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Abstract

[extract] The parallel, but separate, systems of courts that co-exist today in Brunei are a result of these two distinctive imported influences. The British legacy is manifest in the Civil Court system whilst the Islamic inheritance is apparent in the newly reformed system, of Syariah Courts. Whilst the former was retained post-independence to be the dominant institution in the Sultanate's legal system, recent reforms to the Islamic courts and to Islamic laws have signalled the Sultan's commitment to increasing their role and significance for Brunei's predominantly Malay, Muslim population. This is consistent with the nation's ideology, Melayu Islam Beraja (MIB), designed to promote and uphold Malay culture, Islam and the institution of the monarchy as indispensable components in Bruneian development. Inevitably, MIB also impacts upon the current priorities for dispute resolution, including those processes other than adjudication employed in courts, whether the secular common law or the religious Syariah court systems.

It is two of these 'alternative' processes, specifically arbitration and mediation, that are the main focus of this article.

Keywords

alternative dispute resolution, Brunei Darussalam, arbitration, mediation, Islam

ALTERNATIVE DISPUTE RESOLUTION IN BRUNEI DARUSSALAM: THE BLENDING OF IMPORTED AND TRADITIONAL PROCESSES

By Ann Black

Introduction

In 1984 the Southeast Asian sultanate of Negara Brunei Darussalam proclaimed its independence. Whilst this made Brunei one of the last nations in Asia to sever its colonial ties, the kingdom has been in existence for over a thousand years. From its pre-Islamic animistic past, which was shared with the rest of the island of Borneo, the kingdom has been subject to a range of ideological influences. Although the earliest influence was from the Indic Majapahit empire, the more lasting influence was that of Islam. The year 1360 is officially accepted as the date of the conversion of then Raja, which marked the commencement of the Sultanate as a legal and political entity. Islam provided more than a new religion for the Brunei Malays. It offered, as well, a blueprint for an Islamic social order described as 'an ideologically and canonically inspired vision of reality',¹ which included the prescribed Islamic means for dispute resolution. In contrast, in giving the Sultanate Protectorate and then Residential status,² it was the British who prioritised the introduction of western secular values and practices for dispute resolution. The transplantation in the early 1900s of the English common law system – its structure, institutions, laws and jurisprudence – into this quintessentially Islamic society resulted in two distinctive lines of development in dispute resolution.

The parallel, but separate, systems of courts that co-exist today in Brunei are a result of these two distinctive imported influences. The British legacy is manifest in the Civil Court system whilst the Islamic inheritance is apparent in the newly reformed system, of Syariah Courts. Whilst the former was retained post-independence to be the dominant institution in the Sultanate's legal system, recent reforms to the Islamic courts and to Islamic laws have signalled the Sultan's commitment to increasing their role and significance for Brunei's predominantly Malay, Muslim population. This is

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- 1 Sharon Siddique, 'Conceptualising Contemporary Islam: Religion or Ideology?' in Sharon Siddique and Yasmin Hussain (eds), *Readings on Islam in Southeast Asia* (1985) 338.
 - 2 The Protectorate commenced in 1888 and the British Residential system came into effect in 1905. On the history of Brunei see Graham Saunders, *A History of Brunei* (1994).

consistent with the nation's ideology, *Melayu Islam Beraja* (MIB),³ designed to promote and uphold Malay culture, Islam and the institution of the monarchy as indispensable components in Bruneian development. Inevitably, MIB also impacts upon the current priorities for dispute resolution, including those processes other than adjudication employed in courts, whether the secular common law or the religious Syariah court systems.

It is two of these 'alternative' processes, specifically arbitration and mediation, that are the main focus of this article. Once more, the role of Islam and the English common law have been influential, particularly on arbitration. However, with mediation, the people of Brunei have long established culturally preferred means of settling disputes and for reducing conflict that utilise informal localised forms of negotiation and mediation. These continue to be preferred over the exported western versions of the ADR movement. That this is occurring is consistent with MIB, which over the last two decades has operated to limit assimilation of all things western, and seeks to retain that which is, or is deemed to be, congruent with Bruneian culture. This means a preference for Islamic and Malay solutions. The preference for using traditional processes over imported versions is also not inconsistent with findings of other research on the transfer of western ADR processes into different cultural contexts including Asia.

Historical and Cultural Basis for Dispute Resolution Preferences

Traditionally there has been a cultural preference in many Asian societies to resolve disputes privately through negotiation, mediation and conciliation.⁴

There is considerable support for the view that historically and culturally many Asian societies preferred processes other than litigation in the courts for dispute resolution. An APEC⁵ report on dispute resolution in the region noted: 'Parties from the Asian region are generally averse to referring disputes to the courts. There is a strong traditional cultural preference here to resolve disputes by discussion and by compromise'.⁶ Leaving aside the valid issue as to whether the cultures of Asia can be lumped together collectively and generalizations be drawn,⁷ Brunei Darussalam

3 Translates as Malay Islamic Monarchy

4 APEC International Commercial Disputes www.arbitration.co.nz/apec/introduction.htm.

5 Asia Pacific Economic Co-operation. Brunei Darussalam was one of 12 founding member nations in 1989.

6 Catherine Tay Swee Kian, *Resolving Disputes by Arbitration* (1998) 5.

7 For the perspective that 'there is no 'Asian way' nor an 'Asian culture' or approach, but an 'entire spectrum of approaches' see Louise Barrington, Karen Mills & Tan Swee Im, 'Selected Perspectives on ADR in Asia' in International Chamber of Commerce, *ADR International Applications - Special Supplement 2001*, ICC International Court of Arbitration Bulletin, (2001) 31. Also see Veronica Taylor and Micheal Pryles, 'The Cultures of Dispute Resolution in Asia' in Michael Pryles (ed) *Dispute Resolution in Asia* (1997) 1- 6. Cf

would seem to fit the mould of a society, which has a tradition of resolving disputes informally. The interventions of headmen, local *ulama* (religious scholars) in the community, and *imam* (prayer leaders at local mosques) has been established for centuries as a means for settling differences and disputes at the local level. Prior to the Residency period, the more serious disputes would come to either the district chiefs or the Sultan personally, with both fulfilling roles as mediator/arbitrators for these disputes, particularly when valuable property or people of standing were involved. For Brunei the historical antecedents provide strong endorsement for these non – litigious forms of dispute resolution. Longstanding practices became embedded in the culture and continue to influence attitudes and sustain preferred ways of behaving.

In terms of culture, researchers have found that people from different cultures adopt different priorities and means for managing conflict and resolving disputes. Moore⁸ suggests dividing the world into direct-dealing and non-direct dealing cultures. In the former, conflict and confrontation is accepted, and members are comfortable with direct dialogue, face to face interactions, and direct negotiations.⁹ Members of non-direct cultures avoid conflict and confrontation, aim to preserve face for themselves and others, and opt for intermediaries in a resolution process.¹⁰ Moore's descriptors are consistent with the findings of social science research undertaken into cultural variation.

One cultural variable, identified as correlating with divergence in managing conflict and dispute resolution, is that of individualism-collectivism. It has been considered by a number of researchers¹¹ as providing a concise, integrated¹² and 'empirically testable dimension of cultural variability'.¹³ The dimension is bi-polar, with individualism and collectivism at opposite ends of a continuum. Hui and Triandis¹⁴ also found that members of collectivist cultures give emphasis to the implications of their behaviour on others, share resources, emphasize harmony with shame being the controlling regulator, define themselves by group membership and subordinate personal goals to those of the group. People in individualist cultures share mostly with their immediate

Christoph Antons, 'The Study of Asian Law: the Need for a General Concept' (1995) 13 *Law in Context* 106, 117 n 1.

8 Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd ed, 1996) 33.

9 Ibid.

10 Ibid.

11 Geert Hofstede, *Culture's Consequence: Comparing Values, Behaviours, Institutions and Organisations across Nations* (2nd ed, 2001); Harry C Triandis, *Individualism and Collectivism* (1995). Uichol Kim, *Individualism and Collectivism: a Psychological, Cultural and Ecological Analysis* (1995).

12 The construct allows for integration of knowledge across disciplines such as anthropology, psychology, sociology and management.

13 Uichol Kim, above n 11, 3.

14 C Harry Hui & Harry Triandis, 'Individualism-Collectivism: a Study of Cross-cultural Researchers' (1986) 17 *Journal of Cross-Cultural Psychology*, 225 -248.

or nuclear family, are less willing to subordinate their personal goals to that of the group, are prepared to confront others, feel personally responsible for their own successes or failures, and focus on individual initiative, achievements and uniqueness. It has been described as the 'I' identity having precedence over the 'we' identity of collectivists¹⁵ or the normative principle that the well being of the individual should take priority over the well being of the group.¹⁶ Conflict is perceived in terms of the individual and so can be constructed as 'me versus you/us versus them' that is the basis for an adversarial exchange.¹⁷ When conflict arises, people in individualist cultures are more likely to confront the other party directly and employ their rights to justify their solution, on the basis that 'not to claim in the appropriate circumstances that one has a right is to be spiritless or foolish'.¹⁸ Where direct confrontation fails, disputants can elect to articulate their case to a non-partisan third party. In collectivist cultures conflict is perceived as disrupting the harmony in relationships, thereby necessitating that these relationships be restored and maintained. The preferred way to restore relationships is to avoid any direct confrontation¹⁹ and to negotiate a settlement directly, or through a third party, who also shares that group's goals. Only when this fails, and after successive efforts to resolve it intra-group, will external means be used.

