

Alternative Dispute Resolution In ASEAN:
Brunei Darussalam
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Introduction

Alternative Dispute Resolution ("ADR") typically includes arbitration, mediation, and conciliation. ADR is not new in Brunei Darussalam as traditionally disputes are traditionally settled by way of negotiation mediation and conciliation. Such procedures could be done through the social figures like the village headmen known as Penghulus or Ketua Kampung or even through elder family members. Prior to the Residency period, the more serious disputes would come to either the district chiefs or the Sultan personally, as mediator or arbitrators for these disputes.

The two most common forms of ADR are arbitration and mediation. Arbitration is a more informal version of a trial involving simplified rules of evidence and procedure. Furthermore, the parties to the disputes are more in control of the proceedings. Either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise a panel. Arbitration hearings usually last only a few hours and the award and its basis are always confidential hence the interests or even the reputation of the parties are protected. Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other business disputes.

Arbitration

Under the arbitration process the parties agree beforehand to refer any dispute to arbitration. The agreement could cover the choice of procedure of appointing an arbitrator and the procedure of the arbitration itself. To expedite matters the parties would normally agree to adopt a set of established rules e.g. UNCITRAL rules in order to settle disputes.

The preference disputing parties may have for arbitration as a process is determined by many factors. Such factors could cover technicality of the agreement, perceptions as to the advantage or disadvantage of arbitration *vis a vis* other processes, as to the degree of knowledge the parties have of their past experiences, advice given by others, perceptions regarding the specific expertise of the arbitrator or institution providing dispute resolution services, availability, risk assessment, cultural preferences and personal instinct.

In Brunei Darussalam the Arbitration Act (Cap 173) is the principal legislation for commercial dispute resolution outside the court system. As regards to mediation there is no specific legislative framework that covers mediation in Brunei Darussalam. Although under the Arbitration Act (Cap 173) there is specific reference to conciliation, which could to some extent be assumed as part of mediation process.

Further Brunei Darussalam has a separate but parallel court system namely Syariah Court and Civil Courts. The Syariah Courts has limited jurisdiction to determine issues related to personal matters e.g. marriage,

inheritance and custody etc. As can be seen later in this paper ADR is also a mode of dispute resolution recognized under the Syariah Law.

Arbitration Act (Cap 173) (“The Act”)

The Act came into force in 1994. The Act does not incorporate the UNCITRAL model law on Arbitration. The Act also sets out provisions for the implementation of the New York Convention of Foreign Arbitral Awards 1958 (the Convention).

The Convention provides that the courts in Brunei Darussalam to defer to arbitral jurisdiction whenever a case is brought under a contract containing an arbitration clause,¹ and to enforce an arbitral award made in another country, which is also signatory to the Convention. The grounds for appealing arbitral awards are set out in Article V, including that the award was set aside by a court in the country where it was originally awarded.²

The Act allows parties to a dispute to apply the rules of UNCITRAL or the rules of an arbitration institution. The Act gives the parties the autonomy to modify the procedural rules under the Act, and to introduce their own.

Section 2 of the Act 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

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

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

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.

Due to the fact the government is immune from suit and the confidentiality nature of an arbitral proceedings, arbitration agreements are commonly used in Government procurement contracts. Notwithstanding that, the parties to a dispute are not precluded from negotiating a settlement with the Government.

The Act allows for an application to be made to stay the court proceedings in order for arbitration to take place.³ 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.

Section 21 provides that contracts, '*relating to land or an interest in land*' is excluded. Other than that the arbitrator has the same power as a court regarding specific performance remedies, unless it is expressly excluded by the contract. Generally, the types of disputes that can be referred to arbitration are disputes in which damages may be claimed.

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,

3 *Arbitration Act (Cap 173) s7.*

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.⁴

The Act makes a distinction between domestic and international arbitration. The significance is that there are different provisions⁵ in the Act to be applied in either case. An arbitration agreement 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.”⁶

The law to be applied in an arbitration is determined by the parties. In most domestic arbitration agreements it is stipulated to be the law of Brunei Darussalam. All Government contracts would stipulate Laws of Brunei

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

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

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

Darussalam as the applicable law. In all other contracts if applicable law is silent then reliance is made on the principle that in the absence of an express choice then the applicable law is the law with which the agreement is most closely associated.⁷

There is no stipulation as to the language to be used in arbitrations. However as the English language is widely used in commercial transactions and the civil courts use the English language, then the English language would be used in arbitrations. The Act is silent on confidentiality and as such it is important of confidentiality to be specified in the arbitration agreement.

