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Urgency of Licensing Restriction in Joint Venture Companies Related to TKDN

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Abstract

Most companies that market their products in Indonesia in order to pass TKDN using the concept of Joint Venture agreements (PMA) often the parties working together are unbalanced in real terms the shares of foreign owners are greater than domestic shareholders. In such conditions the strong parties tend to impose their will on the weaker party. The restrictions in regulating technology transfer from Advanced countries to developing countries are there to protect the interests of countries that divert technology because the inventor of the technology is considered to have made maximum efforts to find related technology but on the other hand the state is also obliged to protect and improve the welfare of its citizens from that, restrictions on patent licenses are needed so that the TKD is truly "real" and does not reduce the incoming FDI. Based on this, the authors formulated a number of issues discussed in this article namely: Why are restrictions on patent licenses needed and What are the legal consequences of limiting patent licenses. The results of the discussion show that there is a dilemmatic situation on the one hand the acceleration of mastery of technology including the acceleration of development needs to be done by being open to the owners of capital and technology (which generally comes from developed countries), while on the other hand we still have to maintain national interests. Here is related to the authority of the state to regulate the process of technology transfer. In this global era, after the WTO agreement was reached, which was linked to 2 (two) technology transfer agendas, namely TRIMS and TRIPS. Foreign technology protection was very much needed in the context of foreign investment.

Keyword: Licensing Restriction; Joint Venture; TKDN

INTRODUCTION

In this Industrial Age 4.0, the Technology Industry holds a very important role. Indonesia, as a developing country, also does not escape the need for technology in various sectors. In developing countries technology transfer has proven to be a strategic means to complement the availability in the field of technology to face competition with other countries.

In the software sector, Indonesia should be proud, because until the beginning of 2019 in Indonesia it was recorded that there were 4 companies with investment value above 1 million dollars, namely Bukalapak, Gojek, Tokopedia and Traveloka but what about the Hardware sector? In this regard, the Ministry of Communication and Information together with the Ministry of Industry applies the Domestic Content Level (TKDN) policy as stipulated in Minister of Industry Regulation No.65 / M-IND / PE / 7/2016 which requires foreign companies to market their 4G smartphone products in Indonesia to have Domestic Content of 30 percent.[1]

The impact of the presence of TKDN of 30 percent is quite significant in improving the economy in Indonesia. Because as can be seen from the fact that domestic mobile phones continue to grow 36% from 2015 to 68 million units. Then in 2017, cellphone imports fell to 11.4 million units, while domestic cellphone production was 60.5 million units.[2]

TKDN regulation is indeed a solution in improving the quality of Indonesian technology, but this should continue to receive attention from the government because this sector is very important in facing economic

1 https://selular.id/2018/11/empat-tahun-rudiantara-kebamanan-setengah-matang-tkdn-smartphone-bagian-tiga/accessed on 17/01/2019

2 https://inet.detik.com/law-and-policy/d-3876005/berkah-tkdn-ponsel-made-in-indonesia-tembus-605-juta-unit accessed on 17/01/2019

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competition with other countries. One of the interesting problems to be studied is in the case of patent transfer.

As is known that Until now in Indonesia there has not been a law that clearly regulates patent licenses. We can find limited regulations regarding Patent licenses in Law No. 14 of 2001 concerning Patents regulated in Article 69 to Article 73. The regulations in this article do not cover all aspects, so that in Article 73 it is stated that the provisions regarding patent license agreements are further regulated by government regulations.

Until now there are no Government Regulations governing patent licenses, then the making of patent licenses is still based on Article 1338 of the Civil Code. This article is the basic legal basis for freedom of association after the fulfillment of the conditions specified in Article 1320 of the Civil Code concerning the validity of the agreement.

This is certainly dangerous because most companies that market their products in Indonesia in order to escape TKDN use the concept of a Joint Venture agreement (PMA) often the parties working together are in an unbalanced position in real terms of the owner's shares foreigners are greater than domestic shareholders. In such conditions the strong parties tend to impose their will on the weaker party. Therefore, according to the principle of freedom of contact in relation to the free market, in fully contracting is an affair of the parties, however legal protection and public interest are therefore required from government interference in the form of regulation or restrictions.

Restrictions that exist in the regulation of technology transfer from developed countries to developing countries aims to protect k e's interest states that transfer of technology for the State inventor of the technology is considered to have done the maximum effort to find related technologies, but on the other hand the state is also obliged to protect and improve the welfare of citizens the country therefore requires restrictions on patent licenses so that TKDs that are truly "real" and do not reduce the incoming FDI.

