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Comparative ADR

ADR in Brunei Darussalam: the meeting of three traditions

Ann Black

Brunei Darussalam is an independent Malay Islamic Sultanate which is situated on the northwest corner of Borneo. Outside the country, it is best known for its oil and gas wealth, and for its Sultan, Hassanal Bolkiah, who ranks as one of the world's wealthiest men and is famous for his luxurious palace and lifestyle.

In this small affluent nation, the processes used for dispute resolution are as much the legacy of events and influences from the past as they are of the contemporary ADR movement that the west has been exporting to Asia. The diverse ethnic mix in Brunei¹ ensures that there will be a multiplicity of culturally preferred ways of resolving conflict and disputes. There are, however, three traditions, each with its own distinctive dispute resolution processes, that continue to shape and direct dispute resolution in the Sultanate. These three traditions are that of the common law, Islamic law and indigenous Bornean beliefs and practices.

Common law

From the time Brunei became a British

Residency in 1905, the English common law has played a dominant role, particularly in disputes arising in the commercial and business sector. This was because the priorities of a colonial government were 'law and order' and providing security and certainty for trade and commerce. The colonial rulers were content to allow the people of Brunei to manage family, succession and other interpersonal laws in their own way.

Although litigation as a dispute resolution process has been firmly cemented for almost a century, the number of cases coming before the courts in Brunei is comparatively low. The litigation rate of 198 per 10,000 persons² is less than that of Japan, which is generally regarded as a less litigious society than its western counterparts. The low rate in Brunei is not because of a lack of confidence in the common law courts as institutions of integrity, but due to local cultural factors that bring about settlement in other ways.

The vast majority (94 per cent) of civil cases registered in the courts settle prior to

trial, and the introduction of mandatory pre-trial conferences for all intermediate and High Court cases maintains this trend. More significantly, the collectivist nature of Brunei society means there is an innate resistance to direct confrontation with others and a general dislike of adversarial processes. This also has consequences for arbitration.

After the country became a signatory to the New York Convention, the *Arbitration Act 1994* was enacted to provide the country with a legislative framework for resolution of civil disputes by arbitration. The Act does not adopt the United Nations Conference on International Trade Law (UNCITRAL) model law but does not prevent parties from doing so. It distinguishes in its provisions between domestic and international arbitrations. The law applied is that determined by the parties, but more often than not, it is the law of Brunei; the language of the arbitration is customarily English. It allows for conciliation where this has been written into the arbitration agreement.

Although arbitration agreements are contained in 90 per cent of contracts in the construction industry and in a large percentage of commercial contracts, it has been estimated that possibly only four to six disputes a year would be decided by arbitration and three times that number would threaten to use arbitration as a means to bring about settlement.



► There are many possible reasons for the limited role for arbitration. One is inadequate knowledge and familiarity with the process generally, and in addition, there is only a small number of firms with experience in the field.

As mentioned earlier, cultural factors are also important. For some local Bruneian businesses and companies, arbitration is seen as being as rule-bound, inflexible and adversarial as litigation. There is added concern that like litigation, arbitrating a dispute may impact negatively on future commercial dealings. The tenacity of the traditional social hierarchy and its accompanying rules of behaviour, which prioritise respect, loyalty and mutual co-operation, mitigates taking action against a person of royal or high social standing. Settling a dispute by direct or facilitated negotiation, or an informal mediation where the intervener is connected by family, friendship or business ties to the disputants, is preferred. The latter is possible given the small population of 330,000 with just 200,000 persons in the capital and commercial centre — Bandar Seri Begawan. As a result, it is the international companies operating in Brunei that are more willing to arbitrate than the local ones.

The limited use of arbitration is consistent with findings in some other Southeast Asian countries (excluding Hong Kong and Singapore) where Asia Pacific Economic Co-operation (APEC) research has found that 'resort to arbitration has not grown as rapidly as expected given the growth in the numbers of transactions in the region'.³

Islamic law

As Brunei is an Islamic Sultanate, Islamic law has always played a central role in the daily lives of the Brunei Malays. Through the institution of the Kadis Courts, laws on family, succession and matters of religion and morality have been applied to Muslims resident in Brunei throughout the last century.