Most research on the relationship between collectivism and dispute resolution has centered on the Chinese culture,²⁰ whose notions of harmony, reciprocity and moral persuasion are derived from acculturation in Confucianist ideology. However, Hofstede's research also positioned Malaysia as a nation with a predominately collectivist culture. Whilst Brunei Darussalam was not analysed by Hofstede, both Malaysia and Brunei have a similar ethnic mix with Malays, Chinese and Indigenous non-Malays comprising over 80% of the population,²¹ and share a similar geographic, historical, linguistic and social development. Both promote the Malay culture. It is

15 William B Gudykunst, Stella Ting-Toomey and Elizabeth Chua, *Culture and Interpersonal Communication* (1988) 40.

16 J Reykowski, 'Collectivism and Individualism as Dimensions of Social Change' in Uichol Kim *et al Individualism and Collectivism* (1994) 278.

17 Andrew J Pirie, 'Alternative dispute resolution in Thailand and Cambodia' in Douglas M Johnston and Gerry Ferguson (eds) *Asia-Pacific Legal Development* (1998) 526.

18 Kim, above n 11, 51.

19 For individualists, confrontation is seen as being direct, assertive, open and 'to the point', all of which are regarded as positive and signs of personal strength.

20 Bee Chen Goh, *Negotiating with the Chinese* (1996); Lim Lan Yuan, 'Impact of Cultural Differences on Dispute Resolution' (1996) 7 *Australian Dispute Resolution Journal* 197; Stanley Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China' (1967) 55 *California Law Review* 1284; John S Mo, 'Probing Chinese Mediation' (1997) 8 *Australian Dispute Resolution Journal* 43.

21 Census data shows the following distribution in a population of 330 700 in mid-1999: 67% Malays, 15% Chinese, 6% indigenous non-Malays and 12% other races. The definition of Malay for census purposes is broad and includes Dusun, Kedeyan, Tutong, Belait, Bisaya and Murut indigenous.

axiomatic that Brunei's culture would also fall into the collectivist dimension. Additionally, the current MIB promotion of values in accordance with traditional Malay culture ensures continuance of the collectivist viewpoint. Endorsement and maintenance of traditional cultural practices is occurring at both an official and local level, in order to create a buffer against the materialism and individualism of western culture.²²

Whilst the Malays do not have a scholar philosopher such as Confucius dominating their political, ethical and social thought, traditional Malay culture embodies similar characteristics. The overriding aim is to ensure that harmony in human relations prevails. Social harmony is to be maintained through mutual obligations, and through a defined social hierarchy in which respect and loyalty are promoted. Community effort and mutual cooperation (*gotong-royong*) is fostered by kinship and locality ties, and reinforced by Islamic values.²³ Decisions in the *kampongs* are to be reached through consensus.²⁴ The way to maintain good relations in families and communities is through avoidance of conflict by adhering to proper behaviour or *halus*,²⁵ respecting rank and status, and deferring to those with higher status. Social harmony is further achieved by observing the established rituals of courtesy. There is a strong commitment to mutual help, based on notions of duty, obligation and generosity²⁶ with co-operation and sharing amongst group members known as *memucang-mucang*.²⁷ These features of Malay culture extend beyond the family and social setting into the commercial and professional area. Business relationships are equally personalised, and governed by 'elaborate forms of curtesy and standardised rituals calibrated according to the rank of the recipient'.²⁸ In business dealings there is as much concern for the social relationship as there is for the commercial side of the negotiation, with contractual details and obligations less important than the trust and understanding between the parties.

One consequence of Brunei's collectivist character would be the preference for avoiding direct confrontation when a dispute arises, in favour of compromise and settlement through direct, or third party, negotiations. Collectivist cultures generally

22 Dato Paduka Haji Matussin bin Omar, 'The making of a National Culture: Brunei's Experience' in Edwin Thumboo (ed) *Cultures in ASEAN and 21st Century* (1996) 14.

23 Hamzah-Sendut, Tan Sri Datuk & Thong Tin Sin, *Managing in a Plural Society* (1989) 139.

24 The process for working through differences to find consensus is known as *musyawarah*.

25 Similarities between *halus* and other Asian concepts based on respect for others, and their mutually reinforcing nature such as Korean '*kibun*' (considerate behaviour), Thai *krengchai* and Chinese *mien-tzu* and *lien* or 'face' are raised in Hamzah-Sendut, Tan Sri Datuk & Thong Tin Sin, above n 23, 141-142.

26 Lim Jock Seng, *The Inter-relationship of Technology, Economy and Social Organisation in a Fishing Village in Brunei* (1986) 79. Also noted are reciprocity, co-operation and sharing with mutual responsibility and indebtedness.

27 Dato Paduka Haji Matussin bin Omar above n 22,14.

28 Hamzah-Sendut, Tan Sri Datuk & Thong Tin Sin, above n 23, 141.

correlate with preference for consensual rather than adversarial outcomes.²⁹ As the western processes of ADR, particularly those of mediation and arbitration, are seen as being less adversarial and as giving more control to parties in a dispute than litigation, there was an expectation that these ADR processes would be adopted in collectivist societies such as Brunei.

However, the processes labelled as part of ADR in the west were ones that developed in highly individualistic cultures. ADR grew as a response to disillusionment with the litigation model that was being used in common law countries such as the United States, England and Australia. It was widely perceived in those countries that delays in the courts were impacting negatively on outcomes and the perception of justice.³⁰ Concern was also expressed that: 'the adjudicative bias of today's legal profession is not only a fantasy: it harms dispute resolution. Litigation as used in many traditional areas of law is too expensive, divisive, inaccessible or ineffective'.³¹ It was also critiqued on the grounds that it was perceived to be hostile and alienating: 'women and minorities have remained at the periphery of the Anglo-Celtic, male matrix of legal values which are expressed in a court room, together with a distressing style of cross-examination and oppressive discourse'.³² There was sufficient consensus that deficiencies existed with the model and that these needed to be addressed. One means was by reform to the existing system by way of case management. The other was for alternative processes, loosely categorized under the catch-all phrase of ADR, to be encouraged and officially supported by governments and their agencies, the courts, legal and non-legal professionals, and educational or training facilities. A need was perceived and ADR was part of the remedy. It seems that for Brunei the same need has not been identified. In Brunei, court congestion is not a pressing problem, there has been little concern expressed about the cost of litigation, and the society has religious and cultural beliefs, traditions and practices that are distinctive and not shared with the west.

This is the background and context for the description and analysis of the dispute resolution processes of arbitration and mediation that follow. With arbitration both the western and Islamic forms will be considered, and with mediation the focus is on a comparison between the imported western and the local traditional processes.

Arbitration

Arbitration is a process in which the dispute is referred to the adjudication of a third party chosen by the disputing parties and whose decision will be binding on them.

29 Pirie, above n 17, 525.

30 Jay Folberg and Alison Taylor, *Mediation: a Comprehensive Guide to Resolving Conflicts Without Litigation* (1984) 4.

31 Jack Effron, 'Alternatives to Litigation: Factors in Choosing' (1989) 52 *Modern Law Review* 480.

32 Margaret Thorton, 'Equivocations of Conciliation: the Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 735.

Parties, either in a dispute or entering into a contract together, may decide that if a dispute arises it would be best to have it resolved by arbitration, which can give a resolution which is legally binding, but avoid what they consider may be the disadvantages of litigation in the courts.³³ The preference disputing parties will have for arbitration as a process is determined by many factors. These come from their perceptions as to the degree of advantage or disadvantage of arbitration vis a vis other processes, knowledge the parties have of these past experiences, advice given by others, perceptions regarding the specific expertise of the arbitrator or centre providing dispute resolution services, availability, risk assessment, cultural preferences and personal instinct.

In Brunei Darussalam, as in other countries of the Asia Pacific region, arbitration is available to disputing parties. It comes in two forms. There is arbitration in accordance with legislation, *Emergency (Arbitration) Order* (1994), which was designed to meet the needs of commercial transactions, both domestic and international. It is modelled on the English arbitration law. Also there is traditional Islamic arbitration, *takhim*, which in Brunei Darussalam has been limited to family and marital disputes, although in several other Islamic nations it is used widely in commercial disputes.³⁴ Both will be considered.

Features of Arbitration Pursuant to the Arbitration Act (1994)

The *Emergency (Arbitration) Order* (1994) was enacted to provide Brunei Darussalam with the legislative framework for resolution of civil disputes by means of arbitration. It has subsequently become classified as the *Arbitration Act* 1994, Cap 173 of the Laws of Brunei Darussalam. As Brunei Darussalam is now a party to *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the *New York Convention*) the Act gave effect to the provisions of that Convention. The Convention obliges the courts in Brunei, as one of the signatory states,³⁵ to defer to arbitral jurisdiction whenever a case is brought under a contract containing an arbitration clause,³⁶ and to enforce an arbitral decision made in another country³⁷ - although there are some limited exceptions to the latter. The grounds for appealing arbitral awards

33 Advantages for arbitration suggested in the literature include choice of tribunal; confidentiality; speed; technical rather than legal expertise of a particular arbitrator; cost; wider choice of representation; flexibility of procedure and wider jurisdiction than a court.

