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**AN ALTERNATIVE MODEL OF BRAND DISPUTE SETTLEMENT
THROUGH MEDIATION IN AMICABLENESS PERSPECTIVE**

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Abstract

The Indonesian philosophy to live as a society and a state prioritizes amicable principles through deliberation. This negotiation has been escalated by Indonesia's founding fathers by including it into *Pancasila* (The Five Principles) and 1945 Constitution. Brand dispute is one of frequently-occurring issues in Indonesian industrial community. However, the option of brand dispute settlement through mediation is frequently omitted by the disputing parties. It is particularly surprising for dispute settlement through mediation or another alternative has been mandated in Article 93 of Law Number 20 Year 2016 concerning Brands. The problem escalated in this research is how does the alternative model of brand dispute settlement through mediation in amicableness perspective match the Indonesian philosophy based on the values of *Pancasil* (The Five Principles) *a*. This research uses empirical legal study, a legal research method which serves the purpose of seeing the law in its real sense and of reviewing how the law works in the society. The primary data used here are obtained from a set of observations and interviews. The research finds that the mediation model as an alternative brand dispute settlement in amicableness perspective matches the Indonesian philosophy to live as a society through deliberation.

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1. Introduction

Usman (2003) explains that in general a goods or service product made by someone or a legal entity shall be affixed with certain mark, which functions to distinguish it from other goods or service products of similar kind. This certain mark is a marker for the relevant goods and service product, commonly known as brand. It can take such forms as drawing, name, word, letters, numbers, colour composition or a combination of these elements (Usman, 2003).

The need for legal protection of brand is rapidly becoming more and more urgent after many imitate certain products. The urgency keeps on rising after the trading world increasingly advances and the means of transportation gets better, and with promotion the areas of goods and service marketing become even wider. Such a condition increases the importance of brand, i.e. to differentiate the goods origin and its quality as well as to avoid any imitation. At the end of the day, such a marketing expansion requires adjustment in the legal protection system of the brand used in the products being traded (Djumhana & Djubaedillah, 2014).

In the jurisdiction of former Pekalongan Residency which covers Brebes Regency, Tegal Regency, Tegal Municipality, Pemalang Regency, Batang Regency, Pekalongan Regency and Pekalongan Municipality many products have their own brands, yet they have not been certified legally hence legally talking these brands have no rights for legal protection, particularly the protection of their intellectual property rights.

These brands in the former Pekalongan Residency area have not been certified because the awareness of the importance of Intellectual Property Rights in the industrial society is still not too obvious. This can be seen in the constant existence of brand violation cases and the many businessmen among Small and Medium Enterprises (SMEs) who have not registered their Intellectual Property Right for their products. In Pekalongan Regency, as a Batik centre city in Central Java, many batik brands with their numerous Pekalongan batik motives have their brands poorly managed or have not been registered, including Asti, Larissa, Wirokuto, Maskur, Azka, Jayawijaya, Maya, Raja, Samila, Erlita, la Za, Larisdhewe, Tirta, Qonita, Has711, Ismania, MAS, Iman, Dannis, Feno, Mahkota Agung, Amalia, Huza, Sana, Bona, Jayanti Jayanto, Say and so forth.

On the other hand, those brands which have been certified in the former Pekalongan Residency area are found in trouble. Some parties claim that they have used these brands first, hence they should settle the dispute in the court. An example of this is the case of helmets of Lexus brand from one of Small and Medium Enterprises (SMEs) in Tegal which is sued by Lexus brand from Toyota, Japan. Another example is the case of a Small and Medium Enterprise's (SME) product from Tegal in the form of Saos Sambal SINAR AGUNG which is later found out to have been used by similar product with exactly the same Saos Sambal SARI AGUNG brand from Cirebon and it also end up in a court to settle. Lastly, OSKANGIN, a medicine for colds, is sued by PT SUPRA FERBINDO FARMA because it deems the brand makes use of the brands from their company under the first name of OSKA, such as OSKADON, OSKADRYL, OSKAMAS, OSKAMO and OSKAVIT and this takes a commercial court to settle.

