The Potential of Alternative Dispute Resolution in Intellectual Property: Patents in Japan and Indonesia

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Abstract— An increase in records and registrations, as well as a rise in intellectual property conflicts, are indicators of a growing economy. The use of litigation to settle these conflicts is rarely recommended by business practitioners since it frequently results in lengthy proceedings, high expenses, and a win-lose outcome. This study aims to investigate the causes of the increase in intellectual property registrations and records, the rise in connected conflicts, and the need for improving fast resolution procedures through non-litigation methods. This study examines whether non-litigation settlement procedures can settle intellectual property issues in Indonesia as well as how well they function there. Both qualitative and normative juridical methods are used in this study. This study also looks at the arbitrability and mediation of intellectual property issues in other nations using comparative legal sources from the USA, Japan, and the World Intellectual Property Organization (WIPO). The results of this study show that the rate of non-litigation dispute resolution is comparatively high in many developed countries. But this trend is not yet clearly visible in large numbers in Indonesia.

Keywords— arbitration, intellectual property, intellectual property disputes, mediation.

I. INTRODUCTION

The World Intellectual Property Organization (WIPO), a UN body in charge of intellectual property, created the Global Innovation Index (GII). This annual index assigns a number to each nation based on its capacity for and record of innovation[1]. The introduction of novel concepts, procedures, or goods is referred to as innovation.It can include new behaviors or ways of thinking in addition to concrete creations. Innovation is defined by the Comprehensive Indonesian Dictionary (Kamus Besar Bahasa Indonesia, KBBI) as the presentation of discoveries that depart from previously accepted notions (ideas, procedures, or instrument.

GII-high nations frequently allocate large sums of money to research and development. As of 2011, the United States, China, Japan, Germany, and the Republic of Korea were the top five countries in terms of R&D spending in 2019.[2]

It is well-recognized from several studies that intellectual property and a country's economic standing are closely related. According to Kumar (2003), intellectual property laws have an indirect impact on economic growth through knowledge transfer from industrialized nations, as well as a direct one through promoting domestic patents[3]. Through fresh ideas and discoveries, patent numbers, according to Jalles (2010), positively contribute to economic growth[4]. But economic progress can often have unintended consequences, particularly when it comes to environmental contamination that sparks conflict[5].

Indonesia's creative industries, recognized as unique products in the region, can draw tourists due to their unique characteristics. On the other hand, Indonesia works with the travel industry to promote its intellectual property (IP) goods, especially at foreign travel shows that would strengthen the nation's economy[6].

Data on patent applications filed in Indonesia between 2017 and 2022 showed a general rise. Nonetheless, there was a minor decline in 2020, perhaps brought on by the COVID-19 epidemic, which started in China in December 2019 and quickly expanded around the world. Despite this, the general pattern shows an increase in applications. About 14% of these are from within the country, while 86% are from abroad.

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Table. 1 Patent Purposes

Application	2017	2018	2019	2020	2021	2022
Domestic	1,412	1,399	1,599	1,244	1,371	1,509
International	7,403	8,356	8,431	7,299	8,341	8,464
Total	8,815	9,755	10,030	8,543	9,712	9,973

Source : https://www.dgip.go.id/menu-utama/paten/

Indonesian courts use Alternative Dispute Resolution (ADR) to settle cases involving intellectual property (IP). One consideration before choosing to carry out investment operations is the existence of an efficient dispute resolution framework, which supports the continuity of direct investment in a nation.[7]

Courts resolve a large number of intellectual property disputes, which adds to the district court's burden and causes backlogs in cases. This has a detrimental impact on all parties involved in addition to delaying resolution. The litigation procedure can exacerbate problems since it is win-lose, time-consuming, frequently unresponsive, and publicly available[8].

The disputing parties may think about non-litigation settlements or alternative dispute resolution, as described in Law No. 30/1999, often known as the Arbitration and ADR Law, if litigation drags out their differences. Nevertheless, the success rate of District Court mediation in 2021 and 2022 was not very high.
Table 2. Number of cases resolved by Mediation at the District Court, Indonesia 2021, 2022

Year	Number of Cases	Succeed	Not Succeed	Could not Implemented	On Process
2021	39,888	1,187 2.9%	16,251 40.7%	21,193 53.1%	1,257 3.3%
2022	40,551	1,362 3.36%	16,985 41.89%	20.863 51.45%	1,341 3.31%

Source : https://www.mahkamahagung.go.id/id/

Japan is a high-income country that leads the world in technology. Its number of registered patents is closely correlated with economic growth. This implies that a nation's ability to innovate and obtain patents is directly related to how strong its economy is [9].

