parties in dispute are hesitant to choose this path. This leap of action not only raises the pros and cons but has various problems with its presence in Indonesia.

The Indonesian National Arbitration Board (BANI) is an independent body that provides diverse services relating to arbitration, mediation and other forms of extracurricular dispute resolutions. Dispute resolutions through BANI began to increase since the enactment of Act No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Dispute resolution through arbitration is an option because of the benefits that can be owned by the parties. In addition, this alternative is fast, efficient and complete. An arbitration adheres to the principle of win-win solution, and is not long-winded because there is no appeal and cassation institution. The cost of arbitration is also more measurable, because the process is faster. Another advantage of arbitration is that its decisions are immediate and binding. In addition to their confidential nature, the proceedings and arbitral award are not published.

The authority of BANI in resolving disputes especially intellectual property disputes needs to be studied in depth. This is motivated by BANI's role in resolving intellectual property disputes which is new to Indonesia. How the effectiveness and what is faced by BANI in the course of solving intellectual property disputes needs to be analyzed properly.

II. RESEARCH METHOD

This research is a legal research with qualitative research type. This study uses the socio-legal approach (the socio-legal approach in this study is used to analyze the legal roles and behaviors in the community involved in the resolution of intellectual property disputes through BANI. The specifications in this study are to obtain data and information about the resolution intellectual property disputes, the information will be recorded and analyzed so that it can be used as a data base. In addition, this study has specifications on the role of BANI in resolving intellectual property disputes. The research takes place in DKI Jakarta and Bandung. BANI is domiciled in Jakarta and has representatives in several cities, including Bandung, Medan, Pontianak, Jambi, Surabaya, Denpasar. Researchers took the location of the research at the BANI Bandung representative, with the premise that Bandung is one of the business cities that is quite crowded and has the potential to lead to disputes especially Geographic intellectual property. This study uses a field observation and interview techniques. Observation activities were carried out to obtain data and find out closely the mechanism of intellectual property dispute resolution. While the interview was conducted to obtain secondary data in the form of written documents and information about the role of BANI in resolving intellectual property disputes in Indonesia. The data that has been collected is tested for validity by using

a triangulation method. The data obtained were analyzed using qualitative analysis methods.

III. INTELLECTUAL PROPERTY DISPUTE IN INDONESIA

Intellectual property is becoming increasingly valuable and protecting intellectual property rights is becoming increasingly important, it can be said that it is not easy to protect the intellectual property we have. The rapid technological advances open up enormous opportunities for intellectual property rights disputes to occur. The first court that hears the Intellectual Property Rights dispute is the commercial court. The following legal remedies may require litigants to file an appeal to a higher court and to file a cassation to the Supreme Court.

Any settlement of intellectual property disputes as part of trade and business, requires legal certainty which include fast, simple and inexpensive legal process. Regarding civil disputes in the field of intellectual property, according to IPR regulations, the commercial court has been appointed as an IPR dispute resolution agency. Cases involving IPR disputes in the Commercial Court have been carried out in accordance with the procedures in the IPR regulation[2].

Intellectual property rights disputes can occur in any scope of intellectual property rights such as copyright disputes, trademark rights disputes, industrial design rights disputes, geographical indicative rights disputes, patent disputes, disputes over Integrated Circuit Layout Design, trade secret rights disputes.

Copyright is one of the objects of Intellectual Property Rights that is most vulnerable to violations. The mode of copyright infringement is also increasingly sophisticated and is carried out in line with the high level of technological development. Currently, copyright infringement is mostly done through internet media as a logical consequence of the existence of invasion in the field of technology.

Trademark disputes can occur because: (a) The application for trademark registration is rejected by the Directorate General of Information Technology; (b) There is equality of trademarks that are registered with other parties' brands that have been registered beforehand; (c) The mark registered may contain signs or words or images which may not be registered as trademarks.

Geographical Indications disputes occur in the tort of passing-off, that is, taking profits without rights by piggybacking or tailing on the reputation of an item with Geographical Indications. Disputes in Geographical Indications occur in acts of imitation or misuse which can be misleading in relation to the origin of the place or the quality of the goods.

Patent disputes occur in violations committed by parties who make, use, sell, import, lease, deliver, or provide for sale or rental or delivery of patented products without the permission of the patent holder.

A trade secret dispute occurs if a party obtains or controls the trade secret illegally against Act No. 30 of 2000 concerning Trade Secret. In Indonesia, there are seven types of Intellectual Property Rights, namely Copyright, Patents,

Trademarks, Layout Designs of Integrated Circuits, Industrial Designs, Plant Varieties, and Trade Secrets. However, among the seven Intellectual Property Rights, Trade Secret is the only right that if a dispute occurs, then it is settled in the District Court, the rest in the Commercial Court. The main reason is because the examination of trade secret disputes must be resolved in private. The Commercial Court does not recognize any closed proceedings. Closed trials can happen only in the State Court[3].