The brand disputes existing in the jurisdiction of former Pekalongan Residency are mostly settled through litigation or court with all weaknesses such as consuming both great costs and time, the decision being on the Panel of Judges' hand and the winning-losing nature of this decision. In its arrangement,

under article 93 Law Number 20 Year 2016 concerning Brands (In Indonesian version are Undang-Undang Nomor 20 Tahun 2016 tentang Merek), an alternative to settlement through litigation is available, i.e. a brand dispute can actually be settled through non-litigation way or alternative dispute settlement such as Arbitration and other forms of alternative dispute settlements such as negotiation, mediation, conciliation.

Mediation as governed in Indonesia's regulation, i.e. Law Number 30 Year 1999 concerning Alternative Dispute settlement, authorizes or empower the parties to settle their brand dispute by themselves and a mediator does not make any decision on these parties' dispute. The mediator implements the philosophy by helping the parties negotiate cooperatively. This dispute settlement through mediation is highly relevant with the philosophy of Pancasila and 1945 Constitution where every problem arising in the society is preferably settled through deliberation so that the urge to beat others can be prevented and replaced by the desire to understand each other for a greater cause of the nation instead. Through this research, an effort of describing how alternative model of brand dispute settlement through mediation in amicableness perspective under Law Number 30 Year 1999 concerning Alternative Dispute Settlement by considering the values of Pancasila, the obstacles as well as the benefits obtained from this alternative model.

2. Problem Statement

Based on the explanation above, there are several important reasons for conducting this research on alternative model of brand dispute settlement through mediation in amicableness perspective, they are:

- 1) there has been no awareness from Small and Medium Enterprises (SMEs) and other industrial actors of the importance of certification for their business brand;
- 2) The dispute settlement option many industrial actors choose is mostly the one through litigation (court) which consume both significant time and costs for both parties;
- 3) When a non-litigation or alternative brand dispute settlement through mediation is opted, its implementation is too rigid and normative, with less attention and consideration being paid and made to the values of Pancasila, i.e. deliberation, which is more flexible in nature.

3. Research Questions

From the background described above, several problems can be surfaced based on which the problems in this research are formulated as follows:

- 1) What does the term alternative brand dispute settlement mean and how is brand dispute settlement implemented in Indonesia?
- 2) How is the alternative model of brand dispute settlement through mediation in amicableness perspective?

4. Purpose of the Study

Every research is undoubtedly based on certain main goals and objectives to be achieved through the discussion of the topic. Therefore, the researchers formulate this research's objectives as follows:

- 1) To study how is brand dispute settlement implemented in Indonesia?

- 2) To study and describe the alternative model of brand dispute settlement through mediation in amicableness perspective.

5. Research Methods

This research uses empirical legal approach (Soemitro, 1990). This approach does not suffice itself in law and regulations of law, rather it views law in a legal conception living in the society or in other words it is conducted by researching the primary data, the data obtained directly from the society (p.9). Using descriptive qualitative analysis method, this research performs an analysis only to the extent of description, i.e. analysing and presenting facts systematically to enable a greater ease for understanding them and drawing conclusions from them, with the data being of comprehensive nature and constituting an integral, holistic part which demand the availability of in-depth information (Santana, 2007, p. 20).

6. Findings

6.1. Alternative Dispute Settlement and Implementation of Mediation in Brand Dispute Settlement

In essence, dispute settlement has existed since long ago along with the development of human civilization. Dispute settlement can be done in two ways, the commonly used one is the dispute settlement through a court, and then as the human civilization develops, an extrajudicial dispute settlement also develops. This extrajudicial dispute settlement is what is called Alternative Dispute Resolution (ADR). (Usman, 2003, p. 2-3).

