

## ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION OUTSIDE THE COURT ACCORDING TO LAW NUMBER 14 OF 2001 ON PATENT

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### Abstract

This article examines the services of arbitration institutions and Alternative Dispute Resolution in resolving disputes concerning deficiencies in the dispute resolution process held in courts. Due to the lack of the litigation process, concerns on legal certainty or sense of justice may not be achieved are raised among the disputing parties, thus dispute resolution held outside the court emerges, in particular within the Patent Law prescribes in Article 124, refers to Arbitration and Alternative Dispute Resolution. Arbitration denotes a different nature with ADR due to its adjudicative nature which tends to generate win-lose decisions, while ADR has consensus or cooperative nature which prefers to dispose win-win solution decisions. Other forms of ADR are Consultation, Mini-trial, Summary Jury Trial, settlement with organizations, etc. Arbitration and ADR enable a renewal in the settlement of Patent disputes as expected by the public, the deficiency of ADR prescribes in Article 124 of the Patent Law has explicitly stipulated ADR, however the elucidation mentions that ADR comprises negotiation, mediation, conciliation, and other forms in conformity with the laws and regulations.

### Keywords

Arbitration, alternative dispute resolution, patent

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## Introduction

Intellectual Property Rights imply legal rights granted to persons over the creation resulted from an invention, creation, work or anything originates from minds to furthermore contrive in such way in order to inflict a value or provide functionality for the community. Patent is a form of Intellectual Property Rights granted to inventor for any inventions with particular value. According to Law Number 14 of 2001 on Patents, a patent is an exclusive right given by the State to an inventor for his invention in the field of technology, for a certain time, in which he shall himself exploit the invention or give his approval to any other person to exploit the same.

Patent is licensed to protect the patent owner or in this case the inventor especially in the field of sophisticated technology which identically related to inventory step, as a form of appreciation and recognition to invention activity. This protection encourages everyone who has made inventions or creative works with granting exclusive right to use their inventions as a reward for their efforts. Utilizing refers to self-use, produce, sell, or hand over licenses to others to use, and so on.

As the era began to develop, the technology around the world continues to evolve. Basically, technology is the product of patents which serve strategic value in international trade due to its demand which frequently not realized. The issues related to protection of Intellectual Property Rights are increasingly complex over the years, sophisticated technologies or patents are steadily produced which raise the issue of resemblance. The effort to identify the difference is demanded, however it is found to be difficult to carry the effort due to its complexity. In addition, substantial number of Patents made also generates possibility of disputes among parties related to the patent.

Disputes related to patent may be generated from a violation of the ownership of a Patent right over an invention by another party, referring to using or exploiting the patent against the law or without the consent of the owner, and other activities without without permission. Such dispute requires a settlement system as a means of patent protection. The dispute settlement system stipulated in Article 117 to Article 124 of Law Number 14 of 2001 on Patents may bring a lawsuit to the Commercial Court, the decision of the court may only allow cassation to the Supreme Court if a party is not satisfied with the decision. Alternatively, the dispute may be resolved through arbitration or Alternative Dispute Resolution.

In Indonesia, the dispute concerning patent mostly resolved through judicial proceeding which resulted in a win-lose solution despite the fact that there is another dispute settlement mechanism outside the court that enable parties to obtain a win-win solution. Out of court dispute resolution or alternative dispute resolution comprises in form of negotiation, conciliation, mediation, and other form chosen by the disputing parties in accordance with the applicable law. Alternative dispute resolution or

hereinafter referred to as ADR has a principle of fast and low -cost in resolving disputes between parties.

The dispute occurred between Apple and HTC as the two leading gadget companies in the world portrays an example of patent dispute. Apple agreed to shelve the term "thermonuclear war" used by founder Steve Jobs by using an out of court dispute resolution. CEO of Apple Tim Cook said that HTC copied the features on the iPhone. As a response, HTC accused the iPad and Macbook of Apple violating wireless patent. Beside this case, there are many more patent disputes between these big companies. Tim Cook initiated to propose settling the dispute using the out of court resolution form. After Steve Jobs died and Tim Cook became the CEO, Apple preferred to resolve disputes using out of court dispute resolution mechanism (Indo Premier).