Based on this, the authors formulate a number of issues namely: (1) Why are restrictions on patent licenses needed? (2) What are the legal consequences of limiting patent liabilities?

RESULTS AND DISCUSSION

Why the Restrictions on Patent Licenses Are Needed ?

The development of information technology (IT) has spurred new ways for organizations to conduct business. IT has made business activities faster, easier and more efficient. Various economic reports in various countries increasingly recognize the importance of technology in increasing productivity. Various experts in the field of technology have predicted that in the future technology will play an important role especially after many industries recapitulate costs and other matters related to their business using technology. Not only in large-scale industry, many small and medium-sized companies have emerged with the use of technology.

Technology as part of Intellectual Property Rights (IPR) is important in increasing economic growth and industrialization. The technology needed is controlled by and dominated by large companies in developed countries, such as Japan, the United States, Britain, and Germany[3]. Technology, for all countries in the world, has changed from experimental and research facilities to commodities. The assumption that no country in the world does not need technology[4].

Technology and easy and inexpensive access to market a business change the way organizations and individuals in various countries do business. Costs for cheaper business transactions, government regulations in global business, and improved communication infrastructure among various countries also support a business practice called globalization. This globalization in the future will be increasingly complex along with the increasing public demand for high-specification applications.

The high demand for digital devices in various aspects of human life has indirectly created a giant industry in the field of digital technology that involves almost all the major nations of the world, with business value increasing exponentially. Various studies and research concluded that there is a positive relationship between the development of the ICT industry and the economic growth of a country, one of which is represented by a relation or positive contribution between the growth of the ICT industry and an increase in GDP (*Gross Domestic Product*). This increasingly shows how important and strategic the role of the industry is in improving the quality of life for a country's people. So it is not surprising that almost all countries always put ICT as one of the important pillars of development to pay attention to its performance

3 See Erisa Ardika Prasada, 2016, Politik Hukum Pengaturan Alih Teknologi dalam Perjanjian Lisensi Paten Luar Negeri, *Jurnal Hukum Uniski*, 5(2), p. 161.

4 Siti Zulaekhah, 2008, Peranan Negara dalam Pengawasan Pelaksanaan Alih Teknologi di Indonesia, *Pena Justisia*, 7(13), p. 71.

The development and acceleration of information technology in each of the world's countries also affects industrial competition globally. Developing countries must be able to catch up in the use of information technology to be able to compete with developed countries.

Technology becomes a new paradigm to determine the quality of a nation. The expression that "whoever masters the technology will hold the world in his hands", therefore cannot be doubted even though it must be addressed wisely. Technology related to industrialization has become a benchmark for economic growth that reflects the success of a nation's development. But in reality there is a gap in the mastery of technology between developed countries and developing countries, such as Indonesia. By karana it is a matter of technology transfer between advanced countries and developing countries becoming a central issue in decades, especially after reaching an international community agreement in the World Trade Organization (WTO)

Licensing Re striction is one way to protect the national interest (*host country*) in the context of a technology transfer program through foreign investment in Indonesia

In the context of foreign investment, the licensing contract is the main basis for cooperation that regulates the terms and conditions of transfer of technology from foreign parties to the licensing companies in Indonesia. The licensing contract is generally held at joint ventures in Indonesia with parent companies abroad that have or hold the rights to the relevant technology.[5]

The basic rules regarding technology transfer are stated in Article 12 of the UUPMA. In this article it is affirmed that foreign capital companies are obliged to provide facilities and education in and / or abroad on a regular and directed basis for Indonesian citizens with the aim of gradually expatriate personnel being replaced by citizen personnel Indonesia. Technology transfer is urgent to be carried out immediately so that there is no discrepancy between the capital owners and the recipient of the capital and there is no prolonged dependence on foreign parties.

In the first ndonesia patent license stipulated in Law No. 14 of 2001 concerning Patents, which is regulated in Article 69 through Article 73. However, the material law of patent licenses specifically has not been regulated. Patent licenses are one channel for technology transfer from technology owners to technology recipients, because the Pate license is basically a license to use the right to technology that is protected by law by technology owners to technology recipients. For the benefit of host country, Indonesia, the patent license must be specifically regulated so that a local partner can carry out a technology transfer program that is consciously supported by a home country.