In reference to some literatures, the institutions of alternative dispute settlement in essence has many forms, as elaborated above, according to Abdurrasyid (2002) there are around 12 forms of alternative dispute settlement institution. However, the most-commonly known ones are: negotiation, facilitation, conciliation, mediation and arbitration. These many forms of alternative dispute settlement can substantially be classified into 3 groups: Firstly, the form which involves a third party, an example of this first form is negotiation; secondly, the form which involves a third party, yet this third party is not authorized to make decision on the dispute settlement. The authority to make decisions for the dispute settlement lies with the disputing parties, examples of this second form include conciliation, facilitation and mediation; and Thirdly, the form which involves a third party, in which this third party has the authority to make decisions on the dispute settlement, examples of this third forms are: arbitration, mini trial, binding opinion and so forth.

Each of these alternative dispute settlement forms has their own strengths and weaknesses. One form of alternative dispute settlements does not fit for all disputes (one size not fit for all). Whether or not a form of alternative dispute settlement is good will be dependent on the dispute matters, dispute escalation and momentum of occurrence of the conflict or dispute itself. The case of BRI's gold pawn in 2012 between BRI *Syariah* and its customers makes a good example (Setiadi, 2012). This case is purely a civil case. Civil law has its own uniqueness, i.e. individuals play an important role of maintaining or releasing their rights which is completely depending on their own accord (Scholten, 2003). In this case specifically for banking issues, a win-win solution has been commenced when Bank Indonesia issues BI Regulation No. 7/7/PBI/2005. It is then amended with No. 8/5/PBI/2006, and now it has been revised

with Regulation No. 10/1/PBI/2008. In essence, the mediation opportunity between banks and their customers is given where Bank Indonesia facilitates this mediation.

Brand is the mark which can be presented graphically in the form of drawing, logo, name, word, letter, number, colour composition, in 2 (two) and/or 3 (three) dimensions, sound, hologram, or combinations of 2 (two) or more of these elements to distinguish the goods and/or service produced by someone or a legal entity in goods and/or service trading activities. And the Right of Brand is obtained after the Brand is registered.

Under Article 35 of Brand Law, a registered Brand shall obtain a legal protection for a period of 10 (ten) years since the Receipt Date and this protection period can be extended for the same amount of period, where the application for its extension shall be submitted electronically or non-electronically in Indonesian language by the Brand owner or their Attorney within 6 (six) months prior to the expiry date of the protection period for the registered Brand and charged at some amount of money.

To give even greater law protection to registered Brand owners from any Brand violation committed by other parties, the punishment for such Brand violation is increased, particularly for those violations resulting in some threats to human health, environment, and possibly lethal to mankind. Given the tight relation between Brand issue and economic factors, in the latest Brand Law, i.e. Law Number 20 Year 2016 concerning Brands, the punishment is increased.

Article 100 of Law Number 20 Year 2016 concerning Brands sets forth the sanctions for this brand right violation as a form of protection to brand owners who have received the valid certificates. The sanctions include:

- a. Any person unlawfully uses the same Brands in its entirety with the registered Brands owned by other parties for similar goods and/or service which are produced and/or traded, shall be penalized with imprisonment for a maximum of 5 (five) years and/or fine at a maximum amount of Rp2,000,000,000.00 (two billion rupiah) or equal to 147,450US\$.
- b. Any person unlawfully uses Brands with similarity in essences with the registered Brands owned by other parties for similar goods and/or service which are produced and/or traded, shall be penalized with imprisonment for a maximum of 4 (four) years and/or fine at a maximum amount of Rp2,000,000,000.00 (two billion rupiah) or equal to 147,450US\$.
- c. Any person violating the provisions of paragraphs (1) and (2), the goods type of which results in health and environmental hazards and/or human death, shall be penalized with imprisonment for a maximum of 10 (ten) years and/or fine at a maximum amount of Rp5,000,000,000.00 (five billion rupiah) or equal to 368,650US\$.