In addition, based on a news published by sindonews.com, the chief executives of Apple and Samsung agreed to carry out mediation in the middle of February 2014, to address the dispute over each other smartphone patent ( Sindonews.com. This practice denotes that resolution outside the court starting to be widely used beside the court proceeding. Nonetheless, there are advantages and disadvantages of ADR practice. Hence, the authors will analyze the advantages and disadvantages of resolving disputes outside the court. Based on the issue raised above, the authors may issue the problem: Can the settlement of disputes outside the court as meant in Article 124 of Law Number 14 of 2001 on Patents replace dispute resolution through court? and what are the advantages and disadvantages of Arbitration and Alternative Dispute Resolution outside the court?

### Research Methods

This research is a normative juridical descriptive-analytical research. The data was collected through library research and field research, and the library research stage was carried out to find secondary data using primary, secondary and tertiary legal materials. In this stage, a literature review is also carried out on several laws and regulations in several countries that are relevant to the problems studied.

### Discussion

Humans are social creatures that always make interaction with each other, a conflict may arise during that interaction which hereinafter referred to as dispute amongst communities. A dispute can be defined as a situation where there is a party who experiences loss caused by actions of other party. A dispute occurs when there is an aggrieved party who expresses the dissatisfaction to the aimed party, and if the party does not respond and address the dispute with the aggrieved party, which further indicates different opinion (Suyud Margono, 2000). Generally in Indonesia nowadays, people prefer to take judicial proceeding in settling a dispute.

The concept of dispute resolution with win-win solutions has been known for a long time but may have already buried. Alternative dispute resolution is the original culture of the Indonesian nation either in traditional society or the Pancasila as State Ideology prescribes in fourth principle knows as *musyawarah* (consensus decision-making). Such concept of dispute resolution has long been the basis for dispute resolution in Indonesia by preceding indigenous peoples, long before litigation was introduced by the Dutch colonial administration. Customary leader as a representative or mediator in the community resolves a dispute with no aim to find a winner and loser.

Settlement of disputes through consensus decision-making frequently directed at restoring and balancing the disturbed order due to the emerging dispute. A dispute, in particular a business dispute, requires fast resolution at low cost. Therefore, dispute resolution through the judicial proceeding needs to follow the procedures which take a long time and relatively expensive, therefore it is less appropriate for resolving business disputes. Based on that reason, ADR has developed as a simple, fast and low cost dispute resolution mechanism mediated by an institution with prior consent and accepted by the public or disputing parties in order to obtain a gratify decision or win-win solution.

As a means to examine and find the advantages and disadvantages of Arbitration and Alternative Dispute Resolution, the authors uses the theory of legal effectiveness. This theory measures how a law effectively works in society, and implies the beginning of determining whether the law has been effective worked or not, in order to discover the advantages and disadvantages of the law. In addition, the authors observe related researches addressing the advantages and disadvantages of a legal theory or applicable law using the theory of legal effectiveness.

According to Antony Allott, the effectiveness of law enforcement over laws or regulations in a country is not bound to the people as stipulated in the law, but it is the obligation of the legislators (Antony Allott, 1981).

The effectiveness of laws in a country is measured by three degrees of application of the law:

1. When the law becomes a preventive, does the law succeed in preventing the legal subject from a prohibited conduct.
2. When the law plays the role of settling disputes (curatives) arise between the legal subjects, does the law succeed in providing a fair settlement.
3. When the law plays a role as the provider of the needs of legal subjects to perform legal actions (facilitative), does the law succeed in providing rules that facilitate their needs.

The role of judges and legislators in this case is harmonizing related laws applied to existing conditions as well as conforming it to the basic forms of public behavior as the

subject of these laws. In the event the law has transformed into one of the three forms above, the law has become a guide for legal norms recognized by the public.

A law is ineffective according to Allott when there are three conditions:

1. Failure to deliver purpose of the law. The form of laws generally shaped in the form of regulations using standard language which public finds to be difficult to understand as well as a lack of a supervisory body for the acceptance and application of these laws.
2. Emerges a conflict between the goals aimed by the legislators and the nature of society.
3. Lack of supporting statutory instruments including specified implementing regulation, the existence of related institutions or procedure related to the implementation and application of the law.