34 Saudi Arabia is one such country. See George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1987) 9 *University of Pennsylvania Journal of International Business Law*, 211 -255. Generally on Islamic arbitration see Vincent Powell-Smith, *Aspects of Arbitration: Common law and Shari'a Compared* (1995).

35 Art III of the *New York Convention* 1958.

36 Art II of the *New York Convention* 1958.

37 No foreign arbitral awards had been enforced at the time of communication with the Chief Justice, September 2000.

are set out in Article V, including that the award was set aside by a court in the country where it was originally awarded.³⁸

To date, Brunei Darussalam is not a party to the *Washington Convention (ICSID)*³⁹ nor has it entered into any bilateral investment agreements with arbitration provisions. Brunei Darussalam has recently become a signatory member of WIPO.⁴⁰

The *Arbitration Act* does not adopt the UNCITRAL Model law for arbitrations. This procedural model was adopted by the United Nations General Assembly in 1958, with the aim of establishing a comprehensive set of rules that would give a unified framework for efficient settlement of commercial disputes internationally, and harmonize the various national legal systems. Parties in Brunei Darussalam could apply the rules of UNCITRAL or the rules of an arbitration institution, as the Act does not limit the parties doing so. It gives them autonomy to modify the procedural rules in the Act, and to introduce their own. The reason for Brunei Darussalam not adopting UNCITRAL may lie in the fact the Britain has not done so, for the commercial and civil law of Brunei is essentially the same as that of its coloniser, England.⁴¹

The Act will apply when parties have made an arbitration agreement. Section 2 of the *Arbitration Act* (1994) defines an arbitration agreement as 'an agreement in writing (including an agreement contained in an exchange of letters, facsimiles or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration whether an arbitrator is named therein or not'. This covers ad hoc submissions of existing or current disputes, as well as those where the original agreement between the parties had a contractual clause to the effect that any disputes arising out of their agreement would be resolved by arbitration.

It has been estimated⁴² that arbitration agreements would be contained in 90% of contracts in the construction industry, which is the second largest industry in Brunei Darussalam after oil and gas, as well as in a large number of commercial contracts, especially where the subject matter of the contract is complex or technical. Such arbitration agreements are typically found in contracts with the Government of Brunei, for the government and its agencies have immunity from suit.⁴³ Arbitration

38 Art V (e) of the *New York Convention* 1958.

39 The International Convention on the Settlement of Investment Disputes between States and Nationals of other States was signed in Washington 1965.

40 The World Intellectual Property Organisation is an international body of the United Nations established to promote and protect intellectual property around the world. In 1994 the WIPO Arbitration and Mediation Centre was established.

41 Colin YC Ong, *Cross-Border Litigation within ASEAN* (1997) 135.

42 Based on interviews with lawyers and an arbitrator from the Bruneian firm of JR Knowles regarding arbitrations in the construction industry.

43 *Constitution of Brunei* s25 (1) (b).

can provide an avenue for adjudication in the event of a dispute, otherwise the contracting party has to rely on negotiated settlements with the government. Although the majority of commercial and construction contracts contain arbitration agreements, in practice most parties prefer to waive their rights under the arbitration agreement,⁴⁴ in many cases being advised to do so by their lawyers. There were admissions that arbitration agreements were put into contracts to be used as a delaying tactic to buy time, should a dispute arise and the other party commences legal proceedings to get summary judgment in the court. This is because the Act allows for an application to be made to stay the court proceedings in order for arbitration to take place.⁴⁵ The court will stay the proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative, incapable of being performed or that there is in fact no dispute between the parties. The Act does not specify which types of disputes can be arbitrated. Certainly criminal matters are excluded,⁴⁶ and generally have been in the past, for reasons of public policy. However, contracts 'relating to land or an interest in land'⁴⁷ would also be excluded, because an arbitrator cannot make an order for specific performance where there is such a contract. Otherwise the arbitrator has the same power as a court regarding specific performance remedies, unless it is expressly excluded by the contract. Generally, it is matters in which damages may be claimed that go to arbitration. The High Court does have power to set aside any award from an arbitration if it is satisfied that the arbitration agreement was null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to matters agreed upon for arbitration.⁴⁸

The Act makes a distinction between domestic and international arbitration. The significance is that there are different provisions⁴⁹ in the Act to be applied in either case. An arbitration is international

when the agreement expressly or by implication provides for arbitration in a state or territory other than Brunei Darussalam and to which neither:

- a) an individual who is a national of, or habitually resident in any state or territory other than Brunei Darussalam; nor
- b) a body corporate which is incorporated in, or whose centre management and control is exercised in any state or territory other than Brunei Darussalam,

is a party at the time the proceedings are commenced.⁵⁰

44 Based on interviews with lawyers in commercial practice.

45 *Arbitration Act* (Cap 173) s7.

46 Given the long title which states 'An Act to make provision for arbitration in civil matters'.

47 *Arbitration Act* (Cap 173) s21.

48 *Arbitration Act* (Cap 173) s8 (1).

49 Applications for stay of proceedings and exclusion agreements are provided for in *Arbitration Act* (Cap 173), s8 and s30 respectively.

The law to be applied in arbitration is that determined by the parties. In most domestic arbitration agreements it is stipulated to be the law of Brunei Darussalam. Whilst government contracts are generally silent as to the choice of law, the prima facie position is that the law of Brunei Darussalam would be held to apply. This accords with the English position that in the absence of an express choice it is the law with which the agreement is most closely associated.⁵¹

There is no stipulation as to the language to be used in arbitrations but as English is the language used in legal proceedings in the secular courts, and is widely spoken as the second language in Brunei in commercial and international dealings, English would customarily be used in arbitrations. There is no provision in the Act on confidentiality, so this would need to be specified in the agreement to arbitrate.

There are no restrictions on who can be appointed arbitrator, apart from the fact that the consent of the Chief Justice is required before judges and magistrates of Brunei Darussalam can be appointed; and the Minister of Law, who is chairman of the Public Service Commission, must give consent for the appointment of any public servant.⁵² Government contracts give the authority to the Minister of Development to appoint an arbitrator, and where the Minister does not so nominate, then the Chief Justice can appoint the arbitrator.

Conciliation Under The Act

Conciliation is provided for in Part 11 of the *Arbitration Act* (Cap 173), but is limited to circumstances where the parties to an arbitration agreement have included a written provision in their agreement that they should first attempt to settle their dispute by conciliation.⁵³ Conciliation is not defined but has been taken to mean a process whereby parties are assisted by a neutral conciliator/mediator to reach a mutually acceptable solution to the dispute.⁵⁴ The term mediation can be used interchangeably with conciliation, but in the context of this Act, conciliation will be used. If the conciliation process fails to produce such an agreed solution it automatically terminates at the end of three months. Where an acceptable agreement is reached and is signed by the parties, it will be treated as an arbitration award and is to be enforced in the same way as an arbitral award.⁵⁵ Where there is a provision for the conciliator to become an arbitrator if the conciliation were to fail, that alone does not become a ground for objection. The act is silent as to the confidentiality of conciliation.

50 *Arbitration Act* (Cap 173) s 8 (3) & s30 (2).

51 *Hamlyn v Talisker Distillery* [1894] AC 202.

52 *Arbitration Act* (Cap 173) s16.

53 *Arbitration Act* (Cap 173) s3.

54 Based on the definition of conciliation and mediation used in WIPO <http://arbiter.wipo.int/arbitration/index.html>.

55 *Arbitration Act* (Cap 173) s3(4).

Where the arbitration agreement contains a conciliation provision but does not specify who is to act as a conciliator, the court can appoint a conciliator. The High Court of Brunei Darussalam has not to date made such an appointment.⁵⁶ Legal practitioners⁵⁷ indicated that they were not aware of any conciliation proceedings that have occurred under the Act, and there were some expressions of concern or doubt as to who would have the ability or experience to warrant such an appointment. Provisions for conciliation are not standard in either commercial or construction contracts in Brunei Darussalam, and there was a perception that if a dispute had reached a stage where it was proceeding to arbitration, it would be too late and unproductive to spend time on conciliation.

