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Empowering Arbitration for Resolving Environmental Disputes

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Abstract:

Environmental disputes are generally resolved through the courts, both civil and criminal. But rarely win in court, expensive and require a long time, while the pollution continues. However, the environmental dispute settlement out of court through arbitration is more advantageous because it takes a shorter time and can result in decisions that are win-win solution. However, arbitration is still less popular than other forms of ADR such as mediation. Therefore arbitration should be empowered to be more popular.

Keywords: Arbitration, environmental, disputes

1. Introduction

The principal issues for developing countries are to break the economic backwardness and lay a solid foundation to improve the lives of the people's welfare. Science, technology and economic development has indeed been many member benefits, enjoyment and changes in the level of human life for the better, so that developing countries should carry out development in all fields. However, in the implementation of development, environmental issues can't be ignored development activities always cause negative impacts such as pollution and environmental damage caused by industrial activity .

Environmental pollution caused disputes between polluters and victims are contaminated. Until recently, it was thought that the enforcement of environmental laws only through the courts, whereas the judicial process takes a long time, while environmental pollution continue and require immediate treatment, complete, not a lot of cost and completed by an expert, so that the process longer cause any harm to the environment and human surroundings.

Arbitration is generally known as the peaceful settlement of disputes, are closed, there is no publication of the verdict if there is no agreement of the parties, and the trial was not open to the public . Arbitration does not have a lot of formalities such as civil procedure in court, but the arbitration is only good for a bona fide businessmen. Environmental dispute resolution through arbitration also can reduce the burden of the buildup of the court.

This article aims to empower arbitration as a dispute resolution media environment as an alternative, which is more favorable than the courts, by looking at the implementation constraints which led to the arbitration is less popular. This is due to pollution and environmental degradation is becoming a national and international issue because not only do individuals but by a large company that is bad for human survival in the entire world.

2. Environmental Dispute Resolution

Understanding in the context of a legal dispute defined by Henry Campbell Black that "dispute, a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined" (Black, 1991:327). Willem L. Ury, Jeanne M. Brett and Stephen B. Goldberg suggest that "a dispute begins when one person (or organization) makes a claims or demand on another who rejects it" (Ury, Brett and Goldberg, 1988: 4). In environmental disputes, not only disputes, but also there is a demand. The subject is the perpetrator and victims of pollution and environmental destruction, while the object of the dispute is the environment pollution and environmental destruction.

Environmental dispute resolution can be done through the courts, both civil law and the criminal law. Can also be resolved through negotiations outside of court, namely through mediation, conciliation, negotiation and arbitration. Settlement of disputes through arbitration relatively similar to the court, but not too formal, and also can provide a final decision made by a neutral third party chosen by the parties as a referee or arbitrator who has expertise in the field of dispute at hand.

3. Criticism over Environmental Dispute Resolution in the Courts

Variegated critique of environmental dispute resolution through judicial mechanisms that are adversarial, it is also due to time, cost, accountability, and quality of evidence in the trial judge's decision and ability as well as the complexity of the legal procedures litigants, Nancy K. Kubasek and Gary S. Silverman revealed that "many people criticize this system (litigation), they argue that because each side is searching for only the specific evidence that supports its position, a proponent who discovers evidence helpful to the other side will not bring such evidence to the attention of the court, this tendency to ignore contrary evidence prevents a fair decision, one based on all the available evidence, another argument of the critics is that the adversary process is extremely time-consuming and costly" (Kubasek & Silverman, 1997 : 36-37). The delay in the settlement of disputes in court are common in many countries are causing a buildup of the case giving rise disgruntled justice seekers, especially if the face is the need of handling environmental disputes quickly, because the longer the time required for the settlement of disputes, the higher levels of pollution. In connection with the settlement of environmental disputes in court, Abraham Lincoln suggest that "discourage litigation, persuade your neighbor to compromise whenever you can, point out to them how the nominal winner is often a real loser – in fees, expense, and waste of time" (Lovenheim, 1989 :3).

Ideally be the litigation process will not mean much to solve environmental disputes because there is no certainty to win the war. So naturally when people are reluctant to sue environmental disputes in court . Therefore sought and developed other ways as alternative dispute resolution (ADR) as a form of dissatisfaction over the litigation process .

4. Environmental Dispute Resolution through Arbitration

Nowadays people are more familiar with the settlement of disputes out of court through mediation or negotiation. But they forget that there are other forms of ADR are arbitration. Settlement of disputes through arbitration means turning to a neutral party who has the authority to decide or referred to the arbitrator or arbitrators.