Furthermore, according to Lawrence M. Friedman on the effectiveness of law, he stated that law as a system (a sub-system of the social system) thus includes the substance, structure, and culture/legal culture (Lawrence Friedmann, 2004). Friedmann mentioned that legal systems are of course not static (Lawrence Friedmann, 1975). The legal system will be consistently developed following the development of society. The three components above will be deliberated as follows (Lawrence Friedmann, 1969):

1. Structure; The structural component of a legal system includes various institutions mandated by the legal system with multiple functions aimed to support the implementation of the system. One of them is the Judicial or dispute settlement system.
2. Substance; The substantive component includes every output of a legal system in the form of regulations, decisions, doctrines applied to the process concerned.
3. Legal culture; Culture component in particular the legal culture defined by Friedman is referred to as the 'fuel motor of justice' formulated as attitudes and values related to law and its system.

### **1. Out of Court Dispute Resolution in Article 124 of Law No. 14 of 2001 on Patents**

In social life, each of which has various interests and needs, this demand to fulfill these needs leads to the emersion of disputes. As occurs in disputes concerning violation of patent right, the Patent Law stipulates the type of disputes concerning patent protection which may be resolved through arbitration and ADR shall concern on the exclusive rights of patent holder, including the actions of parties who are not entitled or do not get approval or permission from the patent holder, performs an act including makes, uses, sells, imports, rents out, delivers or supplies for sale or rental or delivery of patented products or using a patented production process to make goods.

The Patent Law provides a method for resolving the above disputes, as stated in Article 117 to Article 124 of Law Number 14 of 2001 on Patents. Dispute resolution may be carried out through judicial proceeding, practically known as submitting lawsuit to the Commercial Court or through non-judicial mechanism, generally known through Arbitration and ADR. Article 124 of the Patent Law states "In addition to the settlement of dispute as referred to in Article 117, the parties concerned may settle their dispute by means of arbitration or an alternative dispute resolution." In this case, the settlement of Patent disputes other than through the judicial may also use mechanism outside the court, in particular is arbitration which furthermore addressed in the elucidation of Article 124, ADR implies forms of negotiation, mediation, consolation, and other mechanism consented by the parties in accordance with the applicable law. Subsequent to study conducted by the authors, further disposition of the Law applies in this context is stipulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

The practice of arbitration and ADR in resolving disputes resulted from various deficiencies arises in the dispute resolution process through the courts. We cannot shut our eyes to see the fact that civil dispute cases proceeded in court take more time, money, energy and thoughts. In addition, such process is physically and psychologically exhausting, despite the related theory defines dispute resolution through judicial proceeding before the court is simple, fast, and low cost.

However in practice, judicial proceeding before the court remains detrimental to parties both from the above aspects or the disputed sense of justice, perceived as a mere slogan. The court proceeding in resolving a dispute generally takes a long time and is quite costly.

Considering that Patent disputes will be closely related to economic and trade issue and demanded to continue running, dispute resolution outside the court such as arbitration or ADR is carried out as stated in Article 124 of the Patent Law. Practicing arbitration provides advantages not only faster process, but also costs less money.

In ADR, there are two different concepts. First, ADR is defined as an alternative to litigation and second, ADR is defined as alternative to adjudication. Each concept indicates different implications. The first definition implies as a reference (alternative to litigation) that all dispute resolution mechanisms outside the court, including arbitration are part of ADR. On the other hand, if ADR is defined as an alternative to adjudication, the ADR may only comprise consensus or cooperative mechanisms. Meanwhile, arbitration related to adjudicative is not relevant to the context of this article, since courts tend to provide decisions with win-lose solutions. As stipulated in Patent Law and Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Indonesia appertains to the second definition since the law precisely separates arbitration term from alternative dispute resolution (Surya Perdana, 2009).

The description of arbitration and ADR are as follows:

## 1) Arbitration

According to Article 1 paragraph 1 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Arbitration means a method of settling civil disputes outside the general courts based on an arbitration agreement made in writing by the parties to the dispute. Arbitration is one of the dispute settlement mechanisms outside the court in the form of legal action permitted by the law where one or more parties submit their dispute or disagreement with one or more parties to one person (Arbitrator) or more (Arbiter – Arbiter Council) professional experts, who will act as judges in private courts appointed to practically implement applied legal procedures or implement in the means of amicable procedures with prior consent by the parties to formulate a final and binding decision. It implies that arbitration is a law of procedure and law of the parties. Beside the final and binding decision of the arbitrator, there is also a “binding opinion”.