Role of Arbitration Under the Act

There are no official figures available on the number of domestic arbitrations taking place in Brunei Darussalam. Lawyers in commercial practice who had nominated arbitration as a process provided by their firms indicated that the actual numbers of arbitrations were small, and that it was an under-utilised option. The Chief Justice was in agreement that the numbers were small, estimating that possibly four to six disputes a year would be decided by arbitration, though two to three times that number of disputants would threaten to use arbitration as a means to bring about a settlement. Like litigation, arbitration was used as a tactic to facilitate negotiations rather than a dispute resolution process in itself. A lawyer in the Attorney-General's Department said 'there may be an Act, but people in business don't think of it (arbitration) as a serious option'.⁵⁸

In Brunei there appears to be a perception that there is no real need for arbitration to play a greater role. There could be several explanations for this. On the practical side, local lawyers consider the courts work effectively. 'There is no reason to look for those sort of alternatives - it doesn't take long to get a matter before the courts and you can be guaranteed a fair hearing. Clients are happy and we are happy'.⁵⁹ It was also indicated that there was no significant difference in terms of time or costs between arbitration and litigation, and if there was, arbitration was considered the more expensive (especially arising from payment of arbitrators' fees) and more protracted. Possibly the effectiveness of the court process has been complemented by the introduction of pre-trial conferences. These are mandatory for all civil cases set down for trial before the High or Intermediate Court, where both parties are legally

56 Interviews with the Chief Justice, Dato Sir Denys Roberts in April and September 2000.

57 Ibid.

58 Personal communication.

59 From an interview with a lawyer in private practice in response to a question about the use of arbitration. It was representative of the opinions given by several of the lawyers interviewed.

represented. The judge, or more usually the Registrar, will try to facilitate a settlement.

Another contributory factor to the limited utilisation of arbitration is that knowledge and familiarity with arbitration as a process is not extensive. Arbitration was not a service that all firms in Brunei were able to offer, nor could they provide representation for their clients. Less than half of the firms that responded to a survey conducted⁶⁰ on dispute resolution processes available to their clients in Brunei indicated that domestic arbitration was a service on offer for their clients. Two of the legal firms responded that they could provide for international commercial arbitration. Several of the firms also questioned the ability of some of the other firms to provide a quality service. The process of selling 'arbitration' as a service in Brunei Darussalam has been undertaken by a British firm that specializes in the provision of ADR services to the construction industry. The firm reports that whilst there has been good attendance at information seminars,⁶¹ the majority of attendees were government employees, with private business and the legal fraternity underrepresented and generally resistant to the possibilities. The indications were that in Brunei Darussalam, lawyers perceived arbitration as an alternative method of litigation, rather than an alternative to it, and the level of confidence in the courts obviated the need to consider the alternatives. There have been occasions, however, when the Supreme Court has diverted a matter to arbitration, when the amount of evidence was such that the protracted nature of proceedings would adversely affect the court list.

It was suggested that a number of contracts and transactions in Brunei Darussalam may be tainted with aspects of illegality, minor and major, and that the scrutiny by the courts or by arbitrators would not be wanted. Even without that consideration, both processes were seen as 'going into the minutiae' rather than getting to the crux of the dispute - essentially coming from the western stable of processes, and not according with the inherent collectivist viewpoint. Both appear to threaten, possibly to be destructive of good social relationships, which are prioritised in Bruneian culture. Whilst in theory arbitration can be less regulated, less formal and more consensual than adjudication in the courts, in reality many in Brunei Darussalam see it as equally rule bound, inflexible and adversarial. It means the choice will come down to going to court, always with the strong possibility that a negotiated settlement will be the outcome,⁶² or settle the dispute through 'local means and contacts'. This refers to direct negotiations between the parties, and negotiations which are facilitated 'intra communally' when both disputants share the same ethnicity, language and culture.⁶³ It

60 Eighteen law firms were surveyed by questionnaire in 2000.

61 A seminar in November 1999 had 60-70 people attend.

62 In 1999 94% of cases commenced in the High Court and 98% in the Intermediate Court settled.

63 In Brunei Darussalam awareness of ethnicity is evident. It is a factor in employment, education and government services. The Government uses 'ethnicity' as a classifier more

involves calling on contacts within one's own community to assist in the resolution of the dispute. Often it will involve a significant third party in that community assisting in an informal but persuasive form of mediation. The third party will be connected to one or both of the disputants through family, friendship or business ties. This is possible given the small population of Brunei Darussalam - 330, 700 (1999), with 200,000 residents in Bandar Seri Begawan, the capital and commercial centre.

When any dispute arises in Brunei Darussalam involving a company an important question is, 'who is behind it?' The indications that if the person is well connected, especially with links to the royal family, then the likelihood of proceeding with either litigation or arbitration becomes negligible. Apart from concern over the impact on future business dealings and possible diminution of goodwill, local culture ensures that a Bruneian Malay would find it socially inappropriate to bring an action in the courts, or to invoke arbitration, even when there is a contract with a provision for arbitration. The tenacity of the traditional social hierarchical structure and accompanying rules of appropriate behaviour,⁶⁴ even in today's society, mitigate against taking action against a person of royal standing or rank. The factor of considering social place and deference to be displayed to persons of higher rank, social status or age as impeding the acceptance and implementation of ADR processes, has parallels in other countries such as Thailand and Cambodia.⁶⁵ The state ideology, MIB, through its endorsement of *adat istana* (laws and customs of the palace) and promotion of the formalities and features of traditional stratified Brunei society indirectly reinforces the natural collectivist reluctance to litigate or arbitrate against such parties of significant social standing. The consequence is that arbitration would be more likely to be employed for dispute resolution where there exists some equality in social and commercial standing, without a close social relationship having developed. For this reason overseas international companies rather than local Bruneian ones have been more willing to arbitrate.

Although arbitration has not been widely adopted in Brunei Darussalam as a process for commercial dispute resolution either domestically or internationally, this is not totally inconsistent with the trend in the countries of the Asian region. An APEC Report noted:

arbitration is certainly a dispute resolution technique that is in use in the Asia Pacific region. It would appear, however, mainly from anecdotal evidence, that resort to arbitration to settle disputes has not grown as rapidly as one would have expected given the growth in the number of transactions that make up the present trade flows in the region.⁶⁶

explicitly than do multi-cultural countries such as Australia. Identity cards, passports, entry permits and visas all require 'race' to be entered as well as nationality.

64 For details on the social stratification and importance of rank see DE Brown, 'Brunei in a Social Comparative Perspective' 1978 (26) *Sarawak Museum Journal* 135.

65 Pirie, above n 17, 534.

66 APEC International Commercial Disputes www.arbitration.co.nz/apec/introduction.htm.

The report gives some structural reasons for this, including the fact that rules for conducting arbitration differ among the countries, creating some uncertainty and diminishing confidence, and also that there are differences in the region in the willingness of courts to enforce arbitral awards in international commercial disputes.⁶⁷ Cultural reasons, such as the adversarial nature of arbitration in societies where compromise is prioritised, and its capacity to destroy business relationships were also given. A further factor noted was that in international transactions, where parties may come from diverse geographical and legal backgrounds, there may be insufficient understanding of the other's culture to trust ADR processes as being fair or reasonable.⁶⁸

The level of acceptance of arbitration in Asia, however, really turns on each country's unique circumstances, and their own assessment of its benefits or drawbacks, in their particular circumstances. In the case of the Hong Kong Special Administrative Region and also in Singapore, there has been a much higher acceptance of arbitration as a dispute resolution process. It has been suggested that in the case of Hong Kong, the growing dissatisfaction with the high legal costs, and the proactivity from members of the Hong Kong Arbitration Centre⁶⁹ have contributed to this high level of acceptance. Brunei has different structural, historical and cultural circumstances and it seems that at this point in time Bruneians are not convinced of the need to extend their use of arbitration in the commercial context.

In addition to this western and secular form of commercial arbitration there is also Islamic arbitration which continues to play a small role in dispute resolution for Brunei Malays.

Islamic Arbitration (Takhim)

And if you have reason to fear that a breach might occur between a [married] couple, appoint an arbiter from among his people and an arbiter from among her people; if they both want to settle things aright, God may bring about their reconciliation. Behold, God is indeed all knowing, aware. (Quran, Sura al-Nisa 4: 35.)

Long before the advent of Islam, much of the Middle East including Arabia practiced arbitration. Disputes were settled either by means of self-help processes such as negotiation and personal vengeance or by tribal arbitration. The latter was the sanctioned form for dispute settlement. The divine revelations to the Prophet Mohammad endorsed him as an arbitrator (*hakam*) for disputes amongst his followers. He rejected the pagan elements that existed in pre-Islamic arbitration, but not

67 Ibid. For practical difficulties associated with arbitration see Ong, above n 41, 27.

68 Ibid.

69 See Barrington *et al*, above n 7, 33.

arbitration as a process. He conducted arbitrations as well as adjudications, the differences being that in arbitration the parties chose their arbitrators, whilst in adjudication the judge was appointed by the ruler or government. The Prophet also recommended others to be arbitrators. After his death, the Prophet's companions recognised validity in the process and exhorted the role of those who arbitrate and conciliate.⁷⁰ The importance is evident in the advice that 'composing of differences between men is better than all fasts and prayers.'⁷¹ Islamic arbitration evolved in the centuries that followed. Although it was derived from the *Syariah*, and was required to be in accordance with it, doctrinal variations between the Shia and major Sunni schools of law⁷² developed. These included whether an agreement to arbitrate in a possible future dispute was valid in Islamic law or void for uncertainty.⁷³ There were differences in the process of appointment of the *hakam*,⁷⁴ and in the qualifications required,⁷⁵ but all were in agreement that a third party, even a *kadi*, could not appoint a *hakam* who was unacceptable to the disputing parties.