Some reasons behind the urgency of regulating (limiting) patent licenses are as follows:

a. The importance of the role of patent licenses in the implementation of technology transfer

Technology can be transferred through several ways or channels, both commercial and non-commercial. The transfer of technology carried out on a non-commercial basis usually involves the government in the form of programs: (1) Delivery of labor abroad to learn a knowledge; (2) Utilization of technological information that is included in foreign publications to the government; (3) Use of expertise from abroad; and (4) Technical cooperation program between countries.

While the transfer of technology carried out commercially can be done in various forms. The UNCTC and UNCTAD noted that there are several ways to transfer technology commercially, namely:

1) Foreign Direct Investment;
2) Joint Venture;
3) License;
4) Franchising;
5) Management Contract;
6) Marketing Contract;
7) Technical Service Contract;
8) Turn Key Contract;
9) International sub-contracting.

In this paper what is discussed is the transfer of technology through a joint venture and through a license. In common practice, technology transfer is carried out through licensing agreements in the context of foreign investment, especially joint ventures. Through this patent license contract, the technology owner can transfer the technology by giving certain rights to other people or legal entities to implement (exploit) the technology with a license.

5 Soemantoro, *Economic Law* , UI Press, 1989, p. 119

b. The Importance of Restricting the Principle of Freedom Contracting in a Patent License contract.

Until now, in Indonesia the license contract is based on "contract freedom". There is no rule that limits the parties involved d only that all contracts are carried out in good faith. With the license agreement. The parties have the right to damage any agreement based on the Civil Code; the only conditions needed are that all contracts are carried out in good faith. Thus there is no rule what percentage of the royalty must be paid by the licensee to the licensor.

The importance of patent licensing regulations can also be viewed from the existence of this principle of freedom of contract, especially in making patent license contracts. The principle of contracting freedom is one of the well - known principles in the contract law. Based on this principle, one party can promise what is desired and / or not desired by the other party. In other words, the parties are free to determine what is desired to be stated in this agreement and what is signed by the agreement (Article 1338 Civil Code).

In the opinion of Etty Susilowati, recipients of technology provide certain restrictions or restriction listed in article 1320 paragraph 2 and article 1338 paragraph 3 of the Civil Code and limitation of article 78 of the Patent Law, which aims to reduce the restrictions desired by technology owners. However, the contracts held by technology owners also provide certain restrictions in order to protect licensed technology, so that the technology remains safe as long as it is used by technology recipients. Given the restrictions that are asked by the owners and recipients of technology, in reality it is evident that each party wants to protect the substance of the contract held to reduce risk to a minimum .

According to Amirizal, the principle of freedom can contribute to some elements , namely:[6]

1) Individuals are free to enter into or not enter into an agreement;
2) Individuals are free to enter into agreements with anyone too;
3) Regarding the content, terms and extent of the agreement people are free to determine it.

Regarding the patent license contract, the licensor and licensee are also free to promise or do not promise anything they want. This principle cannot be applied freely. This principle is limited by public order, propriety, and decency. Patent licenses are also limited by the provisions of Article 71 of Law No. 14 of 2001 as mentioned earlier.[7]

The freedom of parties in technology transactions in the Philippines, one of the ASEAN member countries, is limited. A number of requirements must be met in the technology transfer agreement :[8]

1) The agreement may not contain restrictions or business practices that limit the violation of technology recipients to export products made under the contract or restrict the licensee to export abroad only through foreign licensors as exclusive distributors.
2) The amount of royalties for technology transfer must not exceed five (5) percent of the total sales price of the licensed commodity to be made according to the agreement.

The agreement of the Philippine government towards licensees by limiting freedom to contract through legislation should be imitated by the Indonesian government. If the parties have only basing on the principle of freedom of contract and is not limited in detail in legislation that specifically regulates the patent license, then clauses trade restrictions *(restrictive business practices)* is still a lot of patents included in the licensing contract.[9] Of the several sounds of the patent license contract article in a PT it has been seen that freedom of contract is not limited by any provision, for example the stipulation of Article 71 of the Patent Law which prohibits patent licensing contracts containing restrictions that are detrimental to the national economy, even though this clearly exists through the export ban and the Grant-back clause. These limitation clauses can only be removed through restrictions that are detailed in the laws and regulations or provide detailed explanations of Article 71 of the Patent Law.