The consequence of dispute resolution through arbitration for the losing parties is the obligation to voluntarily implement the arbitration award. In the event the award is not voluntarily implemented, according to the provisions of Article 61 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, it may be enforced by an order from the Chairman of the District Court at the request of one of the parties to the dispute (Gatot Soemartono, 2006). Due to that reason, the original copy of the arbitration award and the original sheet of arbitration's appointment must be submitted to the Clerk of District Court. Thus, it means that the Chairman of the District Court shall carry out the process of such case ordinarily as mandated by the law which enumerates permanent legal force. Therefore, each copy of the arbitration award must be registered at the Clerk of the District Court either by the arbitrator or one of parties or by the arbitrator's attorney within 30 days since the pronouncement of the award.

## 2) Negotiation

Negotiation is a form of dispute settlement, carried out with the aim to find solutions over issues through direct discussion (deliberation) between the disputing parties, the results of which shall be accepted by the parties. Negotiation is a form of alternative dispute resolution that plays an important role as a means of resolving disputes outside the court. Negotiation is frequently preferred as the first attempt (the first resort) to find a resolution over a dispute (Surya Perdana, 2009). In negotiation, the disputing parties may directly negotiate (sometimes accompanied by their respective lawyers) without being mediated by the third party. Dispute resolution is entirely controlled by the parties themselves through mutual agreement on the basis of a win-win principle. Negotiations are informal and unstructured, and the time is unlimited. Sometimes a case that has been processed in court may still open to be settled through negotiation forum (Surya Perdana, 2009). The key to success or failure over this form is strongly influenced by the accuracy in choosing negotiation techniques and understanding the general principles of negotiation as well as the steps that must be

taken. Roger Fisher and William Ury divided negotiation techniques into five types, including competitive techniques, cooperative techniques, soft techniques, hard techniques and interest-based techniques (Roger Fisher and William Ury, 1992).

### 3) Mediation

Mediation is the enlargement of negotiation process. Disputing parties who fail to resolve dispute through negotiation shall seek for assistance from a neutral third party in reaching a resolution. Unlike the adjudication process, the third party in mediation enforces the applicable law to the facts as a means to formulate a decision, mediation involves a third party to assist the parties in conforming the values to the facts to reach a resolution. These values comprise law, a sense of justice, religious beliefs, moral and ethical issues. The mediator acted in a case does not hold the authority to enforce the resolution to the disputing parties. The mediator only guides the parties to negotiate until both parties reach consensus. As a further step, the resolution shall be formulated into a written form. In mediation, neither party wins nor loses, because the resolution reached is a consensus between disputing parties. There are many different mediation techniques or patterns, but two of the most common are facilitative and evaluative techniques. Those techniques may be distinguished by the performance of the mediator. In evaluation technique, the mediator will be actively involved in providing advices. The mediator will provide suggestions on how to resolve the dispute and consistently evaluate the dispute (Surya Perdana, 2009). On the other hand, in facilitative technique, the mediator will constantly attempt to strive good communication between the disputing parties as a means to reach a resolution agreed by both parties (Surya Perdana, 2009).

### 4) Conciliation

Conciliation is a means of dispute resolution involving neutral third party to assist the disputing parties in resolving dispute by prioritizing an amicable agreement. The difference with mediation lies in the role played by the third party involved in the process of ADR. One of the differences between mediation and conciliation is third party in conciliation may involve to provide recommendations. The authority to suggest recommendation is only granted to conciliation form, while the third party in mediation may only assist the disputing parties to reach agreement without any involvement. In addition, some forms of conciliation involve profound and more active intervention from the third party, raised an assumption of tendency towards certain norms and have an educational orientation for one or more related parties.

This portrays explanation of arbitration and the types of ADR practiced in Indonesia as stipulated in Patent Law. Other than that, there are several ADR forms outside the court, such as Consultation, Mini-trial, Summary Jury Trial, settlement with organizations, and others.