Mediation is an effort of settling disputes through discussion as aided by a neutral third party (mediator) in order to find a form of resolution jointly agreed upon by the parties (Wijaya, 2005). The implementation of Mediation in Brand Dispute Settlement in Indonesia is integrated into the court proceeding, where the court aims at facilitating it, trying its best to help the disputing parties deal with any obstacles and hindrance for the achievement of simple, fast, and cost-effective justice through discussion and deliberation by waiving the law towards the peace agreed upon by both parties (Sukadana, 2012).

6.2. Alternative Model of Brand Dispute Settlement through Mediation in Amicableness Perspective.

In Indonesia, the dispute settlement process through Alternative Dispute Resolution (ADR) is not something new in its cultural values as a nation, because the soul and characters of Indonesian people have been known as friendly and cooperative in resolving problems. In many tribes in Indonesia, it has been a common practice to resolve problems through deliberation to make decision on them. For example, in Batak tribe in forum *Runggun* it has been a custom to settle a dispute using deliberation and amicableness. In Minang Kabau, lembaga hakim perdamaian (literally: peace judge institution) has been known to generally play a role as a mediator and conciliator in settling a problem encountered by local society. Also the decision in village gathering in Javanese ethnic is not made based on the majority vote, rather it is made by all those present at the gathering as an integral part (Margono, 2004).

The applicability of alternative dispute settlement process through mediation by Indonesian people constitutes an effort of nurturing local wisdom known as amicableness principle. This Mediation by prioritizing amicableness principles is dialogic problem solving between the two disputing parties by prioritizing deliberation. This step is done when the two parties have a good will to settle the problem until justice and peace are reached and dispute can be avoided.

The helmet product case in Tegal Regency can be an example. This product is unintentionally branded with Lexus by the small enterprise owner. However, later on it is found out that this Lexus brand has been used first by a large automotive company from Japan for their car product. In regard to this, this automotive company then sues the owner of the company producing the helmet branded as Lexus and it is granted by the Judge Panel. Based on this case, it can be said that an alternative brand dispute settlement with mediation needs to be developed and designed even further to settle such a brand case by prioritizing the amicableness principle. This is for the sake of keeping the businesses of Small and Medium Enterprises (SMEs) running and prevent them from shutting down and inflicting undesired impacts on the surrounding society.

Through this research, an Alternative Model of Brand Dispute Settlement through mediation based on amicableness principles through deliberation in accordance with the values of Pancasila and 1945 Constitution as the Indonesian philosophy to live in society will be designed.

The model begins with the party finding themselves placed unfairly at a disadvantage due to the existence of a brand which is found to have substantial similarities coming to the IPR Service Centre at Pancasakti University, Tegal. From the report by the business owner party finding himself/herself placed unfairly at a disadvantage the IPR Center Service at Pancasakti University, Tegal would contact the business owner whose brand is disputed and explains to him/her that his/her brand has been owned first by the client of IPR Service Center at Pancasakti University, Tegal and then it is suggested that the Respondent shall make some changes to or replace its brand with other brands with no similarities with the client's nor other brands to prevent any brand dispute.

IPR Service Center at Pancasakti University, Tegal in their approach and explanation to the Respondent would prioritize the amicableness approach, with no such things as threat, intimidation, coercion and it will also explain that the client would not report this dispute to a court or police and the IPR Service Center at Pancasakti University, Tegal, despite its service to its client, remains neutral and

impartial. The respondent's complaints and rebuttals will surely be heard. Then, both parties shall reach an agreement to settle the brand dispute through mediation with the mediator being IPR Service Center at Pancasakti University, Tegal and witnesses from the Office of Industry and Commerce. The mediation process by IPR Service Center at Pancasakti University, Tegal puts amicableness first through deliberation and tries to find the best solution. IPR Service Center at Pancasakti University, Tegal can even give some feedback in the form of alternative names or logos for the Respondent's brands when it is decided so.