There were aspects of conciliation incorporated into *takhim*. Attempts were made to conciliate (*suhl*) the parties, to persuade rather than to coerce, with the *hakam* endeavouring to create a cooperative atmosphere conducive to amicable settlement. If *suhl* could not be attained then the *hakam*, guided by the *Syariah*, reached a decision for the parties. The schools differed as to whether a decision of an arbitrator could bind the parties. Imam Shafi'i considered that an arbitral award would only be enforceable if both parties agreed to it.⁷⁶ This renders it closer to a form of conciliation or mediation. There were other scholars in addition to the Maliki and Hanbali who felt a *hakam's* decision was legally equal to that of a *kadi*. The Hanafi scholars held that a *kadi* could only enforce an arbitral award if he agreed with the veracity of the decision.⁷⁷

Today, arbitration remains a recognised process for dispute resolution in many Islamic countries.⁷⁸ Whilst the *Syariah* continues to inform the procedural and

70 Vincent Powell-Smith, *Aspects of Arbitration: Common law and Shari'a Compared* (1995) 4 - 6.

71 In the Fatimid authority *Da'a'im al-Islam* cited in *ibid*.

72 The four main Sunni schools are the Hanafa, Maliki, Hanbali and Shafii. These are outlined in Jamila Hussain, *Islamic Law and Society* (1999) 31-32.

73 The uncertainty (*gharar*) is based on the possibility of a dispute arising at some future time over an aspect of the contract that was unknown at the time of agreement.

74 In the Shafii, Hanifa and Hanbali schools, the appointment of the *hakam* could be revoked by either of the disputing parties or by the *hakam* himself, up until the announcement of the decision. In the Malaki texts it was irrevocable. These are discussed by Sayen, above n 34, 230.

75 See Hussain, above n 72, 175.

76 Abdul Hamid El-Ahbad, 'Moslem Arbitration Law' in Proceedings of the International Bar Association First Arab Regional Conference, Cairo, February, 1987, Vol 1, 341.

77 Sayen, above n 34, 235.

78 Saudi Arabia, Egypt, Jordan, Sultanate of Oman, Qatar, Bahrain, Yemen Arab Republic, United Arab Emirates.

substantive aspects, the actual application and implementation does differ widely among schools and therefore countries. The degree of secularization of the courts, the extent to which statute law has been developed, as well as the 'degree of strictness'⁷⁹ in adherence to specific Islamic doctrine have created significant divergence in application.

Role of Islamic Arbitration in Brunei

To date, the scope of Islamic law has been limited to family, succession, personal and religious matters, with the common law regulating commercial and financial matters. This meant that *takhim* as a method of commercial dispute resolution did not develop in Brunei. However, this could change given the increasing Islamisation of all aspects of Brunei society, including extensions into the commercial and administrative sectors.⁸⁰ Since 1956, Part IV of *The Religious Council and Kadi Courts Act* (Cap 77) did provide for arbitration in disputes relating to marriage and divorce, when both parties were Muslim and their marriage was solemnised in accordance with Islamic law.

The Quranic recommendations regarding arbitration for marital disputes as outlined above had been reflected in the specific sections of the *Religious Council and Kadis Courts Act* which required the appointment of *hakam* by the kadi when there were 'constant quarrels between the parties to a marriage'.⁸¹ Two arbitrators, acting for the husband and wife respectively, were to be appointed. Where possible, the *hakam* should be a close relative of the parties because this would provide them with knowledge of the circumstances of the case,⁸² and ensure a strong commitment to do what is in the best interests of the disputants. The kadi could give directions to the *hakam* on how to conduct the arbitration, which must be in line with Islamic law. Where the arbitrators were unable to resolve the dispute or the kadi was not satisfied with the arbitral process, other *hakam* could be appointed. If the *hakam* were in agreement that the parties could not be reconciled a divorce could be granted by the *hakam*, provided the parties had given their authority for this. Otherwise, the kadi could confer on *hakam* the authority to decree a divorce and to have it registered.

The second provision for the intervention of a *hakam* under the Act was when there had been a revocable divorce after one or two *talaks*,⁸³ and the husband has

79 Samir Saleh, *Commercial Arbitration in the Arab Middle East* (1984) 12.

80 Islamic Banking, Islamic Trust Funds and Islamic Insurance have been established since 1993.

81 *Religious Council and Kadis Courts Act* (Cap 77) s149.

82 *Religious Council and Kadis Courts Act* (Cap 77) s149 (1).

83 *Talak* or *talaq* is a form of divorce in Islamic law, available only to a husband. The *talaq* is a pronouncement to his wife that a husband is divorcing her. The *talaq* can be revoked by the husband during the period known as *idah* (the time during which three menstrual periods elapse), and the marriage continues. After three *talaqs* a divorce becomes irrevocable. See Hussain, above n 72, 87-89.

pronounced *rujok*, (the term for his intention to resume 'conjugal relations')⁸⁴ with the wife consenting to the *rujok*, but not resuming conjugal relations. Where there was no reason in Islamic law not to resume conjugal relations, *hakam* could be appointed to assist with the resolution of this dispute. If a wife would not consent to the *rujok*, the kadi could require the husband to divorce her, and if he refused to proceed with the divorce, *hakam* could again be appointed to assist.⁸⁵

The use of *hakam* pursuant to the Act had been declining,⁸⁶ so that rarely did the kadi use his discretion for the appointment of such arbitrators. The reasons⁸⁷ given for this were that divorce had become more accepted as a common life event for both Muslims and non-Muslims in Brunei.⁸⁸ This had lessened the social stigma of divorce, and so the earlier priority to reconcile disputing spouses had reduced. Marriage breakdowns had become more complex and bitter with less willingness to be conciliatory.⁸⁹ Kadis continued to encourage settlement and conciliatory solutions to marital disputes but were increasingly using professional counsellors, known as Family Advice Service officers, rather than *hakam*. Unlike *hakam*, these officers received training for their role, being supervised employees of the Religious Affairs Department. The establishment of the Family Advisor Unit in the Department of Religious Affairs corresponded with the declining role for *takhim* in marital conflict and disputes.

Despite this noted decline in *takhim*, the recent *Emergency (Islamic Family Law) Order* (1999), which came into effect in 2001 with the establishment of the Syariah Courts, has retained and expanded the role of *hakam* in the reconciliation of *syiqaq* disputes (those marked by marital discord and disharmony).⁹⁰ The Order distinguishes the roles for the Family Advice Service Officer and for *hakam*. *Hakam* can intervene when the Family Advice Service Officer has been unable to effect reconciliation between parties where one of them is seeking divorce.⁹¹ *Takhim* is also specified in the Order for cases where the court rejects a wife's complaints to them that her husband has mistreated, assaulted or caused her harm, but she continues to repeat similar

84 *Religious Council and Kadis Courts Act* (Cap 77) s150 (6)(a). Also *ruju* in *Emergency (Islamic Family Law) Order* (1999) s53.

85 *Religious Council and Kadis Courts Act* (Cap 77) s 150 (6) (b).

86 Official figures are not available but in an interview with the Chief Kadi in September 2000 he noted this trend.

87 Also based on interviews with the Chief Kadi, practitioners in Islamic law and representatives from the Department of Religious Affairs in 2000.

88 Ignatius Stephens, 'Hard Times bring Upsurge in Divorce Cases' *Borneo Bulletin*, 1 April, 2001.

89 Personal communication.

90 *Emergency (Islamic Family Law) Order* (1999) s43.

91 *Emergency (Islamic Family Law) Order* (1999) s42 (13). The officer has to submit to the court a certificate to that effect that he or she is unable to bring about a reconciliation and persuade the parties to resume conjugal relations.

complaints thus demonstrating that there are constant quarrels in the marriage.⁹² In these cases, the court may appoint two qualified *hakam*, 'competent in matters relating to arbitration' with 'one acting on behalf of the husband, and the other on behalf of the wife in accordance with *Hukum Syara*'.⁹³ The qualifications referred to are those required under Islamic law, as discussed above, rather than professional arbitral qualifications. Also in accordance with traditional practice, the Order states that 'where possible' preference should be given to appointment of family members as '*qarabah qarib*'⁹⁴ of the parties having knowledge of the circumstances of the case'.⁹⁵ *Hakam* are given authority to investigate the reasons for the quarrels, *syiqaq*, and endeavour to reconcile the parties.⁹⁶ This is to be a concerted process, because if the *hakam* are unable to agree in arbitration, the court has the power to order them to keep trying, and if the dispute continues for a longer period without reconciliation, the court can dismiss the *hakam* and appoint new ones.⁹⁷ When the point is reached where the disagreement and disharmony between husband and wife continues unabated, and the *hakam* consider reconciliation unlikely, they can decide that the parties are to divorce, in *talaq baain*. The *hakam* refer the divorce to the Syariah court where it is accordingly registered and certified.⁹⁸

The retention of the role for *hakam* in this new legislation demonstrates a clear affirmation of traditional Islamic dispute resolution practices. The delineation of the respective circumstances for intervention of *hakam* and of a Family Advice Service officer serves to guarantee the place of Islamic arbitration, as endorsed by the Prophet, for Brunei. As prescribed in the Syariah, the primary focus of *takhim* continues to be on reconciling differences between the disputing parties.⁹⁹ Where amicable resolution is not possible, *hakam* have authority to reach a conclusive settlement, which is recognized as binding and conclusive by the Syariah courts. One significant difference from arbitration in the western model, is that Islamic arbitration is considered a religious act, so the *Syariah* must guide and inform any arbitral process. With these parameters *hakam* must ensure that the process, and any settlement, accords with the *Syariah*. Additionally, under Brunei legislation the *hakam* will be chosen precisely for their knowledge of, and family relationship with, the parties.