Layout Designs of Integrated Circuits (LDIC) rights disputes occur when it is created, used, sold, imported, exported, circulated, without the approval of the rights holders.

IV. DISPUTE RESOLUTION THROUGH INDONESIA NATIONAL ARBITRATION BOARD (BANI)

The judiciary as an institution created by the legal system functions as a means of fair dispute resolution through a simple, fast and low cost judicial process. The principles that the judicial process is carried out simply, quickly and with low costs are realized in achieving effective and efficient justice. However, the implications of the rapid development of economic and business activities are not matched by the court as a means of resolving disputes expected by the community[4]. Business dispute resolution through conventional means or litigation has begun to be abandoned[5]. Alternative disputes outside the court currently become an alternative for businesses to be able to settle disputes outside the court, this is because the dispute resolution through the court process, is considered to be overloaded, slow and waste of time, very expensive, and unresponsive to the public interest or considered to be too formalistic and too technical[6]. The litigation process produces adversarial agreements that have not been able to embrace the common interest, tend to cause new problems, and cause hostility between the disputing parties[7].

Slow and complicated dispute resolution is detrimental to justice seekers in all aspects, especially if it concerns the business world, it will result in high economic costs, and can drain the company's potential and resources. In turn, this affects the relationship that is not harmonious with fellow business colleagues. While in the business world, it is very necessary to settle disputes quickly, low cost, and informal procedures[8]. The purpose of regulating dispute resolution outside the court is to protect the civil rights of the disputing parties in a fast and efficient way[9]. The disputing parties, especially from the business environment, have realized that the resolution of business disputes must be resolved in a manner and in accordance with the business paradigm, that is, fast, fair, free/ flexible and inexpensive[10]. Resolving disputes through arbitration and alternative dispute resolution is the most preferred way by business people because it is considered the most harmonious way with the needs in the business world. Another advantage of arbitration is that its decisions are immediate and binding, in addition to its confidentiality, its proceedings and arbitral award are not published.

Arbitration as an extra judicial institution has legal authority deriving from legal instruments based on the national legislation in the field of arbitration and the agreement of the parties in an agreement that contains an arbitration clause[11]. The parties who will settle the dispute through arbitration must express it in the form of an arbitration agreement that was made before the dispute occurred and after the dispute occurred[12]. Arbitration is only a method chosen by the disputing parties to make a decision regarding a particular dispute. Even disputes that can be resolved through arbitration are also limited, namely only narrow civil disputes and trade disputes[13].

Institutionally, there is an independent institution has been formed to handle the dispute resolution of intellectual property rights through Arbitration, namely through BANI (Indonesian National Arbitration Board). Through an arbitration, it is hoped that a quick, inexpensive dispute resolution can also be realized and can maintain the good name of the parties and protect the interests of those in dispute[14].

BANI is an independent institution that provides diverse services relating to arbitration, mediation, and other forms of dispute resolution outside the court[15]. BANI aims to participate in law enforcement efforts in Indonesia by organizing dispute resolution or dissent that occurs in various sectors of trade, industry and finance, through arbitration and other forms of alternative dispute resolution, including in the areas of Corporate, Insurance, Institutions Finance, Fabrication, Intellectual Property Rights, License, Franchise, Construction, Shipping/ Maritime, Environment, Remote Sensing, and others within the scope of international laws and customs.

BANI has legal status that is autonomous, free and independent. The board is not influenced by anyone, any outside power and any form or nature. The principle of autonomy, independence and freedom is to guarantee that BANI as an Arbitration Judiciary, like the General Judiciary, can stand on or beside all parties to the dispute, be objective, fair and honest, on the basis of law and confidence that is clean and pure[16]. BANI is domiciled in Jakarta and has representatives in several major cities in Indonesia, namely Surabaya, Bandung, Medan, Denpasar, Palembang, Pontianak, and Jambi.

Not all disputes can be processed by BANI. In order for a dispute to be submitted for examination and its termination by BANI then in the agreement letter made by the parties must contain an article containing the arbitration clause. What is meant by an arbitration agreement is an agreement in the form of an arbitration clause stated in a written agreement made by the parties before the dispute arises, or a separate arbitration agreement made by the parties after the dispute arises. The existence of an arbitration agreement negates the right of the parties to submit a dispute to the court, and the court is not authorized to adjudicate the dispute of the parties that have been bound in the arbitration agreement.

