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ENVIRONMENTAL ISSUES IN MALAYSIA: A PERSPECTIVE OF ALTERNATIVE DISPUTE RESOLUTION WITH THE AID OF VIDEO CONFERENCE TECHNOLOGY

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Abstract

There is no specific law on the environmental damages in Malaysia. Uncertainty of the laws to be referred to in addition to clients' lack of time, cost & energy to go litigation exacerbates the situation. How effective is the adoption of alternative dispute resolution (hereinafter ADR) and video conferencing technology in the solution to resolve disputes relating to environmental issues? The purpose of the paper is firstly, to assess the extent of technological developments (in court) in solving the problems of civil court cases. Secondly, the paper aims to determine the effectiveness of the adopting of video conferencing technologies into the context of ADR over environmental issues. A qualitative research method was implemented in preparing this paper based on content analysis and observation methods. The observation method was used to prove that video conferencing technology (VC) can be applied to the ADR process in resolving environmental issues. The result will also provide a simulation for adopting the ADR by the use of VC. When technology elements are adopted for ADR methods, it can launch more interactive dispute settlement procedures in various locations. In addition, it can be more efficient in solving the problems related to environmental issues. Environmental practitioners should use ADR approaches in making environmental damages claims. Some advantages of using this method are that these cases will be settled without any unnecessary delay and reduce the total number of environmental cases on hold.

Keywords: Alternative Dispute Resolution**,** video conferencing, technology.

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1. Introduction

Malaysian environmental law began with creation of the Environmental Quality Act 1974 (EQA). However, any matters in law regarding to environmental issues existed even before EQA was gazetted. Among these were the Waters Act 1920, the Drainage Irrigation Areas Act 1953, the Works Act 1954 and the Town and Country Planning Act 1972.

Regulations such as the Environmental Quality (Clean Air) Regulation 1978, the Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978, the Environmental Quality (Motor Vehicle Noise) Regulations 1987, the Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996 and the Environmental Quality (Refrigerant Management) Regulations 1999 were also in existence.

Nonetheless, Malaysia only started to acknowledge the importance of environmental law in 2000's, when, on 14 January 2012, the then Chief Justice Tun Ariffin Zakaria announced the setting up the environmental courts. The environmental courts commenced operations on 10 September 2012. However, the jurisdiction of an environmental court in Malaysia only covers specific environmental offences within the purview of 38 Acts and 17 Regulations. Besides the previous Acts that had been mentioned, The International Trade in Endangered Species Act 2008, Atomic Energy Licensing Act 1984, Sewerage Services Act 1993, Fisheries Act 1985 and Wildlife Conservation Act 2010 are also be considered as the usual Acts that being trial in Malaysian Environmental court.

2. Problem Statement

The civil legal system is the accepted reference to resolving disputes including those related to the environment. Consequently, a civil court has full jurisdiction in any dispute arising from environmental concerns. It involves a temporary designation of a magistrate's and sessions court as an environmental court when it presides over 'environmental' cases. There were also no specific written laws pertaining to environmental issues then. This led to the uncertainty of the laws / provisions to be referred to. This problem became more complicated when the parties in dispute did not have time, cost and energy to pursue the issue in litigation (Ishak, 2006).

Besides that, the commencement of the first and specialized Environmental Court was an example of environmental courts established to mediate in civil cases. Even though, such a court had been established, not all environmental issues/matters can be tried there. All other environmental law cases are also being tried in both the High Courts and the Subordinate Courts.

In Malaysia, the courts are reluctant to permit anyone to pursue further action unless he/she is able to show violations of some personal rights. In other words, only a person who has suffered legal injury can maintain an action and no third party can be permitted to have access to the court on behalf of the person injured to seek compensation. As such, environmentalists or non-profit organisations cannot petition in court on behalf of the public in the event of a violation of environmental rights. In consequence, administrators of environmental agencies or even local councils can be seen also to adopt environmental ADR in settlement of disputes brought by environmentalists or non-profit organisations (Nuraisyah Chua Abdullah, 2015).