The decision made based on deliberation according to the values in Pancasila as the state ideology of the Republic of Indonesia with no intention of beating each other, rather it moves from common awareness that every dispute can be settled by a win-win solution. Later on the witnesses from the Office of Industry and Commerce follow up the agreement by helping the process of changing the Respondent's name/logo. Based on the process of brand dispute settlement, an illustration can be made on the alternative model of brand dispute settlement through mediation by prioritizing the amicableness principles by deliberation as follows:

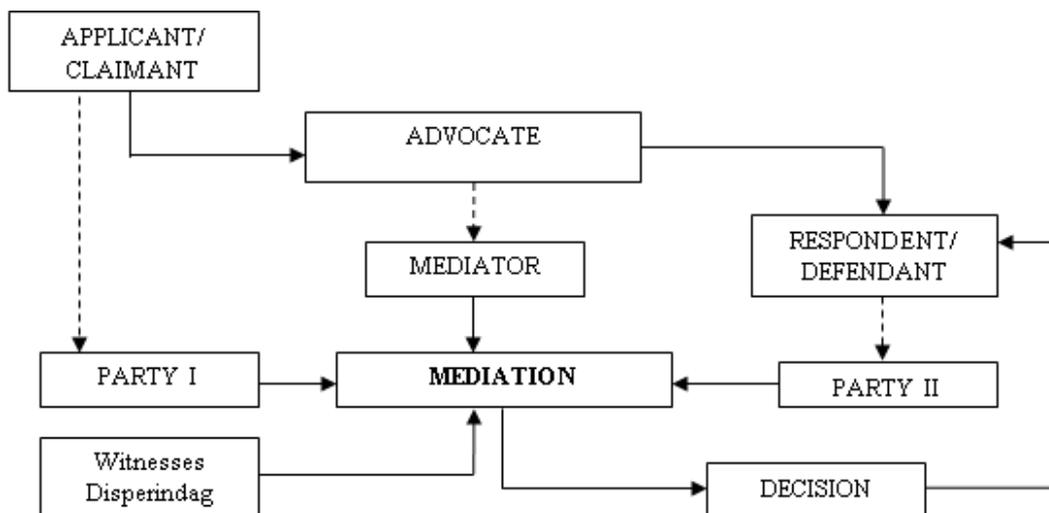


Figure 01. Applicant/Claimant Appoints an Advocate to settle his/her brand dispute

The first alternative model of brand dispute settlement through mediation with amicableness principle approach by deliberation begins with the brand owner (Applicant/Claimant) finding himself/herself placed unfairly at a disadvantage by other parties who own the similar brand (Respondent/Defendant), coming to an Advocate to convey his/her wish for the Respondent/Defendant to change their brand.

The Advocate appointed by the Applicant/Claimant to represent himself/herself does not abruptly serve a legal notice or threat and intimidation to the Respondent/Defendant, yet he/she tries an approach of amicable nature to persuade the Respondent/Defendant to voluntarily and mindfully settle the dispute regarding the brand which has actually been owned first by the Applicant/Claimant.

On the Advocate initiative, both parties are gathered in a mediation process in the presence of witnesses from the Office of Industry and Commerce and then at the mediation process it will then be decided that the Respondent/Defendant shall be willing to change their brand and the changed brand will then be

facilitated and advocated by the Advocate and the Office of Industry and Commerce to be registered in IPR Directorate General.