By appointing BANI and/ or choosing BANI procedure rules for a dispute resolution, the parties in the agreement or dispute are deemed to have agreed to abolish the case inspection process through the district court in connection with the agreement or dispute, and will carry out any decision

taken by the arbitral tribunal based on the regulations BANI procedure.

An intellectual property rights (IPR) dispute resolution is considered better when resolved through non-litigation or through mediation institutions because it is faster and cheaper. However, in its implementation, there are still many intellectual property dispute settlers who resolve their disputes through a litigation[17].

In its practice among the Indonesian business community, the choice of resolving intellectual property rights disputes through BANI is still in a rather slow stage. There is still a need for understanding for the public (especially the business people) about its existence, benefits and advantages of intellectual property disputes resolution through BANI compared to that of through courts (litigation). The business groups can mainly become the parties who can use BANI as a solution for intellectual property dispute resolution.

The Intellectual Property Rights Mediation and Arbitration Board (BAM HKI) was formed on April 19, 2012 in Jakarta. This institution provides adjudicative dispute resolution services, namely arbitration and non-adjudicative matters including mediation, negotiation, and conciliation for disputes arising from commercial transactions or relationships involving the IPR sector. BAM HKI is a form of dispute resolution that is helping to resolve disputes outside the court[18]. An intellectual property dispute resolution through BAM HKI has the advantage of, among other things, a case closed to the public, so that the dispute will not be exposed. In addition, the process lasts in 180 days. That is, during this period, the case handled by BAM HKI is being decided by the Arbitrator Council. Another advantage is that the procedure is simple and the cost is relatively lower and the decision is final and binding on the disputing parties[19].

An arbitration dispute resolution in the Arbitration and Mediation Board for Intellectual Property Rights (BAM HKI) is a way to resolve a civil dispute in the area of IPR which is based on a written agreement by the parties and resolved according to the provisions and procedures of BAM HKI and Act Number 30 of 1999 concerning arbitration and alternative dispute resolution. The first stage of dispute resolution procedure, namely the submission of a dispute resolution request, then the management looks at whether the request meets any civil requirements. The request is communicated to the opposing party, then the parties choose the arbitrator. Areas that can be handled by BAM HKI include Patents, Trademarks, Geographical Indications, Copyrights, Industrial Designs, Layout Designs of Integrated Circuits, Trade Secrets, Plant Varieties, and other fields related to IPR[20].

The purposes of BAM HKI are: (1) organizing adjudicative dispute or civil disputes in the field of Intellectual Property Rights fairly and quickly; (2) organizing information dissemination, training, and education in the field of IPR in line with the aims and objectives of establishing BAM HKI; (3) carrying out other activities related to arbitration and mediation that are not in conflict with the main activity[21]. An arbitration of BAM HKI can only be carried out if the parties have been bound by an arbitration agreement. The arbitration agreement is then registered in court. The party won can ask the bailiff to force the losing party to carry out the obligations according to the decision. With the power of

the court, a person can force other parties to carry out obligations according to the decision.

A specific IPR dispute resolution has been formed by a special Agency namely BAM KI, but in reality, the business people have not utilized the function of the agency optimally, so the existence of BAM KI has not been effective. There is a need to disseminate information about the existence and function of BAM KI so that business people are interested in resolving IP disputes through the agency, but it is also necessary to provide a legal basis by including BAM KI as a choice of forum through the provisions in the relevant IP Law.

V. CONCLUSION

Disputes are generally not desired by any parties, but if the dispute is already present it needs to be resolved and not avoided. Business disputes are disputes that often occur in the realm of private law, including disputes in intellectual property rights. Intellectual property is very important for business continuity, especially in the current millennial era. Everyone is literate about intellectual property and fully understands the importance of intellectual property rights in the business world.

Disputes over intellectual property rights can be resolved through litigation and non-litigation. The court is the basis for parties who choose to resolve their intellectual property rights disputes in litigation. Another option for using non-litigation channels is to use arbitration and alternative dispute resolution. The non-litigation has not become a common choice for the parties to the dispute, but now the parties to the dispute have begun to open themselves to see the benefits of choosing a non-litigation dispute resolution. Intellectual property disputes require a quick, inexpensive and straightforward solution.

BANI provides solutions to resolve intellectual property disputes that make BANI the choice for parties to the dispute. There are not many resolutions of intellectual property rights disputes through BANI because they are mostly carried out in the court. BANI as an institution that receives registrations of intellectual property rights disputes awaits registration of the disputing parties. There needs to be awareness of the disputing parties to resolve their intellectual property rights cases through the BANI. Although BANI has been established since 1977, there are not many business people who understand the importance and urgency of resolving their intellectual property disputes through BANI.

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