With the limitation of the principle of freedom of contract through the applicable laws and regulations and the limitation of Article 71 of the Patent Law, these restrictions can be reduced.

c. The Importance of Efforts to Balance the Position of Parties

Efforts to balance the position of the parties in the patent license contract, namely between licensors and licenses also urged the need to hold specific arrangements regarding patent licenses. In practice, the license has a weak position compared to the licensor (technology owner). This has been started from the application of the principle of freedom of contract in the manufacture of patent license contracts as a result of not specifying

6 Amirizal, *Business Law, Deregulation and Joint Venture in Indonesia, Theory and Practice*, Djambat: Jakarta, 1996. p.36

7 Suteki. *Law and Technology Transfer a Sociological Struggle*, Thafa Media: Yogyakarta, 2013 p.166

8 Budi Budi Maulana. *Patent License*, PT. Citra Aditya Bakti: Bandung, 1996, p.16-17

9 Soekirno, 1995, Technology Transfer Constraints and Solution Alternatives, Read: *Journal of Documentation and Information*, DOI 10.14203 / j. Read.v20i5.38 ,p.138

patent licenses specifically. Through this principle of freedom of contract, the strong party (licensor) will dominate some power over the weak party (licensor).

The position of the recipient of this weak license can be proven through the inauguration of several trade restrictions articles or commonly referred to as Restrictive Business Practice (RBP) in patent license contracts. Licensee is usually not able to refuse the contents and requirements other than just accept and approve all the contents and requirements proposed by the patent licensor. This occurs as a result of share ownership ratios which are mostly owned by licensors, company management (directors) as policy makers dominated by licensors, transferred technology is usually also owned by foreign investors and there is no adequate protection for licensee parties by the government.

d. Restrictions on Freedom of Contract

The holder or license owner (*licensor*) can make an agreement with the licensee (*licensee*) regarding anything in accordance with their wishes based on the principle of freedom of contract. What is clear, the *licensor* has monopoly rights and can prohibit, permit or transfer their IPRs based on agreements to third parties. If so, does it mean that there are no restrictions or restrictions can be made on the application of the principle of freedom of contract in a licensing agreement

The principle of freedom of contract is regulated in Article 1338 paragraph (1) of the Civil Code which states that *every agreement made legally applies as a law for the parties who make it* . Whether the article above must be interpreted as if the parties can make an agreement on anything in accordance with the wishes of both parties

In making an agreement the parties may not make agreements that are prohibited by law, contrary to decency or public order. So, however, the principle of freedom of contract stipulated in Article 1338 paragraph (1) of the Civil Code still has limits. This is because morality and law cannot be separated from each other. Therefore in Article 1337 of the Civil Code it is stated that a *cause is prohibited if prohibited by law* , or if it is contrary to morality or public order.[10]

The legal consequences of limiting patent licenses

Technology when associated with science includes: (a) Products; (b) Process and (c) Ethical Paradigm. Technology as ' The application of science' is based on science which is the ' *enlarging international pool of knowledge and equally valid every where* '. Initial knowledge originated from knowledge that gradually became an independent scientific discipline when branches the branch of science breaks away from the 'stem' of its philosophy and develops according to its methodology.

The law is part of the technology because the technology guessed it with constitutional issues and legal functions as a fundamental structure. In the constitution of a country covered by various human considerations and decisions which are positioned as technicians, bureaucrats and politicians. Law determines advanced technology, intermediate technology or populist technology.

In the 1945 Constitution, the basis and direction of economic development are laid down which certainly includes the problem of technology transfer. In Article 33 it is stipulated : "The Indonesian economy is arranged by ... Branches of production ... Earth, water and natural wealth ... are used as much as possible by the prosperity of the people". Economic development is intended to achieve the National Goals, it is realized that the Indonesian people have shortcomings in terms of capital, expertise and technology. For this reason, a series of policies and rules are needed that can meet those needs, among others, through technology transfer policies.

The policy of technology transfer is put in place by Law No. 1/1967 Regarding Foreign Investment. In Article 2 of Law No. 1/1976 states that "... foreign capital includes ... inventions of foreigners ... ". Further in Article 12 of Law No. 1/1976 stipulated: "Foreign capital companies must provide facilities and education ... for Indonesian citizens". The purpose of this provision is to gradually replace foreign workers with Indonesian labor.