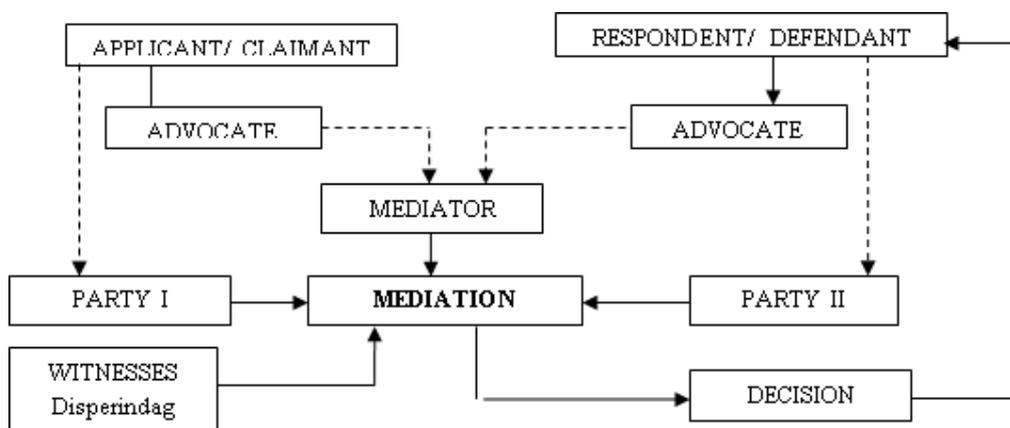


Figure 02. Both the Applicant/Claimant And the Respondent/Defendant Jointly Appoint Their Own Advocates To Settle Their Brand Dispute

The second alternative model of brand dispute settlement through mediation with amicableness principle approach by deliberation begins with the brand owner (Applicant/Claimant) finding themselves placed unfairly at a disadvantage by other parties who own the similar brand (Respondent/Defendant), coming to an Advocate to convey his/her wish for the Respondent/Defendant to change their brand, and the Respondent/Defendant, as a response of the fact that the Applicant/Respondent has appointed an Advocate, also appoints an Advocate to assist him/her in the said brand dispute case.

Both Advocates appointed by the Applicant/Claimant and the Respondent/ Defendant do not abruptly serve a legal notice or threat and intimidation to each other. Instead, both try an approach of amicable nature to convince the parties to voluntarily and mindfully settle their brand dispute through mediation by prioritizing deliberation and amicability.

Both Advocates then serve the role of mediators by gathering both parties in a mediation process in the presence of witnesses from the Office of Industry and Commerce and then at the mediation process it will then be decided that the Respondent/Defendant shall be willing to change their brand and the changed brand will then be facilitated and advocated by the Advocates and the Office of Industry and Commerce to be registered in IPR Directorate General.

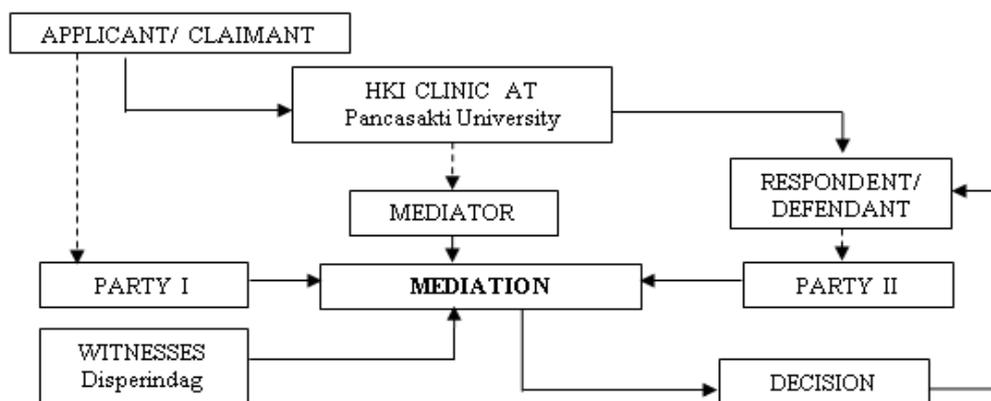


Figure 03. Claimant/Applicant Appoints the HKI Clinic at Pancasakti University, Tegal to settle his/her brand dispute

The third alternative model of brand dispute settlement through mediation with amicableness principle approach by deliberation begins with the brand owner (Applicant/Claimant) finding themselves placed unfairly at a disadvantage by other parties who own the similar brand (Respondent/Defendant), coming to HKI Clinic at Pancasakti University, Tegal, to convey his/her wish for the Respondent/Defendant to change their brand.