92 *Emergency (Islamic Family Law) Order (1999)* s43 (2). Where the wife proves to the court her claims of mistreatment, assault or harmful acts to her body, modesty or property by her husband, and the court fails to reconcile them, then a divorce (*talaq baain*) can be given. *Talaq baain* means the divorce does not allow for a *ruju*, or return to the original state of the marriage and resumption of conjugal relations.

93 *Emergency (Islamic Family Law) Order (1999)* s43 (2).

94 This means a family member, based on lawful blood lineage. Defined in the *Emergency (Islamic Family Law) Order (1999)* s2.

95 *Emergency (Islamic Family Law) Order (1999)* s43 (3).

96 *Emergency (Islamic Family Law) Order (1999)* s43 (4).

97 *Emergency (Islamic Family Law) Order (1999)* s43 (6).

98 *Emergency (Islamic Family Law) Order (1999)* s43 (7).

99 This stage is akin to mediation. This is noted by Powell-Smith, above n 70, 4.

Although *takhim* had been declining in marital disputes, its resurrection as a process integrated with those provided by the new Syariah courts is likely to generate a revival in Islamic arbitration that may not be limited to disputes between husbands and wives. It is possible that its role in the settlement of commercial and other disputes could also be resurrected. If Brunei Darussalam continues in its implementation of Islamic principles and processes into its commercial and financial practices, it is likely to follow other Islamic nations, such as Saudi Arabia, Egypt, Qatar, Oman, Iraq and the United Arab Emirates, in ensuring arbitration accords with *Syariah* principles.

Mediation

In this section consideration will be given firstly to some of the terminological issues in mediation in order to highlight the significance of context and culture on the nature of the mediation process. This is followed by analysis of the role played by two variants of mediation - western and traditional - that are employed in Brunei today.

Mediation is a process in which a third person or persons seek to assist the parties resolve a dispute without imposing a binding decision.¹⁰⁰ The parties in dispute are assisted by the mediator, who facilitates a process of discussion to enable them to reach an outcome to which each can assent.¹⁰¹ Whilst there are many variants and permutations of mediation, with the word meaning different things to different people, it is acknowledged as a process that has had a long and diverse history in most cultures around the world.¹⁰² The cultural context naturally directs and informs the nature of the process so that mediation in rural Islamic Turkey will differ from that conducted by a People's Mediation committee in the PRC. In the same way, mediation in the kampongs and longhouses of Brunei will differ from mediations informed by the western ADR philosophy. Within the latter, much of the discourse has considered the diversity that exists under the label of mediation in western countries¹⁰³ to the extent that Greenhouse considers 'mediation' now represents a residual category, filling the gap between formal judicial processes and systems of violent self-help.¹⁰⁴ That there is an on-going terminological debate on what exactly is mediation¹⁰⁵ is, in itself, a feature of western culture, where mediation has been

100 Micheal Mills, 'China: Some Lessons in Mediation' [1993] *Australian International Law News*, 31.

101 See generally Laurence Boulle, *Mediation: Principles, Process and Practice*, (1996) 3.

102 Moore, above n 8, 20-22.

103 A chapter on diverse styles and approaches to mediating conflict is in Folberg and Taylor, above n 30, 130; and an overview of core, secondary and variable features of mediation is in Boulle, above n 101, 3-11.

104 Carol J Greenhouse, 'Mediation: a Comparative Approach' (1985) 20 *Man* 90.

105 Mediation is an imprecise term that is acknowledged as having multiple meanings and permutations. See especially John H Wade, 'Mediation - the terminological debate' (1994) *Australian Dispute Resolution Journal* 204. See also Gregory Tillet, *The Myth of Mediation*

theorised, evaluated, researched and professionalised. This does not happen in the context of traditional mediations where the long-standing, more informal and localised nature of the process, obviates any need for theorising, analysing or evaluating. Western mediation, which has been variously labelled modern mediation,¹⁰⁶ or independent mediation,¹⁰⁷ was consciously formulated and promoted to be an alternative process either in competition with, or complementary to, other dispute resolution options, notably litigation, in the common law countries. The common law setting has informed the process so that some features were to ameliorate perceived problems identified with litigation, whilst others were considered so important that they were incorporated into western mediation process and theory. Significant amongst the latter was the principle of independence of the judiciary. Hence similar features of independence,¹⁰⁸ impartiality,¹⁰⁹ and neutrality¹¹⁰ for mediators were engrafted onto the process of mediation. In assisting parties to explore options for settling the dispute, the goal of western mediation is to bring about a consensual outcome rather than to coerce parties to settle¹¹¹ against their wishes, or on terms with which they feel dissatisfied. The emphasis in the western model is on the participants' own responsibilities for making decisions that affect their lives, and that this personal investment will engender more commitment than one imposed upon them. Although this factor of individual control is not present in every type of mediation found in western nations¹¹² it is a representative feature in the type of mediation being 'exported' from the west to Asia. This exported form of mediation is to be labelled 'western' mediation in this dissertation to distinguish it from the traditional forms found in Brunei.

'Traditional' mediation therefore refers to the processes that evolved and have been used for centuries on the island of Borneo to resolve disputes. It seeks to bring about a consensual settlement through the intervention of a third party mediator. Like its

(1993); George Verghese Kurien, 'Critique of Myths of Mediation' (1995) *Australian Dispute Resolution Journal* 43. Folberg and Taylor write that the practice of mediation falls along a spectrum that defies a strict definition, but they then proceed to define it, above n 30, 7.

106 Ibid 32. Also referred to as the North American model of mediation, *ibid* 51.

107 Moore, above n 8, 41-53.

108 Andrew Zilinskas, 'The training of mediators - is it necessary?' (1995) *Australian Dispute Resolution Journal* 58, 65.

109 Impartiality refers to the constant requirement for 'even-handedness, objectivity and fairness towards the parties'. See Boule, above n 104, 19.

110 Mediators are described as third party neutrals, being 'comparatively neutral as to outcome' see Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (1992) 102-105; *ibid* 18.

111 Folberg and Taylor, above n 30, 7 - 10. However the degree of consensuality in mediation is questioned by Boule, who demonstrates how pressure to settle can be indirectly or directly imported into the process. See Boule, above n 101, 26-28. See also Kurien above n 105, 46.

112 This is why Moore classifies this process as independent mediation to distinguish it from authoritative mediation and social network mediation. See Moore, above n 8, 41.

western counterpart, mediation here is not rigid or unvarying in application. However, there are differences in roles, goals and procedures between the two, and these are set out in Table 1. The dichotomy reflects the underlying dimensions of collectivist versus individualist culture.

Table 1 Comparison of Features of Western and Traditional Mediation

| Western /Independent Mediation | Traditional/Iban Mediation |
|--|---|
| <p>Goal of mediation is for parties to reach an agreement that ends the dispute to their mutual satisfaction.</p> <p>Mediators are guided by codes of conduct, statutes, and publications on process, skills and techniques.</p> <p>Mediators should not have social ties, or be related to, the disputants.</p> <p>Mediators have no role in preventing or pre-empting disputes.</p> <p>A mediator’s role is complete once a dispute is resolved - though strategies for dealing with future conflict or disputes may be provided.</p> <p>A mediator can be any person who possesses the necessary qualifications/training.</p> <p>Accreditation has objective basis - such as courses, professional qualifications, recognition by authoritative bodies.</p> | <p>Goal of mediation is to end the dispute between parties so that harmony can return to the longhouse community.</p> <p>Mediation is guided by <i>adat</i> and traditional spiritual beliefs.</p> <p>Mediators are connected to the disputants through social relationships or kinship ties.</p> <p>Mediators may have a preventative or pre-emptive role.</p> <p>Mediators will have an ongoing continuing relationship with the parties post resolution of the dispute.</p> <p>Mediator function is assumed as the role of the longhouse headman.</p> <p>Accreditation has subjective basis - trust and respect of that community. There is no training, other than community enculturation.</p> |

| | |
|--|--|
| <p>Authority of the mediator comes from either an institutional source such as the courts, or from selection by the parties. This is related to training and reputation.</p> | <p>Authority of the mediator comes from the support and confidence the longhouse community has in him, as headman.</p> |
| <p>Mediations occur in private settings - an office/ room neutral for the parties.</p> | <p>Mediations typically occur in a public setting - <i>raui</i> of the longhouse.</p> |
| <p>Mediation has no educative role beyond the disputants.</p> | <p>Mediation has an educative role for the longhouse community.</p> |
| <p>Mediators should be impartial, objective and even-handed.</p> | <p>Mediators should be fair, kind, loving and subjectively appraise options.</p> |
| <p>Criticism of disputants' behaviour or character is unacceptable.</p> | <p>Criticism is acceptable where this is relevant to the dispute.</p> |
| <p>Parties direct the outcome - mediator should not persuade or coerce.</p> | <p>Moral persuasion and coercion can be justified in the interests of the longhouse community.</p> |

Role of Traditional Mediation

As in other non-western, indigenous or traditional forms of mediation found throughout much of Asia,¹¹³ the traditional mediation process in Brunei places a greater focus on ensuring an outcome - that is, settlement of the dispute - than is seen in the western model. This arose because traditional mediation was not an alternative to litigation but was the dominant means for dispute resolution, and the alternatives to it were not courts of law, but physical ordeal, combat and retributive and institutionalised forms of vengeance.¹¹⁴ For the dayaks in Borneo that meant

113 China for over 2000 years has used mediation as the preferred method of dispute resolution. Weidong Ji 'The Chinese Experience: a Great Treasure-house for the Sociology of Law' in Masaji Chiba (ed) *Sociology of Law in Non-western Countries* (1993) 17; Mills, above n 100. In the context of Japan there has been much research into the reasons why there is an 'expectation that disputes will be settled by an amicable solution or compromise'. See Joseph WS Davis, *Dispute Resolution in Japan* (1996) 5; John O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 *Journal of Japanese Studies* 360; Nobutoshi Yamancouchi and Samuel J Cohen 'Understanding the Incidence of Litigation in Japan: a Structural Analysis' (1991) 25 *International Lawyer* 443.