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The application of ADR in environmental issues can assist to disprove the severe criticisms on the misuse of the public interest litigation concept. Definitely, administrative ADR which allows the public to bring up environmental issues with the aim of lessening the judiciary's discretionary powers in accepting those actions the courts of a heavy burden of public interest cases, henceforth making environmental justice more reachable to the public.

Sadly, it seems that this practice is not applicable for the environmental courts. This is because the jurisdiction of environmental courts is narrowed to specifically environmental offences under the specified 38 Acts and 17 Regulations. Furthermore, the practice of ADR is only applicable for civil disputes. The Practice Direction No 5 of 2010, Practice Direction on Mediation by the Chief Registrar of the Federal Court of Malaysia which came into effect on 16 August 2010, should be extended to cover mediation in areas of breach of environmental statutes.

The Practice Direction in Malaysia is used in the event of settlement of civil disputes via ADR between victims of environmental violators and the environmental violators in normal courts. In summary, the Practice Direction allows for two choices of mediation; the judge-led mediation or the mediation to be conducted by the Malaysian Mediation Centre (MMC) under the auspices of the Malaysian Bar Council. In the judge-led mediation, if mediation is successful, the judge mediating shall record a consent judgment on the terms agreed on by parties. In the mediation by MMC, a successful mediation will be reduced to writing in a Settlement Agreement signed by parties and similar to the judge-led mediation, parties are then mandated to record the terms of the settlement as a consent judgment. However, in the case where parties fail to reach a settlement in the judge-led mediation, the case will revert to the original judge to hear and complete the case (Bukhari, 2015).

3. Research Questions

In Malaysia, environmental experts are needed to assist the court in giving their opinions in the process of examination and cross-examination. Yet, the scientific technical experts are not the decision makers of the environmental courts.

This is different in India (Bakshi & Yadav, 2011). In *M.C Mehta vs. Union of India case* in 1986, Supreme Court observed that environmental cases involve assessment of scientific data. Setting up of environmental courts on regional basis would require professional judge and experts, keeping in view the expertise required for such adjudication. Supreme Court of India in *A.P. Pollution Control Board vs. M.V. Nayudu*: 1999 referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as a part of the judicial process.

However, the courts in Malaysia also have embarked on the practice of mediation as a one of the forms of ADR through the issuance of a Practice Direction No 5 of 2010, Practice Direction on Mediation on all civil litigation. This include the 'environmental cases'. Henceforth, ADR can better be conducted by scientific-technical experts especially when the method of ADR used is facilitative mediator or evaluative mediation.

In order to illustrate the effectiveness of using video conferencing technologies in the context of ADR related to environmental issues, this paper intends to analyse and examine the Law Commission of India Report as one of the references (The 186th Report of Law Commission of India on the Proposal to

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Constitute Environmental Courts). The Law Commission of India Report includes the access to environmental justice via ADR, specifically powers of mediation. As for New Zealand, the right of appeal to the environmental court, commonly referred to adjudicator which involves any person who makes a submission on resource-consent decisions (i.e. to third parties) and to applicants. Next, the New Zealand's Court may also ask one or more of its Environment Commissioners to conduct mediation or reconciliation to resolve the dispute (Amirante, 2012).

4. Purpose of the Study

4.1.1. to assess the extent of technological developments (in court) in solving the problems of civil court cases;

4.1.2. to discover the strengths and weaknesses of the use of technology in the courts throughout the trial procedure; and

4.1.3. to determine the extent to which the adoption of video conferencing technologies is effective in the context of ADR in environmental issues.

Generally, the cause of action involved in environmental litigation (including waste or industrial waste management) does not depend on showing fault even though it does require a degree of knowledge on the part of the defendant of the consequences or likely consequences of his actions. Burnett-Hall (1990) mentioned that it should also be required that an occupier is responsible for the actions of persons on his property with his consent, whether or not he knows what they are doing.

5. Research Methods

A qualitative research method was implemented in preparing this paper, based on content analysis method. The observation method was also used to prove that video conferencing technology can be applied in the ADR process in resolving environmental issues in Malaysia. This paper will also provide a simulation method for the purpose of applying the positive or negative scenarios that may occur when adopting video conferencing technology in ADR.