While the HKI Clinic at Pancasakti University, Tegal is on the Applicant/Claimant side, the HKI Clinic at Pancasakti University, Tegal will make an approach and advocacy to both parties to prevent them from serving a legal notice or threat and intimidation to each other. Instead, the Clinic will try an approach of amicable nature to convince both the Applicant/Claimant and the Respondent/Defendant to voluntarily and mindfully settle the dispute regarding the brand which has actually been owned first by the Applicant/Claimant.

The HKI Clinic at Pancasakti University, Tegal then gather the parties in a mediation process in the presence of witnesses from the Office of Industry and Commerce and then at the mediation process it will then be decided that the Respondent/Defendant shall be willing to change their brand and the changed brand will then be facilitated and advocated by the HKI Clinic of Pancasakti University, Tegal and the Office of Industry and Commerce to be registered in HKI Directorate General.

7. Conclusion

One form of alternative dispute settlements available under the regulations of law in Indonesia does not fit for all disputes (one size not fit for all). Whether or not a form of alternative dispute settlement is good will be dependent on the dispute matters, dispute escalation and momentum of occurrence of the conflict or dispute itself.

The implementation of alternative dispute settlement process through Mediation in Indonesia constitutes an effort of nurturing local wisdom known as amicableness principle. This Mediation by prioritizing amicableness principles is dialogic problem solving between the two disputing parties by prioritizing deliberation. The alternative model of brand dispute settlement for settling a brand dispute with amicableness principle through deliberation is a model of brand dispute settlement which fits the personality of Indonesian people as set forth in Pancasila and the 1945 Constitution of the Republic of Indonesia.

References

- Abdurrasyid, Priyatna. (2002). *Arbitrase & Alternatif Penyelesaian Sengketa-Suatu Pengantar*. Jakarta: Fikahati Aneska.
- Djumhana, M., & Djubaedillah, R. (2014). *Hak Milik Intelektual, Sejarah, Teori dan Praktiknya di Indonesia*. Bandung: Citra Aditya Bhakti.
- Margono, Sujud. (2004). *ADR (Alternative Dispute Resolution) dan Arbitrase Proses Pelembagaan dan Aspek Hukum*. Jakarta: Ghalia Indonesia.
- Santana, Septiawan. (2007). *Menulis Ilmiah Metode Penelitian Kualitatif*. Jakarta: Yayasan Obor Indonesia.
- Scholten, Paul. (2003). *Struktur Ilmu Hukum (Arief Sidharta, Penerjemah)*. Bandung: Alumni,
- Setiadi, Edy. (2012, September 15). *Masalah Gadai Emas, BI Akan Panggil BRI Syariah*. February 18, 2016. <https://www.viva.co.id/berita/bisnis/351624-masalah-gadai-emas-bi-akan-panggil-bri-syariah>

- Soemitro, Romy Hanitijo. (1990). *Metodologi Penelitian Hukum dan Yurimetri*. Jakarta: Gahlia Indonesia.
- Sukadana, I Made. (2012). "*Mediasi Peradilan: Mediasi dalam Sistem Peradilan Perdata Indonesia dalam rangka Mewujudkan Proses Peradilan yang Sederhana, Cepat dan Biaya Ringan*". Jakarta: Prestasi Pustaka.
- Undang-Undang Nomor 20 Tahun 2016 tentang Merek*
- Usman, Rachmadi. (2003). *Pilihan Penyelesaian Sengketa di Luar Pengadilan*. Bandung: PT. Citra Aditya Bakti.
- Wijaya, Gunawan. (2005). *Alternatif Penyelesaian Sengketa*. Jakarta: Rajawali Pers.