114 The role of organized contests, in which the disputants, or their supporters, prove the superiority of their case by physical violence or competition, is noted in Philip Hatch Gulliver, *Disputes and Negotiations* (1979) 1.

headhunting.¹¹⁵ A mediated outcome became an imperative in traditional small communities, for the survival of the group could, in practice, depend upon keeping harmony among its members. These past imperatives can explain some of the characteristics of the traditional forms that continue today.

The person who, by tradition, intervenes as a mediator for local community disputes is typically the headman, either of the kampong or village, or of the longhouse. Unlike western mediators, headmen also assume preventative roles in their communities, to minimise the transformation of conflict into a dispute. Because of long standing membership of that community, they can use their cumulative knowledge of people and events to deal with grievances that experience suggests could escalate into a dispute. When a dispute develops and intervention of a third party is sought, the disputants approach the headman directly, jointly or singly, or another person in the community can bring the dispute to his attention. Generally, the mediation will be informal, so that the venue,¹¹⁶ dress,¹¹⁷ and behaviour will not differentiate it. Also a headman's mediation will occur within a short time frame after notification, often the same or the next day.¹¹⁸ Western mediation also is identified as being informal, inexpensive and able to occur within a quick time frame. However, this is in comparison to the formality, cost and delays that mark litigation in western nations, rather than to 'the in situ' availability of traditional mediations.

Identifying and isolating the issues in the dispute is a feature of most mediation. Whilst the headman typically knows the parties involved, he will seek additional background information on the events and behaviour proximate to the dispute. As well as gathering details from the parties, the opinions and accounts of others who know them is also ascertained. The headman, either alone or with the assistance of other elders in the community, will use these to try to facilitate a settlement with the disputants. If it seems to the headman that one of the disputants has been largely responsible for the conflict, this can be identified. In contrast to the western model where there is avoidance of 'who is right or wrong',¹¹⁹ mild chiding by the headman is acceptable. Once wrongs or mistakes have been isolated and identified, these can be apologised for, and if necessary reparations or appropriate changes made. Providing examples of 'good role models'¹²⁰ and how they may have acted in circumstances similar to those of parties in dispute, may be drawn on, to guide one or both disputants to a particular outcome. The 'role model' is informed by the ideological

115 See generally Janet Hoskins, *Headhunting and the Social Imagination in Southeast Asia* (1996).

116 In a longhouse, the typical venue is one end of the communal gallery or hall, known as the *ruai*.

117 In the past an Iban headman did have distinguishing tattoos and head-dress, but today wears a similar mix of western attire and sarongs as others in the community.

118 In a longhouse, the hearing of the dispute will be on the same day, after the evening meal has been completed.

119 Folberg and Taylor, above n 30 at 10.

120 For example a 'good' wife, husband, child, friend, worker.

underpinnings of that group, so that in a Malay context, Muslim role models, whether Malay or from the times of the Prophet,¹²¹ are used. Malay *adat* with a range of proverbs,¹²² metaphors and legal maxims¹²³ can be employed to guide outcomes. On the other hand, in an indigenous non-Malay community, such as Iban, Dusun, or Murut, it is the *adat*, and the heros¹²⁴ of their own cultural tradition, that inform the process.

The headman is chosen still on the basis of his standing and authority in that community. There is respect and deference accorded to one holding this position. In both Malay and Dayak communities the headman is elected. The headman of a longhouse is chosen not through a formal ballot, but through discussion and debate until a consensus is reached by the members. Although the position is not hereditary, kinship ties continue to have relevance. Since 1992, the election of a kampong headman is by secret ballot and is held in accordance with rules prescribed by the government. To nominate for the position, one must be over 30 and less than 65 years of age, have good knowledge of Islam, some formal education, and not be involved with any political party. Requirements prescribed by the government are part of the ongoing bureaucratisation of the role, so that these headmen are having an increasing administrative and liaison role to perform for the government. This is likely to see a shift in the type of mediation, so that it shifts in the direction of what Moore described as 'authoritative mediation',¹²⁵ so that the headman's more official authority requires bargaining parameters that allow for what is mandated by the government.

Although there is no specific formal¹²⁶ training required, other than acculturation through observation and participation in community life and experience, headman are expected to be knowledgeable, and to demonstrate personal qualities seen as desirable by that community.¹²⁷ Actual knowledge of the particular disputants is regarded as desirable, and as has been found in traditional Chinese mediations, mediation can be particularly effective where parties share an on-going relationship, since 'this forces co-operation.'¹²⁸ Equally important is for the mediator to have good knowledge of the

121 The lives of the Prophet, his wives, daughter Fatima, her husband Ali, as well as the Prophet's companions and successors are seen as models for all Muslims.

122 Proverbs and the advice contained in them play an important role in Malay culture in Brunei. See Haji Hakim bin HM Yassin 'The Folk Literature of Brunei Darussalam' in *ASEAN Folk Literature: an Anthology* (1995) 591-599.

123 Michael Barry Hooker (ed), *Readings in Malay Adat Laws* (1970).

124 Dayak people have an oral tradition of recounting the exploits of ancestors and deities in epics and legends. Victor T King, *The Peoples of Borneo* (1993) 234; Benedict Sandin, *Iban Adat and Augury* (1980).

125 Moore above, n 9, 41.

126 In the western sense of courses taken or evaluative standards achieved.

127 The Iban interviewed identified honesty, fairness and 'loving' as important personal attributes for their headman.

128 Lokki Woo, 'Sweet and Sour Law: Does Chinese Mediation Suit the Australian Palate?' (1996) 7 *Polemic* 91.

rules to apply¹²⁹ and to employ these to determine what is the right or fair outcome, and then to direct and guide the parties towards a similar solution. An ability to persuade, even to coerce parties by moral imperatives, to a settlement, is an attribute.

The settlement must be an appropriate outcome for the community as a whole as well as for the actual disputants.¹³⁰ The group's interests guide the process. This is consistent with collectivist culture generally where communal and societal interests will preside over individual party interests. It enables this form of mediation to serve an educative role by articulating the social norms and providing acceptable behaviours and solutions for the disputants and for the community as a whole. In this way it differs from western mediations where confidentiality and privacy constraints, for the benefit of the individuals involved, limit a wider instructive role. Although there could be 'take-home' knowledge for individuals¹³¹ having experienced a western mediation, which may provide those individuals with a model for future conflict resolution, the educative component is limited to the parties involved.

Whether traditional mediation by headmen and elders continues will depend on several factors. One is whether these communities can maintain their social cohesion and shared values. Aubert found that dissensus, or divergence in values, corresponded with mediation being less amenable in those communities.¹³² Witty also argues that indigenous processes of mediation are characterised by a shared cultural or community identity derived from a shared belief system of rules, obligations, procedures and sanctions.¹³³ The government of Brunei seeks to maintain traditional values, but has chosen an assertive national culture policy aimed at cementing Brunei Malay culture as the source of values and national identity. This is on the basis that 'undeniably, the Brunei Malay culture is the soul of the Brunei national culture' and can serve to 'unite different ethnic groups, and defend indigenous values and interests against harmful foreign influence'.¹³⁴ Whilst it may reinforce cohesion amongst the Malays, so there is no discrepancy between internal moral values and the external national code of ethics; for others such as non-Malay indigenous Dusun, Iban, Murut and Penan absorption into the Malay is at odds with their culture, identity and values. As conversions occur their social cohesion fractures, and traditional ways of social control become less viable. Dispute resolution in these communities requires an assumption that there are benefits from adherence to the traditional means over that

129 This is 'rules' in the broadest sense and could include *adat*, local government regulations, *syariah* (in a Malay kampong) or augury in an Iban community.

130 This is a feature of traditional mediation generally see: Sally Engle Merry, 'The Social Organization of Mediation in Non-industrial Societies' in Robert L Abel (ed) *The Politics of Informal Justice* (1982).