The foregoing description of arbitration and APS implies that the settlement of disputes over Patent rights may use settlement using ADR considering the benefit to both parties. By using arbitration ADR outside of court, the parties are free to choose the dispute resolution they prefer, as those various forms of dispute resolution have the same goal to resolving disputes based on the agreement consented between the disputing parties. In addition, the disputing parties can also choose how they resolve dispute with a system which reflects a sense of justice for the parties, not only relies to the judicial proceeding with its rigid procedures. This context conforms to the definition of Antony Allot, in which he mentions that when a law is made to resolve a dispute, it shall only be effective if the law strives a fair settlement. IPR, or in this case a patent is a private right and a violation occurs when a person, without rights or without permission, utilizes a licensed patent belonging to a registered inventor. The form of permission is usually a contract signed by both parties. Therefore, the appropriate form of dispute resolution relating to patent rights is arbitration or ADR which resulting to a win-win solution.

According to Roscoe Pound, law is a tool of social engineering which implies that law is not passive, but law may perform as a tool to change certain circumstances and conditions based on the expectation of the community (Suparto Wijoyo, 1999). ADR should be used as the first and last institution in resolving disputes, since settlement through judicial proceeding fails to portray a proper dispute resolution. It also implies that judicial proceeding resulting on a decision which mentions a winner party, however the winner shall pay for certain number of costs and it is furthermore not affordable for the disputing parties as well as not comparable to the object of the dispute. Moreover, too many times wasted from resolving disputes through judiciary proceeding may also risk business actors, in this case is the Patent holder on the other hand, the losing party frequently decline to accept the decision of the court which causes psychological pressure and depression by which eventually leads to anarchist action. Therefore, Arbitration and ADR are expected to upgrade the dispute settlement mechanism on Patent. The win-win solution enables both parties to enjoy the resolution and the costs incurred will also be adjusted to the circumstances of the disputing parties in order to choose a appropriate dispute resolution for their needs. The required time of the dispute resolution process also considered fast, depending on the needs of the disputing parties. Arbitration and ADR perform a revitalization of dispute settlement system through the judicial proceeding, thus that arbitration and ADR can satisfy the disputing parties and lead to the aimed conditions as expected by the people.

In Indonesia, the authorized body/institution has been established to act as arbitrator and mediator. This institution is known as the Intellectual Property Rights Arbitration and Mediation Board or commonly referred to as BAM HKI. This institution was formed in 2011 and consists of experts in the field of IPR, either serving as arbitrators, mediators, or in other positions. The backgrounds of the members consist of the former Director General of KI, or practitioners in the IPR field. This development serves a

boost to the IPR dispute resolution mechanism outside the court. However, the authors observe that people deem ADR and Arbitration less favorable as an alternative to dispute resolution outside the court, since the many people still tend to settle the dispute through judicial proceeding.

## **2. Advantages and Disadvantages of Arbitration and Alternative Out of Court Dispute Resolution**

In observing or analyzing the advantages and disadvantages of arbitration and ADR, the authors use the theory of legal effectiveness to formulate indicators in identifying the disadvantages and advantages of arbitration and ADR. As mentioned by Lawrence Friedman, the authors will examine the advantages and disadvantages of arbitration and ADR in terms of legal substance, legal structure, and legal culture. In addition, according to Antony Allot, regulation or legislation are effective when the law stipulates a dispute settlement mechanism, to determine the ability to achieve justice. Therefore, the authors decide that the theory is appropriate to serve as an indicator to determine the advantages and weakness of arbitration and APS, in order to identify whether the law is effective or not.

However, the authors prefer to not separating the analysis of the advantages and disadvantages of arbitration and ADR in terms of its substance, structure, or legal culture. Hence, the analysis will be separated from arbitration with APS. Because arbitration is more adjudicative in nature, in the description of the analysis of advantages and disadvantages the authors will also separate between arbitration and ADR. However, in the alternative dispute resolution forms, the authors combine them together due to the similarity on finding a consensus or agreement from the parties without adjudicating.

### **1) Arbitration**

Dispute resolution through arbitration has several advantages for several reasons, such as:

- a. The processing time in the dispute resolution and cost-effective. Prior to conducting arbitration, parties must specify a certain time to completely settle the dispute. As an alternative, if the parties have not specified a specific period, the duration for settlement will be determined by the arbitral tribunal based on the arbitration rules chosen. Likewise, as mentioned in Article 53 and Article 60 of Law Number 30 of 1999, the arbitration award is final and binding to the parties, therefore possibility to make an appeal or cassation is not possible.
- b. Examination by experts based on related field. To examine and decide cases through arbitration, the parties are entitled to choose experts with particular expert field and mastering the topic of the dispute. Thus, the considerations suggested and the quality of the award can be accounted for. On the other

hand, courts with the only knowledge of law will find less accurate in disposing decision related to cases in extra legal matters.