Fig. 1. Correlation between Patents and Economic Growth, in Japan

Source : D. Sinha, “South Korea : Evidence From Individual Country and Panel,” *Appl. Econom. Int. Dev.*, vol. 8, no. 1, pp. 181–188, 2008.

There is a positive correlation between the rise of intellectual property registrations and the rise in disputes within the intellectual property industry. In 2012 and 2013, 393 respondents from 62 countries with residences in Europe, North America, Asia, South America, Oceania, the Caribbean, Central America, and Africa participated in surveys conducted by WIPO regarding intellectual property disputes.

Law companies, corporations, research groups, universities, government agencies, and independent contractors make up the respondents; their employee counts range from 1 to 10,000. They work in a variety of industries, including consumer goods, chemistry, biotechnology, IT, electronics, telecommunications, pharmaceuticals, and life sciences.

According to the report, NDAs, R&D agreements, licensing, settlement agreements, M&A agreements, and assignments are the most common sources of problems in the technology industry. With 25% of the disputes, licenses are the most common type of agreement. R&D agreements come in second with 18%, NDAs with 16%, settlement agreements with 15%, and assignments and M&A agreements with 13%.

The table below shows the considerations respondents take into account when resolving cases.
Table 3. Considerations in choosing the type of dispute resolution

Main Considerations	International Agreement	Domestic Agreement
Cost	71%	71%
Time	56%	60%
Enforceability	52%	33%
Quality Outcome	44%	45%
Neutral Forum	36%	18%
Confidentiality	32%	33%
Business Solution	29%	30%
Support Provided by Institution	9%	6%
Standard Internal Practice	5%	8%
Setting Precedent	5%	6%

Based on the dispute resolution clause in the agreement, 94% of respondents stated that their contract documents included a negotiation clause for dispute settlement.

For disputes involving external parties, court litigation was the predominant resolution method at 32%, followed by arbitration (30%) and mediation (12%). Detailed data is provided in the table;

Table 4. Most Frequently Used Dispute Resolution

Dispute Resolution Type	Percentage
Court Litigation	32%
Arbitration	26%
Mediation	12%
Mediation followed by Court Litigation	9%
Mediation followed by Arbitration	7%
Expedited Arbitration	4%
Expert Determination	3%
Mediation followed by Expert Determination	1%
Others/Combinations	6%

The types of Intellectual Property cases that are the most disputed objects are;

Table 5. Object Matter of Technology Disputes

Dispute Technology Content	Percentage
Patents	55%
Copyright	27%
Know-how	18%

Source:[14]

This study examines the effectiveness and operation of non-litigation settlement procedures in Indonesia and explores the possibility of using them to settle disputes about intellectual property, specifically patents, inside the nation.

II. LITERATURE REVIEW

A. Mediation

Mediation is a method of resolving conflicts in which opposing parties aim to achieve a mutually acceptable agreement with the aid of an unbiased mediator. In contrast to expert decisions, arbitration, and litigation, the mediator lacks the power to make choices; settlement is achieved through mutual agreement of the parties involved. The information disclosed during the mediation process is considered privileged and inadmissible as evidence in legal proceedings. This facilitates transparent communication among the parties involved, enabling the mediator to grasp the interests of both sides comprehensively.

Once the relationship is fully grasped, a mutually advantageous solution can be achieved. Mediators frequently suggest settlement methods and offer legal assessments throughout the process. Mediation is a more expeditious and economical alternative to arbitration and litigation in intellectual property disputes. Tiered conflict resolution clauses involving court action, mediation, arbitration, and negotiation have become a familiar and accepted practice.[11]

When parties want to keep their relationship intact, mediation is a good way to settle conflicts. Long-term contracts for things like research and development or licensing work best with it.