The content analysis method will focus on civil court documents and cases (in particular environmental law cases & civil case courts applying video conferencing technology during case trials). The cases solved by ADR method were also analysed using document analysis method. This is to show that ADR cases can be successfully resolved in a short period and compared to the duration of the case settlement through trial in court which can be time consuming.

The observation method will focus on the aspect of data collection and analysis of data relating to court procedures and the effect of video conferencing technology in civil courts. The observation is based on video conferencing technology practices in civil courts.

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6. Findings

The purpose of this study is to assess the extent of technological developments (in court) in solving the problems of civil court cases. Secondly, to determine the effectiveness of the adoption of video conferencing technologies in ADR related to environmental issues.

When technology elements are adopted in ADR methods, it can launch more interactive dispute settlement procedures in various locations. For example, to address the seriousness of the impact of the violations on the environment, the destructive impact can be highlighted with the aid of video conferencing technology. The visual images of the damage may influence the parties involved (the judges and the lawyers) to assess the capacity of worth for compensation such as the cost of restoration and maintenance of the environment for the future.

In addition, video conferencing is widely perceived as a "rich" communication medium that allows for win-win bargaining and mutual gain, because it allows people to receive non-verbal cues from each other's visual and oral signs. Through facial expressions and hand gestures, negotiators can build rapport and understanding. In addition to allowing parties to communicate both verbally and non-verbally, video conferencing enables them to jointly view and discuss documents, slide shows, and videos.

By evaluation, e-mail has been called an "impoverished" medium because negotiators must grasp one another's meaning through written words alone. Hence, misunderstandings are common. Similarly, phone calls lack the visual signs that can tell us, for example, when someone is listening closely or angry in reaction to what he or she's just heard.

Nevertheless, there are limitations to the negotiation through video conferencing. When video conferencing, we see less of the other person and his environment than we do when negotiating in person. Individuals typically appear as "talking heads," with only their heads and upper torsos showing on the screen. In addition, a weak Internet connection or poor technology can result in a blurry image that makes it difficult to read a counterpart's facial expressions. Background noise or a "busy" background may also cause distractions.

Besides, it's typically impossible for negotiators to truly make eye contact during a video conference (Ebner, 2017). Because computer cameras tend to be located at the top of the screen, when we stare at our screen, we appear to be looking downward rather than into our counterpart's eyes. This lack of eye contact might impair negotiators from building trust and rapport.

Anyone who video conferences regularly knows that technical difficulties are unavoidable. It's not unusual to have trouble linking up or to suddenly lose audio and/or video in the middle of a meeting. Such glitches may interrupt the flow of a negotiation or leave us feeling irritated. It's best to practice using new video conferencing apps before important meetings, but keep in mind that technical difficulties may still crop up.

Overall, video conferencing offers unparalleled convenience as compared to face-to-face negotiations, but we need to weigh these advantages against the potential costs to ensure that it's a win-win negotiation strategy. One smart solution would be to meet periodically in person and negotiate via video, email, and phone in between the face-to-face meetings.

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7. Conclusion

ADR can assist the parties in dispute such as the developer and the public to uncover potential environmental disputes at an earlier stage, to resolve the issues in a friendlier manner and to create a positive contribution in environmental disputes. Environmental practitioners should use ADR approaches in making any environmental damages claims. ADR through video conferencing has a number of advantages where these cases may be settled without any unnecessary delay and the total number of environmental cases may be reduced.

It is also vital that Malaysian ADR practitioners should have at least a fundamental understanding of environmental law and issues and in this context, we must take note that environmental matters are commonly classified according to the relative size of its geographical input as local, regional and global.

In conclusion, it is suggested that environmental practitioners should use ADR approaches in making any claim related to environmental damage. Due to that, this ongoing research is intending to explore such field in order to examine whether ADR with the aid of video conference technology can achieve justice for all in the shortest time possible. As mentioned in the landmark Court of Appeal judgment of Datuk Seri Gopal Sri Ram in the 1996 case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [Education Service Commission] which stated that:

> *'...the expression "life" appearing in art (5) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment'.*

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