- c. The arbitrator's discretion and sensitivity. The arbitrator's wisdom and sensitivity towards the rules play major role in influencing the choice of disputing parties to choose arbitration.
- d. Maintain confidentiality. The examination of disputes by the arbitral tribunal carries out in closed sessions and the award will not be published. Settlement through arbitration will maintain the confidentiality of the disputing parties.
- e. As observed in the Elucidation of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the arbitration institution has advantages over other judicial institutions, such as the confidentiality of disputes, delays caused by procedural and administrative matters can be avoided, the parties can choose arbitrator with specific expert field, experience and related background regarding the disputed matter, honest and fair, the parties can determine the choice of law to resolve the issue including the process and place of arbitration, the nature of the award is binding to the parties with simple or straightforward procedures, the arbitration agreement (arbitration clause) does not become void due to the termination or cancellation of the main agreement. Hence, in the arbitration process, the arbitrator or arbitration panel must prioritize peace between the parties to the dispute.

Disadvantages in arbitration institutions are as follows:

- a. It may only be carried out by consistent parties. Arbitration is only beneficial for honest and trustworthy parties or entrepreneurs. The parties have credibility and integrity, implies that they bound to the agreement; the defeated party must voluntarily enforce the arbitration award. On the other hand, the defeated party refuses to enforce the award, a case through arbitration will in fact cost more money, even longer than the judicial proceeding.
- b. Reliance on arbitrators. An arbitration award usually depends on the technical ability of the arbitrator to dispose appropriate award based on the fairness sense of the parties.. Although the arbitrator has high technical expertise, it is not easy for the arbitral tribunal to satisfy and fulfill the expectations of the disputing parties. Absolute dependence on arbitrators can be considered weakness because the substance of the case in arbitration cannot be re-tested (through an appeal process).
- c. There is no precedent for previous decisions. The arbitration award and all decision therein are confidential and not published. As a result, these decisions are independent and separate from other awards, therefore there is no legal precedence or attachment to previous awards. Arbitration awards on a dispute consisting good argumentation is buried due to this condition. In theory, the

loss of precedence can also result in conflicting decisions on the settlement of similar disputes in the future. This will reduce legal certainty and contradict the principle of similar cases (*similia similibus*). Furthermore, the nature of this confidentiality can become an obstacle to research development of arbitration theories.

- d. Issues of foreign arbitration awards. Settlement of disputes through international arbitration finds to be difficult due to the recognition and enforcement of awards. This difficulty remains significant since there are assets that must be executed. Therefore, the success or failure of dispute resolution through arbitration is closely related to whether or not the arbitration award can be implemented in the country of the defeated party. As in Indonesia, it is regulated in Article 66 of the ADR and Arbitration Law, stated that International Arbitration Awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia by an agreement, both bilaterally and multilaterally. The recognition and implementation of International Arbitration Awards; are limited to those which complied the Indonesian law fall within the scope of commercial law;
- e. Ethical or professional code. Unlike the judicial institution which must comply ethical code for professional accountability in judicial proceeding, arbitration has no standards and provisions on professional ethics. As a result, practitioners and arbitrators face various issues about ethics and professional responsibility without any definite answers. Internationally, a set of ethical guidelines for international arbitrators (Ethics for International Arbitrators) is issued by the International Bar Association (IBA) in 1987. However, the code of conduct focuses more on the ethical obligations of arbitrators rather than the behavior of the arbitrator in arbitration proceedings. One example of ethical problems is the requirement to maintain the confidentiality of the dispute.

Initially, arbitration was able to provide a relatively short settlement, as well as a relatively less cost compared to judicial proceeding. However as time goes by, the nature and character of judicial proceeding is increasingly attached to arbitration, cannot solve problems, put the parties in a losing or winning position and recently become increasingly formalistic and costly. However, arbitration remains as the main choice and trend in the resolution of international business disputes nowadays. Yahya Harahap stated that "commercial arbitration" has been considered as "a business executive court". The resolution of international business disputes through arbitration will remain exist if there is a procedural reform aimed to emphasis on a rational and economic process and is less complicated without sacrificing the foundations of justice (Cita Citrawinda Priapantja, 1991).