Conversely, if the matter involves halting the defendant's Intellectual property rights infringement is not a good topic for mediation because it centers on the legitimacy of those rights and compensation.[12]

B. Arbitration

These days, the most common method for settling conflicts involving foreign commerce is arbitration. the referral of a disagreement to an unbiased (third) party selected by the disputing parties who consent in advance to follow the arbitrator's ruling following a hearing when all sides are given the chance to be heard. An agreement that avoids the formalities, delays, costs, and frustration of regular litigation by accepting and abiding by the decision of a chosen group of people in a disputed topic rather than using it to create tribunals of justice.

Arbitration can take two forms: (1) a separate arbitration agreement made after a disagreement arises (compromise deed); or (2) a provision in a written agreement produced by the parties before a dispute arises (factum de compromitendo). Arbitration as a means of resolving disputes can therefore be agreed upon in advance or proposed during a conflict based on mutual consent.

A mutual agreement is the first step in the arbitration procedure. It stresses the autonomy of the parties while being similar to litigation. Without regard to nationality, the parties may select an arbitrator based only on their areas of expertise. Each side appoints one arbitrator, and a third is designated as the chief arbitrator if three are required. As long as they abide by applicable legislation, the parties may determine the language, number of arbitrators, and procedural guidelines. They also choose the meeting's venue and structure. The parties may also choose how much or how little of the disputes are included in the arbitration.[14]

C. Intellectual Property Disputes

In addition to resolving disputes in the Commercial Court, parties may also choose to use arbitration or other alternative dispute resolution procedures. This is stated in Article 153(1) of the 2016 Patent Law, Number 13. The types of intellectual property and alternative dispute resolution for intellectual property rights violations have been regulated in the provisions of laws and regulations.[17]

Through Law No. 7 of 1994 on the Establishment of the World Trade Organization (WTO), Indonesia ratified TRIPs and is now required to enforce the intellectual property requirements of the agreement. Mediation results in an agreement between parties without the executive power of arbitration, which is binding.[18]

Specific regulations govern the arbitration and mediation process for resolving IP disputes in Indonesia. Copyright is regulated by Article 95 of Law No. 28 of 2014, patents by Article 153 of Law No. 13 of 2016, trademarks by Article 93 of Law No. 20 of 2016, trade secrets by Article 12 of Law No. 30 of 2000, industrial design by Article 47 of Law No. 31 of 2000, and the Layout Design of Integrated Circuits by Law No. 32 of 2000's Article 39. Articles 66–69 of Law No. 29 of 2000 also discuss the "right to demand" concerning Plant Variety Protection.

III. METHOD

Using a normative legal approach, this work emphasizes secondary data library research. Document reviews are used to gather data, and then qualitative analysis is done[10]. The 1945 Constitution, Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, and Law No. 13 of 2016 on Patents are the main sources of legal authority. Secondary references are expert opinions and studies that explain these fundamental laws. Secondary and primary references are further explained in tertiary materials like Black's Law Dictionary and the Big Indonesian Dictionary.

IV. RESULT AND DISCUSSION

The Center for Intellectual Property Arbitration and Mediation was founded by WIPO in Geneva in 1994, providing worldwide alternative dispute resolution (ADR) services. In 2010, WIPO established a representative office in Singapore to broaden its presence. IP arbitration frequently encompasses conflicts related to confidentiality, transfer of materials, research and innovation, licensing of patents, as well as agreements for production and distribution. The parties involved in these confrontations encompass pharmaceutical companies, drug developers, university research centers, and startups. IP arbitration, which is similar to litigation but relies on the parties' cooperation, has been proven to be an effective method for resolving IP disputes. Despite being less adaptable than mediation, it has a proven history of success. The WIPO Arbitration Mediation Center employs arbitration and mediation to resolve license and contract issues. Significantly, WIPO mediation was vital in resolving a dispute between a pharmaceutical company and a university patent. It highlights its effectiveness in facilitating agreements when the parties cannot do so independently.

The WIPO Arbitration Mediation Center's ADR Platform has undergone continuous improvement over 15 years to facilitate smooth online arbitration and mediation processes, allowing for efficient interchange of documents. Amidst the problems posed by the epidemic, it is now feasible to conduct arbitration hearings and mediation sessions virtually. Following the epidemic, tiered dispute resolution clauses have become a customary feature of contracts. The WIPO Arbitration Center's mediation success rate had a 5% increase, from 70% to 75%, amidst the pandemic, demonstrating its ongoing efficacy..