Arbitration is a process of dispute resolution in which a neutral third (arbitrator) renders a decision a hearing at which both parties have an opportunity to be heard, where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision. An arrangement for taking and abiding by judgment of selected persons in some disputed matter, instead of carrying it to established tribunal of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation, such arbitration provisions are common in union collective bargaining agreement (Black, 1991:70). In an environmental dispute resolution, arbitration is the resolution of a dispute by neutral third party outside the judicial setting – is one of the most well-known alternative to litigation, although not the most common form used to resolve environmental matters, the arbitration hearing is somewhat similar to trial, but there is no prehearing discovery process, the stringent rules of evidence applicable in a trial are generally relaxed in arbitration. Each side presents witnesses and evidence, and the parties are given the opportunity to cross-examine their opponent's witnesses, the arbitrator frequently takes a much more active role in questioning witnesses than would a judge, an arbitrator who needs to know more information will generally ask for that information from witnesses (Kubasek & Silverman, 1997: 58-59). By choosing arbitration the parties will give authority to the arbitrator to resolve the dispute. Arbitration is very beneficial for the settlement of environmental disputes because of time is fast, not expensive, proceedings and place can be agreed upon by the parties.

There is another set of perspectives that view choice-based arbitration as offering greater control and assurance of a "right" result. These include several factors identified in one recent study as supporting the use of arbitration, including the avoidance of "excessive or emotionally driven jury awards," the ability to choose arbitrators with particular qualifications, and the relative capability of arbitrators to cope with complex contractual issues. There are, moreover, choices available that help parties remedy the leading concerns about arbitration. For example, concerns about arbitrators' conformance to legal norms may be addressed by selecting experienced lawyers or former judges as arbitrators (now the prevailing norm in commercial arbitration), through competent legal advocacy, including oral argument and briefing, and by imposing contractual standards for award-making in accordance with applicable law. Despite statutory limitations on judicial scrutiny of the merits of arbitration awards, some organizations publish appellate arbitration rules offering different models for review of arbitration awards. Concerns about arbitrator compromise may be allayed by better information about award-making, more specific guidance for arbitrators regarding award-making, and relying on single arbitrators in lieu of multi-member panels that might be tempted, for example, to rely on compromise to fix damages. The ability to make process choices in arbitration offers other potential benefits. These include, notably, the opportunity to cloak proceedings with a degree of privacy and to protect the confidentiality of proprietary information (Stipanowich, and Lamare, 2013: 65-66).

Internationally, arbitration has been known since long. Even some international agreements in the field of environment have been handed over to the body of environmental dispute resolution arbitration among others:

1. Convention on International Trade in Endangered Species of Wild Fauna and Flora –CITES (Washington, 1973, 1979, 1983, 1995) in Article XVIII Paragraph 2,
2. Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979) in Article XIII Paragraph 2,
3. Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora (Lusaka, 1994, 1996) in Article 10 Paragraph 2-7,
4. The Vienna Convention for the Protection of the Ozone Layer (Vienna 1985, Montreal 1987, London 1990) in Article 11 Paragraph 3,
5. Basel Convention on the Control of Trans boundary Movements of Hazardous Waste and Their Disposal (Basel, 1989) in Article 20 Paragraph 2-3,
6. United Nations Convention on Biological Diversity (Rio de Janeiro, 1992) in Article 27 Paragraph 3,
7. United Nations Framework Convention on Climate Change (Rio de Janeiro, 1992) in Article 14 Paragraph 2 and 4,

8. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 1994) in Article 28 Paragraph 2, 3 and 5,
9. United Nations Convention on the Law of the Sea – UNCLOS, 1982, in Article 287 Paragraph 1, 3 and 5,
10. International environmental disputes have been resolved using the dispute arbitration for example Trail Smelter Arbitration (United States of America v. Canada) which was completed in 1938 and 1941. Arbitration is considered the most appropriate than judicial settlement (World Commission on Environment and Development, 1987: 132-133).

5. Constraints through Environmental Dispute Resolution Arbitration

Dispute resolution is better if the environment through arbitration with all its advantages. However, there are obstacles that are less popular dispute resolution through mediation and arbitration compared to court. Likewise, the judge who hears the case sometimes do not have expertise in the field of environment as the arbitrator may be selected from an environmental and national laws that exist, sometimes there is no set of dispute resolution through arbitration or sometimes less obvious settings, making it hard for people to understand .

6. Conclusion

Environmental disputes are settled through the courts, but the solution requires a long time because they have to follow the legal procedures in the court so that the results are not satisfactory. While the issue of legal fields, especially aspects of law enforcement that requires an understanding of cross-disciplinary knowledge about the environment.

Settlement of disputes through arbitration is more favorable than the court because it can resolve disputes quickly and prevent damage and more severe environmental pollution. For that we need efforts to popularize understanding of environmental dispute resolution through arbitration.

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