## 2) Alternative Dispute Resolution

The authors will demonstrate the advantages and disadvantages of ADR by not separating the types of ADR, due to the similarity nature of the resolution as the result of agreement or consensus between each party, in which the only difference relies on the position and the presence or absence of a third party.

The advantages of ADR are the voluntary nature of settlement process, choice of procedures depend on the needs and good faith of the parties, decisions are non-judicial nature which aimed to immediately implemented, procedures and settlement results are confidential, parties are free to design terms and procedures for dispute resolution by mutual agreement, maintains good relations between parties in estimating the result of the dispute resolution.

ADR is less complicated, faster and cheaper dispute resolution process which provides wider access to justice for parties in finding satisfactory dispute resolution and fulfilling a sense of justice. ADR is a problem-solving negotiation process in which an impartial process which a neutral third party hired to assist them obtains a satisfactory agreement. Unlike the judge or arbitrator, the third party does not have the authority to dispose a decision over the disputes between the parties. However, in this case the parties delegate the authority to the third party to assist them resolving their disputes. The third party is expected to change the advantage and social dynamics of conflict relations by influencing the parties' beliefs and personal behavior by providing information or by conducting effective negotiation process aimed to resolve the dispute.

ADR provides equality and the efforts to determine the final resolution on negotiations is reached according to mutual agreement without pressure and coercion. Likewise with the benefits in terms of costs, the incurred cost will be less expensive and the amicable settlement will be emphasized to restore good relations between the disputing parties, especially if the disputing parties are in fact fellow business partners who need an atmosphere of collegial relations, a dispute arises between them will possibly risk the good relationship since settlement through judicial proceeding resulted in a win-lose solution. Likewise, good relations between families will become tenuous and destroyed, especially in the event of an inheritance matter. To prevent family relationships from falling apart because of dispute over a right as mentioned in the foregoing example, amicable settlement should be preferred.

Another advantage of ADR as described by I Made Widayana in his book prescribes several advantages including (Yahya Harahap, 1997):

- a. The process is faster, means that the process can be carried out in only days, weeks or months, unlike dispute resolution through judicial proceeding which takes months or even years.
- b. The cost is cheaper
- c. It is informal/flexible, since all matters can be determined by the disputing parties, such as determining the meeting schedule, the meeting place, the provisions related to them and so on. Compared to the judicial proceeding

(summons of witnesses, proof, replication, duplication and so on) the mediation process is very flexible. If required, the parties with the assistance of a third party can design their own mediation procedure. Moreover, informal procedures enable parties to actively control the process and dispose settlement without being too dependent on arbitrator.

- d. Confidentiality is guaranteed, means that the subject matter of the dispute will only be shared to the third party, therefore the confidentiality is guaranteed.
- e. Freedom to choose third party, means that the parties can choose a neutral third party they prefer and have expertise in related field.
- f. Maintain good relationship, since the process will be informally held, the parties shall attempt and strive to reach a cooperative dispute resolution to maintain good relationship. Since the judicial proceeding is considered time consuming, expensive and create disputes due its win-lose resolution, ADR sets a less complicated procedure which enables parties to enjoy win-win solution.
- g. Encouraged to make improvement, means that ADR will enable parties to revise the existing agreements, the parties may conduct renegotiation to revise any substance or consideration including the extra-legal factors.
- h. It is final, means that the decision achieved by the parties is final according to the agreement.
- i. Certain face-to-face implementation means that the parties determine the time, place and agenda for discussing and achieving resolutions.
- j. The procedures for dispute resolution are determined by the parties since there is no precise provision set to settle the procedure.