Mediation, highly regarded for its flexibility, has the potential to occur before or during court or arbitration processes. Mediation's benefits include flexibility, privacy, use of explicit language, a more excellent range of topics for discussion, and encouragement of collaborative solutions, ultimately resulting in a faster and more cost-efficient process than litigation. Nevertheless, mediation achieves optimal results when both parties sincerely strive for consensus. At the same time, it can sometimes be exploited as a tactic to prolong proceedings or extract information from parties with undisclosed motives. Mediation may not be suitable for all instances, particularly those based on deeply ingrained ideas. Mediation, which falls under private law, typically involves resolving disputes outside the court system. On the other hand, reconciliation is a specific type of mediation that requires the parties involved to confirm their agreement in a peace deed and register it with the executive authority.

The Singapore Convention on Mediation, also known as the "United Nations Convention on International Settlement Conventions Resulting from Mediation," streamlines the global implementation of settlement agreements arising from mediation. Effective September 12, 2020, it establishes a legal structure for implementation in states that have entered into a contract. Indonesia has expressed its support for the convention. However, it has not officially approved or endorsed it since October 2023. The agreement's objective is to strengthen the practice of international business mediation by providing clear legal guidelines, increasing effectiveness, and promoting legal collaboration. The United States and Japan are two of the 65 nations that have ratified the agreement, guaranteeing that settlement agreements resulting from mediation between parties in these countries will be acknowledged and enforced.[13]

Furthermore, the arbitration process's confidentiality guarantees that information and rulings made public stay private, which makes it especially appropriate for reviewing corporate secrets. One major benefit of international commercial arbitration is the simplicity with which decisions can be approved and carried out. The United States, Japan, Indonesia, and 169 other nations have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is consistent with this.[15]

Because international commercial arbitration is quicker and less expensive than litigation, it is becoming more and more popular. Even though intellectual property issues have long presented obstacles to arbitrability, the consensus is that national entities, such as courts and patent offices, should handle property rights conflicts in the best interests of the country. This is a result of a strongly held belief that arbitrating state administrative disputes is inappropriate.[14]

According to Articles 377 HIR and 705 Rbg, the establishment of arbitration organizations as alternative dispute resolution procedures in Indonesia dates back to the Dutch East Indies era. These articles show how arbitration was included in Indonesian law at an early date. Parties in dispute had the right to take their disputes before a single arbitrator or a panel of arbitrators under these statutes. These arbitrators, who were endowed with intellectual property rights, would settle disputes by the terms and values that the parties involved had agreed upon. With Indonesia's independence, this custom has persisted. With multiple legislation and articles serving as its legal underpinning, arbitration continues to play a significant role in Indonesian law:

1) *Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.*
2) *Law No. 14/1970 on the Principles of Judicial Power, in the explanation of article 3.*
3) *The Civil Code, in article 1338 paragraph (1).*
4) *Article 377 HIR or Article 705 RBg.*
5) *Articles 615-651 Rv*.

Indonesia is home to several arbitration organizations that handle intellectual property disputes, including the Intellectual Property Rights Arbitration and Mediation Board (BAM HKI) and the Indonesian Arbitration Board (BANI). Nevertheless, considering the small number of cases they now handle, their involvement in settling intellectual property conflicts needs to be improved.

Established on December 3, 1977, the Indonesian National Arbitration Board (BANI) is an autonomous and independent organization tasked with settling business disputes. It was founded by Prof. R. Subekti, SH (former Chief Justice of the Supreme Court), Harjono Tjitrosubono, SH (Chairman of the Indonesian Advocates

Association), and A.J. Abubakar, SH. Its goal is to guarantee the prompt and equitable settlement of civil issues about business, trade, and finance.[16] With its headquarters located in Jakarta, BANI maintains representative offices in several of Indonesia's largest cities, including Medan, Surabaya, Denpasar, Bandung, Palembang, and Batam.