131 Folberg and Taylor, above n 30, 9.

132 Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 *Journal of Conflict Resolution*, 26.

133 Cathie J Witty, *Mediation and Society: Conflict management in Lebanon* (1980) 13.

134 Dato Paduka Haji Matussin bin Omar, above n 22, 12.

of the external institutions of courts, police and lawyers. Unless the traditional is seen as a legitimate and effective process relevant to the issues arising in the community, other options will be chosen. In addition to the dissonance with Islamic Malay values, it has been noted that some of the non-Malay groups are finding traditional *adat* generally ineffective in dealing with modern problems and issues.¹³⁵

Linked to shared values is the need for an on-going personal relationship and interaction between disputants.¹³⁶ Traditional and homogenous communities, as exist in the kampongs and longhouses, have complex kinship networks with strong reciprocal social and economic ties among their members. When these break down, usually with younger members leaving for educational or employment opportunities in urban centres, traditional mediation declines. Whilst those who leave may retain a preference for consensual resolution, the previously reflexive intervention of the headman is not available and the urban environment is generally less conducive to it. This is because social and economic independence and anonymity replace the consistent personal interdependencies and kin relationships of the traditional community. It is a pattern that has been evident in many societies. Even in early America, in the small New England colonial villages interwoven with tight social networks, consensual and mediated processes thrived.¹³⁷ The multiplicity of social relations and the need for cooperation and trust did not break down until commercial activity brought about the growth of towns, together with an influx of new persons with different backgrounds and values, and expansion in commercial dealings so that people were doing business with strangers.

A further way in which traditional mediation can be undermined is by government interference and regulation. This introduces changes to both the functions and role ascribed for the headman. The bureaucratisation of their role, and the increased reliance upon the government for delineating functions, can weaken the relationship between community and the headman. Prior reliance on community consensus for obtaining and maintaining the position is being supplemented by the government's confidence in the headman's ability to fulfil these and other tasks. Headmen now receive remuneration from the government, and in turn, government policy informs their role.

Lastly, adherence to traditional means can be affected by structural changes in the society that either decrease its effectiveness, or perceptions of it, through comparison with newer or competing processes. Just as *takhim* was seen to be less effective once the new option of counselling services of the department of Religious Affairs was introduced, so too could traditional mediation be seen as ineffective as other options

135 Jay H Berstein, 'The Deculturation of the Brunei Dusun' in Robert L Winzeler (ed) *Indigenous Peoples and the State: Politics, Land, and Ethnicity in the Malayan Peninsula and Borneo* (1997) 159–178.

136 Witty, above n 13e, 10.

137 B Mann, *Neighbours and Strangers: Law and Community in Early Connecticut* (1987).

are presented, or tested. Now that the Syariah Courts are required to refer particular disputes for arbitration by *hakam*, this structural change may have a reverse effect, back to the use of Islamic arbitration. People make differential selections on how to settle disputes and will select an option, whether traditional or imported, which best suits their needs or purpose at the time.

Role of Western Mediation

To date, the role for western mediation in Brunei has been limited. Apart from the provisions dealing with it as a condition precedent to arbitration under specific sections of the *Arbitration Act* (Cap 173), and reference to conciliation in the *Trades Dispute Enactment* (1961) for employment and industrial disputes, there is scant statutory recognition.¹³⁸ The use of mediation in commercial and other disputes would be a matter of contract. There are no centres providing mediation, and it was not widely regarded as a service to be offered by the existing law firms. This may be because lawyers in Brunei see this type of mediation as less effective than other processes offered, or that the clients who come to law firms do so with the expectation of more typical legal services being provided. It did not seem to be the case that lawyers felt they needed more training in mediation techniques, but rather that their area of expertise lay in traditional adversarial-based lawyering services. Because Brunei does not have a law society nor access to the related continuing legal education programs run by such societies, lawyers in Brunei may have had less exposure to courses and information on ADR and mediation. However, all lawyers have had to have been trained in other common law countries (particularly England and Malaysia)¹³⁹ and graduates in the last decade would have had acquired knowledge and training in mediation as part of their law courses. Additionally, as intervention by way of traditional mediation is taking place informally in the social setting in which most disputes arise, it is likely to be viewed as a more appropriate forum than a lawyer's office. There was anecdotal evidence supporting this latter view. One lawyer in a major city practice responded to a question as to whether his firm offered mediation for their clients by asking: 'Isn't that what friends and family are for?' Mediation, as an ADR process provided by lawyers or others so trained, was generally dismissed as not needed in Brunei Darussalam.

This has been the experience of bodies that have considered the promotion of western mediation. A British based international firm¹⁴⁰ currently promoting arbitration for the construction and engineering sector also offers services in conciliation, mediation and dispute review boards. However, their prime focus to date has been in the selling of

138 In contrast Australian States have legislation providing opportunities for litigants to use ADR processes, rather than proceeding to trial.

139 Brunei has no Law School or other legal training centres providing for admission to the common law courts of Brunei. However, a Diploma in Syariah Law has commenced at the local university.

140 See above n 59.

arbitration, with the promotion of the other ADR services a possibility for the future. Other organizations have run seminars and courses on mediation targeted at lawyers and the government of Brunei. These were referred to by several lawyers as 'visits from the lovey people', indicating a sceptical reaction. In the mid 1990s, APEC determined that it should assume a role in providing additional dispute resolution services for the region by creating a Dispute Mediation Service (DMS),¹⁴¹ that emphasizes mediation rather than arbitration, and which would be voluntary and non-adversarial in nature. The service was to be made available to APEC governments and to private entities.¹⁴² However, it did not become operational and the Mediation Services Expert Group formed to establish it has been disbanded.

Conclusion

The experience in Brunei bears out the pattern elsewhere in the world, which Galanter summed up in the following terms: 'Courts resolve only a small fraction of all disputes that come to their attention. These are only a small fraction of the disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes'.¹⁴³ The collectivist nature of Brunei society maintains the preference for avoiding confrontation and for employing consensual and less adversarial means of dispute resolution. Certainly, litigation and settlement prior to trial are used by lawyers in Brunei Darussalam, but their occurrence per head of population remain small, and their role is more clearly delineated in commercial and business transactions rather than in family and community issues where the majority of disputes arise. This is not surprising given that the colonial regime's priority was to secure the certainty and familiarity English derived laws and courts could give to British commercial endeavours; family, personal and community matters, on the other hand, could continue to be sorted out by the traditional means.

Arbitration is also offered by lawyers and is available for a range of commercial and construction disputes. As its role is seen as an alternative form of litigation, and given the general level of satisfaction and confidence in the courts, this mitigates against its use by Bruneians. International companies operating in Brunei are more in tune with arbitration than local Bruneian ones. In keeping with the collectivist perspective, Bruneians wherever possible want to avoid adversarial means, so that business and social relationships can be preserved. The limited utilization of arbitration accords with the findings of APEC research in the region.¹⁴⁴ The small role that Islamic arbitration had been playing in marital and family disputes has been revitalised by the *Emergency (Islamic Family Law) Order*. Given this, and the increasing Islamisation of

141 Protocol on ASEAN Dispute Settlement Mechanism was agreed to in 1996.

142 Valerie Hughes, Chair, Dispute Mediation Experts' Group, APEC International Commercial Disputes www.arbitration.co.nz/apec/forward.htm.

143 Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1, 24.

144 See above n 66.

commercial and administrative practices throughout Brunei Darussalam, it is likely that traditional *takhim* may also become an option for commercial and financial disputes, as it is in the Middle-east.

Most disputes occur in the local community and continue to be resolved there. The continuance in the twenty first century of the kampong and longhouse as the basic social entities and as the smallest units of local administration, together with the retention and recognition of the position of headmen, has assisted in long-standing practices and values being retained. The more remote and removed a community is from the capital city, and the stronger the social and kinship ties, the greater is the adherence to traditional and collectivist ways of keeping harmony. The mindset is to cooperate rather than to confront, and the assistance of a traditional mediator is culturally conditioned to feel right. Going to a lawyer, or to court, is an option when all else fails. Although Malays, Chinese and the indigenous non-Malays all share a preference for informal and consensual means of dispute resolution, cultural and structural factors combine to maintain traditional avenues for this, so far restricting the scope for western mediation. Whether the incremental modernization and westernization in Brunei will impact on culture and tradition in a way that lessens the relational and collective foundations seems unlikely. Brunei vigorously resists what are seen as the counter-cultural forces of the west, prioritising instead retention of the 'inherent norms of our own internal lifestyle that is collectively practiced by our society'.¹⁴⁵ By rejecting the concept of individualism on the basis that in the west 'it has been the prime cause of moral decadence, degradation of social values and cultural demoralization, disrespect of elders, family and authority',¹⁴⁶ Brunei is turning to Islam to enhance its Malay culture and illuminate its future direction. This means that as well as strengthening the role of the Syariah Courts, alternative means compatible with Islamisation will be more accepted than offerings from the modern ADR movement.

145 Abdul Latif bin Haji Ibrahim, 'Cultural and Counter-cultural Forces in Contemporary Brunei Darussalam' in Thumboo (ed), above n 23, 23.

146 Ibid.