If in 2 or more arbitration proceedings it appears to the court that some common question of law or fact arises in both or all of them; that the rights or relief claimed arises from the same transactions or series of transactions; or if it is desirable to do so the court may make an order to consolidate the proceedings; or order for them to be heard one after the other or order any of them to be stayed pending the outcome of any other one of them⁸.

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 in the case of a public servant, the chairman of the Public Service Commission, must give consent for the appointment of any public servant.⁹

⁷ *Hamlyn v Talisker Distillery* [1894] AC 202.

⁸ *Arbitration Act (Cap 173) s9*

⁹ *Arbitration Act (Cap 173) s16.*

The court does not have jurisdiction to set aside or remit an arbitration award on the grounds of errors of fact or law on the face of the award. However the court would hear an appeal on a question of law arising out of an award if parties consent, or with leave of the court, if the court considers, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties. The parties can preclude this right of appeal with an "exclusion agreement".

The Act gives the parties autonomy to modify the rules of procedure and to introduce their own procedural rules. It would seem that the parties could apply the rules of an arbitration institution if desired or UNCITRAL rules for an *ad hoc* arbitration.

Unless provided to the contrary, a reference to arbitration shall be deemed to be before a sole arbitrator. If the agreement specifies two arbitrators it is deemed that they may, in the event of disagreement, appoint an umpire who shall make the final decision. In the event that there are three arbitrators, the decision of any two will be binding. In the event that the three cannot agree, then the one chosen as chairman shall make the decision. An award on an arbitration agreement may be enforced in the same manner as a court judgment¹⁰.

¹⁰ Arbitration Act (Cap 173) s36

Conciliation

Conciliation is not defined but it could be taken to mean a process whereby parties are assisted by a neutral conciliator or mediator to reach a mutually acceptable solution to the dispute.¹¹ The term mediation can be used interchangeably with conciliation, but in the context of this Act, conciliation will be used.

Part II of the Arbitration Act contains provisions under which a court may appoint a conciliator if the parties have agreed to conciliation in an arbitration agreement. A conciliated settlement made within the framework of an arbitration agreement must be in writing and signed by the parties. It will be regarded as an arbitration award and will be enforceable in the same way as an arbitration award. There are no specific rules of procedure for conciliation

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.¹² 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. It is therefore important to insert such confidentiality requirement in the agreement.

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

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

In the event that an agreement to arbitrate contains a provision for conciliation, and for the conciliator to act as arbitrator in the event that conciliation fails to lead to a settlement, no objection may be taken to appointment of the conciliator as arbitrator solely on the ground that they had acted as a conciliator.

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 Act merely provides the requirements for arbitration. At present there are no institutions in Brunei for resolving domestic or international commercial disputes outside of the courts or through ad hoc arbitration or private ADR. so the parties are free to choose a venue for arbitration.

Arbitration in Brunei Darussalam

There are no official figures available on the number of domestic arbitrations taking place in Brunei Darussalam. The actual numbers of arbitrations were small as such it would seem to be an under-utilised option. One of the reasons for such small numbers is the fact that the public still prefers to refer to the courts for settlement of disputes. Backlog of cases are not a problem. There are no significant difference in terms of time or costs between arbitration and litigation, and if there was, arbitration can be considered the more expensive (especially arising from payment of arbitrators' and paying for the venue), more protracted and inconvenient, as there is no

institution that offers arbitration. The Courts also play an active role in trying to reach a settlement by requiring the parties to a dispute to go to a pre trial conference. This process has so far proven to be effective.

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 PBUH endorsed him as an arbitrator (*hakam*) for disputes amongst his followers. 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. Prophet Mohammad PBUH also recommended others to be arbitrators. After his death, Prophet Mohammad's PBUH companions recognised validity in the process and exhorted the role of those who arbitrate and conciliate.¹³ The importance is evident in the advice that 'composing of

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

differences between men is better than all fasts and prayers.¹⁴ Islamic arbitration evolved in the centuries that followed. These included whether an agreement to arbitrate in a possible future dispute was valid in Islamic law or void for uncertainty.¹⁵ There were differences in the process of appointment of the *hakam*,¹⁶ and in the qualifications required,¹⁷ 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.¹⁸ This renders it closer to a form of conciliation or mediation. There were other scholars in addition to the Malaki and Hanbali who felt a *hakam's* decision was legally equal to that of a kadi. The Hanafi scholars held

14 In the Fatamid authority *Da'a'im al-Islam* cited in *ibid*.

15 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.