The Intellectual Property Rights Arbitration and Mediation Board (BAM HKI) was founded in Jakarta on April 19, 2012. It provides dispute resolution procedures, including arbitration for adjudicative purposes and mediation, negotiation, and conciliation for non-adjudicative purposes. BAM HKI specializes in intellectual property rights, encompassing patents, trademarks, geographical indications, industrial designs, and other related areas. It offers an alternative approach to conventional legal procedures. Indonesian businesses can designate their preferred method of arbitration in agreements, providing them with options for resolving conflicts without resorting to litigation.

As to Article 5(1) of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, arbitration is restricted to commercial disputes in which the parties have full authority over their rights. Arbitration does not apply to family or divorce cases where the parties do not have complete control over their property rights. Law No. 30 of 1999 permits the utilization of arbitration and alternative dispute resolution in conjunction with traditional courts to resolve civil disputes. This law establishes a separate civil dispute resolution procedure outside the standard court system, contingent upon a written agreement between the involved parties.

Mediation is often more effective than arbitration regarding party relations, atmosphere, results, and costs. While arbitration decisions provide more legal certainty as they are binding and final, mediation offers flexibility. Although Indonesia established BAM KI explicitly for IP dispute resolution, its underutilization by companies has hindered its effectiveness. The country has mechanisms for resolving patent disputes through arbitration or mediation, but improvements are needed to enhance its effectiveness and appeal.

Japan, with solid Eastern cultural roots, emphasizes discussion and negotiation for conflict resolution. The country has a long history of mediation, evident in the establishing of the Civil Mediation Act in 1951, governing the Court of Civil Mediation.[19]

Japanese courts typically tolerate mediation. According to data from 2020, 30,723 new mediation cases were successfully handled. The average length of time for mediation is approximately 4.2 months. If mediation fails to provide a resolution, the case is then sent to the local court for a typical legal trial, which takes a lot longer—an average of 13.9 months. It's important to remember that the official completion success percentage for 2019 was 35.8%.[20]

Mediation is an efficient and economical choice because the costs involved are around half of those of litigation. Moreover, the terms of an agreement have the same legally binding power after they are formalized as a court decision. On the other hand, the Japanese government has approved roughly 158 Arbitration Institutions, often known as private ADR organizations. The small number of new cases these institutions handled in 2019—1,485—is insignificant when compared to the volume of cases that go through mediation procedures.

The Tokyo district court or the Osaka district court will supervise intellectual property mediation cases. In the first two mediation meetings, each party will present their case and supporting documentation. The mediation panel normally gives an oral declaration of their position by the third session, and the procedure ends six months after the application date.[29].

The COVID-19 epidemic has necessitated video conferencing technology for mediation procedures, mainly due to limitations on inter-regional travel. The Japan Intellectual Property Arbitration Center (JIPAC) was founded in 1998 as a government-sanctioned institution responsible for Japan's Alternative Dispute Resolution (ADR). JIPAC deals with problems of industrial property rights, providing services such as resolving disputes over JP domain names and delivering centralized adjudication. Significantly, JIPAC resolves 43% of the cases it handles, with disputes over intellectual rights being a major cause of friction. JIPAC maintains a list of professionals, which includes arbitrators, attorneys, and former senior judges. The Japan Commercial Arbitration Association (JCAA) is a highly significant institution with a history spanning over 70 years. Approximately 72% of the 230 mediators successfully settled issues before engaging in arbitration. The JCAA has responded to the epidemic by implementing online arbitration and mediation services, catering to the demand for adaptability and harmonious resolutions in cross-border contexts.

V. CONCLUSION

The study conducted by the author reveals that Mediation and Arbitration mechanisms have not significantly impacted the resolution of intellectual property disputes in Indonesia. These non-litigation methods need a stronger trend in resolving such disputes. Indonesia's non-ratification of the Singapore Convention on Mediation contributes to the absence of definitive legal certainty for mediated agreements. In contrast, industrialized

countries like Japan and the United States effectively employ mediation or arbitration to address patent disputes, showcasing their crucial roles in non-litigation settlement. To address contemporary challenges in handling intellectual property disputes, Indonesia should establish a mechanism for resolving these issues outside of court, incorporating arbitration and alternative dispute resolution methods such as mediation. Achieving this requires developing governing institutions, focusing on technological expertise and human resources, and ensuring that decisions or agreements from these processes carry legal weight equivalent to a court decision with permanent validity.

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