The disadvantages of the ADR are as follows:

- a. Article 124 of the Patent Law explicitly stipulates about ADR, although the elucidation states that alternative dispute resolution is negotiation, mediation, conciliation, and others in accordance with statutory regulations. The appropriate law in this regard is the Law on arbitration and ADR, however the authors observe that this law has not prescribed sufficient clarity on what and how ADR carries out, thus it raises further questions and issues. For example, there is no definition of negotiation or mediation settlement. Article 1 on General Provisions does not describe such settlements. In fact, each of these solutions needs to be arranged in detail to avoid issue of subjective interpretation. Moreover, Law Number 30 of 1999 has only one that addresses superficial manner of dispute resolution process through ADR. This raises possibility to cause confusion in practice. For example, in Article 6 paragraph (2) of Law Number 30 of 1999 states that: "The resolution of disputes or differences of opinion through, alternative dispute resolution, as contemplated in paragraph 1, is carried out by a direct meeting of the parties within fourteen (14) days, the result of which will be set out in a written agreement." There is no further explanation about what is meant by "face to face meeting". Hence, it can be subjectively interpreted that the definition of dispute resolution by conduct a meeting in person is known as negotiation. Likewise, the following Articles also raise further questions such as; the definition of by person meeting (face to face), or whether it can be carried out through electronic media (teleconference) or through direct correspondence, for example using e-mail, or conversation via the internet, or in the event the parties unable to conduct face to face communication, will the negotiation remain valid according to the law?; the calculation to determine the fourteen (14) days limitation; is it determined since

the notification where parties began to negotiate (even though the parties have not met face to face), or since the first meeting (small talk, with discussion related to the subject matter), or since the meeting has entered a discussion on the dispute? These disadvantages are actually a small part of the many problems that might arise if the dispute is resolved through ADR based on Law Number 30 of 1999.

- b. Settlement through ADR has not been able to provide sufficient protection and influence control to produce constructive decisions due to the degree of severity over disputes using ADR is considered tolerable. For example, if the disputing parties refuse to meet, it means the degree of disputes is considered severe; that circumstance implies that there is expectation to achieve win-win solution. Hence, the parties will prefer a win-lose solution or through arbitration or judicial proceeding.
- c. The obstacle in resolving civil disputes is the execution of decisions. In this case, ADR as a civil or private agreement between one party and another has no strong certainty on the the execution of the decision. This condition remains avoided by the winner party.

## Conclusion

The practice of arbitration and ADR in resolving a dispute is indicated from various deficiencies on judicial proceeding. Presently, the judicial proceeding remains detrimental to the disputing parties due to the above aspect or the unfulfilled sense of justice, therefore such principle perceives as a mere slogan. Therefore, the emergence of dispute resolution out-of-court based on Article 124 of Patent Law, later known as Arbitration and Alternative Dispute Resolution. Arbitration and ADR may be distinguished by its nature of resolution; arbitration is adjudicative in nature which tends to dispose win-lose solution, while ADR has consensus or cooperative nature which resulting to a win-win solution. A thorough arrangement is prescribed in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution which divides form of ADR into Negotiation, Mediation and Conciliation. In addition, there are other ADR forms such as Consultation, Mini-trial, Summary Jury Trial, settlement with organizations, and others. Arbitration and ADR portray a development of dispute resolution especially in Patent disputes as expected by the public. The win-win solution enable parties to enjoy the resolution without force, and further the costs incurred will also be adjusted to the circumstances of the disputing parties to choose the affordable choice of dispute resolution. The dispute resolution period can also be resolved quickly, depending on the needs of the disputing parties. Arbitration and ADR are perform a role as a tool for development upon dispute settlement system through the judiciary proceeding which has deficiencies, arbitration and ADR are carried out to satisfy the disputing parties and achieving justice as expected by the public.

Arbitration has the advantages of being fast process and cost-effective, examined by experts according to their fields, wisdom and sensitivity of the arbitrator, confidentiality, and so on. The disadvantages of Arbitration comprises the consistent parties carry out the process, dependence on the arbitrator, there is no precedent for previous decisions, there are obstacles to conduct execution of foreign arbitration awards, issues of ethical code or fast professional ethics. The advantages of ADR are volunteerism in the settlement process, procedures depending on the needs and good

faith of the parties, decisions are non-judicial which aimed to immediately implement, procedures and settlement results are confidential, , the parties are free to design terms and procedures for dispute resolution by mutual agreement, maintain good relations in estimating the resolution of dispute, decisions tend to last long because the results are consensus between parties. The disadvantage of ADR comprises Article 124 of the Patent Law only explicitly stipulates ADR, no clarity on what and how ADR carries out, ADR may only be carried out by face-to-face, and so on. Moreover, the settlement through ADR has not been able to provide sufficient protection and influence control to dispose constructive decisions. As well as the issue of execution of the decision or agreement.

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