One more important thing to watch out for is not to have the company's tools or new inventions 'something' that it actually owns (house country) obsolete or even be banned because it pollutes the environment, but with the calculation that the investment in meng produce the tool can be returned, then the tools of the company are brought along in the framework of investment in the country of investment (host country) which relatively has a weaker bargaining position.[11] Still with regard to company tools and discoveries, often foreign investors forbid local partners to make development improvements. This is what has often been criticized that

10 http://www.hukumonline.com/berita/baca/hol13761/klausula-hitam-dan-pembatasan-kebebasan-berkontrak-dalam-perjanjian-laktik accessed on 17/01/2019

11 Tony Hanoraga, Niken Prasetyawati, Obligatory Patent License as One of the Signs of Limiting Exclusive Patent Rights , *Jurnal Sosial Humaiora*, DOI 10.12962 / j24433527.v8i2.1250 , p.156

for many years PMA companies in Indonesia "Our nation has only a limited capacity".

In Law No. 1/1967 technology transfer is actually arranged in 3 (three) terms:

a. Transfer of knowledge or skill

b. Transfer of share (divestment)

c. Transfer of employee

Regarding *Transfer of Knowledge* , Article 12 of Law No. 1/1967 requires investors to educate Indonesian workers as an effort to develop the quality of human resources. This education is ideally, becoming a means of technology transfer. However, we must be careful when participating in foreign parties' education, do not let us be fooled, meaning that we get knowledge from them, in fact we are the object of research to develop their knowledge or technology in order to maintain their determinant and dominant position in developing countries as company are the forefront of one's country.[12]

The purpose of transfer of share or Indonesianization of shares (divestment) is to accelerate the control of the company (including software, information and technology). In an effort to achieve these objectives before the enactment of PP No. 20/1994 Regarding the Ownership of Foreign Shares in Companies Founded in Investment, the Government's policy stipulates that within 15 (fifteen) or 20 (twenty) years since the commercial production of Indonesia's partner position must become a majority of 51%: 49% in ownership shares in a PMA company. In fact, even though Indonesia's partners are in a majority position whose assumption is to control the company, we must still recognize the superiority of foreign partners who are very good at 'playing' in legal gaps, for example, their control is held through various agreements such as technical assistant management, management agreement and others. This fact actually contradicts the principles of *National Treatment* and the *Most Favored Nation* which are the basic principles of the WTO.

Transfer of employee is determined based on Article 11 which stipulates that " Foreign workers can be used in companies, PMA, as long as these positions cannot be filled by Indonesian employers". There are records here in the practice of foreign workers for the same position can get wages of 10 (ten) times even more than Indonesian workers. Based on this fact, it appears that what happens is that the sell is not a share, especially the transfer of technology that can be used as a means of technology transfer. Indeed, in origin 11 it is possible to employ foreign workers, but their expertise must be transferred to Indonesian workers.

The method of technology transfer also differs as referred to in the Reading Backgroud Material on Intellectual Property published by WIPO, saying there are three types of basic legal formats that can be taken to implement technology transfer:[13]

1) In the form of sales or transfer of technology transfer
2) Through licensing
3) With know how agreements,

While for developing countries, according to the same issue, there are at least five other types of ways that developing countries can do technology transfer;

1) Through the importation of capital goods
2) With the franchise *(franchising)* and distribution program (distributorship)
3) Management agreement and consultation (*consultation agreements*)
4) *turn key project* in the form of manufacturing cooperation that involves substantial capital participation with one technology source that is fully responsible for the success of the project
5) *Joint venture agreements* .

If in consultation agreements, developing countries must play an active role so that they obtain the optimum technology they want to absorb, and in the *turn key project* , the burden is transferred to technology owners, so that *agreement agreements are* expected to be role balance occurs between them up to results can be obtained more optimum for technology

CONCLUSION

From the description above, some conclusions can be drawn as follows, including :

1. The transfer of technology is needed for developing countries to advance their products in the era of globalization so that arrangements for them are needed so that in case of cooperation there is no inequality.
2. The legal role in technological policies is to transform agrarian societies into industrialist societies. Here there is a dilemmatic situation on the one hand the acceleration of mastery of technology including the

12 M.Shidqon and Yurida Zakky Umami, The Existence Of A Company In The Society And Its Legality In Indonesian Law, *Journal of Private and Commercial Law, Vol 2 No1*. Year 2018, p.36.

13 Gunawan Wijaya, LICENSE , Issue 1, 1st Printing (Jakarta: PT. Grafindo Persada, 2001), p.98

acceleration of development needs to be done by being open to the owners of capital and technology (which generally comes from developed countries), while on the other hand we still have to maintain national interests. Here is related to the authority of the state to regulate the process of technology transfer. In this global era, after the WTO agreement was reached, which was linked to 2 (two) technology transfer agendas, namely TRIMS and TRIPS. Foreign technology protection was very much needed in the context of foreign investment.

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