16 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.

17 See Hussain, above n 72, 175.

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

that a kadi could only enforce an arbitral award if he agreed with the veracity of the decision.¹⁹

Today, 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.

Arbitration Under Syariah Law In Brunei Darussalam.

The use of arbitration as a method of resolving disputes is embedded in various laws, which implement Syariah principles in Brunei Darussalam. 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. The use of arbitration as a way of resolving disputes has been preserved in the Islamic Family Law Order, 1999 (which came into force in 2001). Section 43 of the Order 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).

The Order distinguishes the roles for the Family Advice Service Officer²⁰ and for the *hakam*. The *hakam* can intervene when the Family Advice Service Officer has been unable to effect reconciliation between parties where

¹⁹ Sayen, above n 34, 235.

²⁰ These are Officers who are trained for their role in dispute resolution in family and marital matters. They are supervised employees of the Religious Affairs Department.

one of them is seeking divorce.²¹ The use of the concept of *Takhim*²² 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 complaints thus demonstrating that there are constant quarrels in the marriage.²³ In these cases, the court may appoint two qualified *hakam*, 'competent in matters relating to arbitration' and with 'one acting on behalf of the husband, and the other on behalf of the wife in accordance with *Hukum Syara*'.²⁴

The qualifications referred to are those required under Islamic law, 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*²⁵ of the parties having knowledge of the circumstances of the case'.²⁶

The *hakam* are given authority to investigate the reasons for the quarrels, *syiqaq*, and endeavour to reconcile the parties.²⁷ This is to be a

²¹ *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.

²² "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.)

²³ *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.

²⁴ *Emergency (Islamic Family Law) Order (1999)* s43 (2).

²⁵ This means a family member, based on lawful blood lineage. Defined in the *Emergency (Islamic Family Law) Order (1999)* s2.

²⁶ *Emergency (Islamic Family Law) Order (1999)* s43 (3).

²⁷ *Emergency (Islamic Family Law) Order (1999)* s43 (4).

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.²⁸ 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.²⁹

This retention of the role for *hakam* in this recent legislation is evidence of 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.

The primary focus of the application of *takhim* continues to be on reconciling differences between the disputing parties.³⁰ Where amicable resolution is not possible, the *hakam* has the 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.

²⁸ *Emergency (Islamic Family Law) Order (1999) s43 (6)*.

²⁹ *Emergency (Islamic Family Law) Order (1999) s43 (7)*.

³⁰ This stage is akin to mediation. This is noted by Powell-Smith, above n 70, 4.

More recently, Section 98 of the Syariah Courts Civil Procedure Order, 2005 (*Perintah Acaramal Mahkamah-Mahkamah Syariah, 2005*) also stipulates that the Syariah Court may encourage any party in any proceedings to use *sulh* or amicable settlement in accordance to syariah law principles (*hukum syara*).

Court Annexed Mediation

Court Annexed Mediation has not yet been used or developed in Brunei Darussalam. One reason for this is that the Court process is viewed favourably by the business community and by litigants in general. There is no serious backlog of cases and the court fees have been kept at affordable levels.

International Commitments

Investor and State dispute resolution under Bilateral Investment Treaties for Brunei Darussalam are referred to arbitration under the Convention for the Settlement of Investments Dispute on 16 September 2002 (“the ICSID Convention”). Brunei Darussalam became signatory party to ICSID Convention on 16 September 2002.

Conclusion

Brunei Darussalam reliance to ADR is still minimal. However this is not to say that it is not practised. As trade liberalisation is on the increase, dispute is inevitable. Against this background all the more reason that ADR

should be further promoted. What is important is actually enforcement of these awards. As ASEAN are made up of different cultural background and traditions there is a risk that enforcement are not possible.

We should continue to promote Arbitration in particular as all of ASEAN member countries but one is a signatory to New York Convention. We should embrace ADR and use it as a alternative to litigation. An arbitral tribunal is better equipped to deal with disputes.

On Syariah resolution although to date limited to personal law, as Brunei Darussalam develops its Syariah laws, dispute resolution under Syariah principles would also be utilised further.

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Resources

1. Arbitration Act (Cap 173)
2. New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.
3. Washington Convention for the Settlement of Investment Disputes.
4. Ann Black, "Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported And Traditional Processes," 2003.