Since independence, however, there has been a national commitment to 'making the Islamic system the most effective judicial system in the country'.⁴ This has meant significant reforms to the religious courts, which have been restructured as Syariah Courts, with increased jurisdiction.⁵ There

has also been legislative change in the areas of finance and banking,⁶ family law,⁷ adoption⁸ and evidence.⁹ In addition, the small role that Islamic arbitration¹⁰ had been playing in marital and family disputes has been revitalised by the Emergency (Islamic Family Law) Order (the Order). The Order requires the *hakam* or arbitrators to intervene in certain cases of marital discord,¹¹ to facilitate (if possible) a reconciliation. Where the *hakam* consider this unlikely, they can decide that the parties are to divorce. This is then referred to the Syariah Court where the divorce is registered and certified.¹² In cases of family disputes, the *hakam* must be qualified for the role, and (where possible) be close relatives of the husband and wife having knowledge of the circumstances of the case.¹³

Islamic arbitration is used more widely in other Muslim countries, particularly in the Middle East, for commercial, administrative and contractual disputes. Although it gives authority to the arbitrators to impose a decision, aspects of conciliation (*suhl*) are incorporated into the process, so that an amicable settlement is the preferred outcome. Given the increasing Islamisation of commercial and administrative practices throughout Brunei Darussalam, it is likely that traditional *takhim* may become an option for commercial and financial disputes, as well as for family matters.

Traditional Bornean practices and beliefs

The third tradition that informs the way disputes are settled is the indigenous traditional forms of mediation that evolved on the island of Brunei centuries ago, before the establishment of courts. In those earlier times, a 'mediated' outcome that maintained harmony and co-operation between its members was an imperative for group or village survival. The person who, by tradition, intervened as mediator was the headman, either of the kampong or village for the Malays or of the longhouse for Iban and other non-Muslim indigenous peoples. These forms of mediation were, and still are, relatively informal; occur within a short time frame after notification; are educative in that social norms can ►

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► be articulated; can be coercive; and any outcome needs to be appropriate for the community as a whole, not just for the disputants.

Today in Brunei, particularly in the more rural and remote areas where the complex kinship and economic ties still exist, mediations of this type continue. But in the towns where social and economic independence and greater anonymity have replaced former social networks, this practice has lessened. However, as the headmen now receive remuneration from the Government, and liaise with the Government in implementing policy at the local level, their role as community mediators in the rural parts could also change.

Even when mediation by a headman is not an option, the values and ethics underpinning those traditions — including maintaining social harmony through mutual obligation and respect, community effort, co-operation and avoidance of conflict — are still features of Malay culture. They favour a non-adversarial form of dispute resolution. The mindset is to co-operate rather than to confront, and the assistance of a third party as informal mediator, whether headman, imam, friend or family member, is culturally conditioned to feel right. Going to a lawyer, or to court, is an option when all else fails.

Conclusion

The mixing of the three traditions in Brunei Darussalam has created concurrent streams of dispute resolution for different sectors of the society. The common law's legacy of litigation and, to a lesser extent, arbitration, has the confidence of the commercial and investment sector, where the level of satisfaction is generally high. The role played by Islamic law is strengthening, and the revitalisation of Islamic arbitration for marriage disputes may lead to *takhim* being extended to commercial and other disputes, as in the Middle East. Most disputes occur in local communities and continue to be resolved there through informal means.

Although Brunei's 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 more western, professionalised mediation. Whether the incremental modernisation and westernisation in Brunei will impact on culture and tradition in a way that lessens the relational and collective foundations, seems unlikely. While Brunei is adopting modern technological advances, it is trying selectively to resist 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'.¹⁴

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',¹⁵ 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. ●

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Endnotes

1. The nation is also home to almost 340,000 people, who are a mix of many indigenous ethnic groups, with Brunei Malays in the majority, and a substantial Chinese community which dominates the business and commercial sector. Chinese

also are well represented in the legal profession. There are smaller numbers of Indians, and expatriates from Australia and Europe who are employed mainly in professional areas, and others who are given temporary work visas for labouring and construction work.

2. Based on court figures for 1999.

3. APEC Report on International Commercial Disputes at <www.arbitration.co.nz/apec/introduction.htm>.

4. Zain bin Haji Serudin, Minister for Religious Affairs 'Syariah law for Brunei' (1995) *June Borneo Bulletin* 14.

5. *Emergency (Syariah Courts) Order 1999*.

6. *Islamic Banking Act 1992; Perbadanan Tabung Amanah Islam Brunei Act 1991*.

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

8. *Islamic Adoption of Children Order 2001*.

9. *Syariah Courts Evidence Order 2001*.

10. The process is *takhim* and it was derived from the Prophet Mohammad's practices.

11. *Emergency (Islamic Family Law) Order 1999* ss 42, 43(2) and 43(3).

12. *Emergency (Islamic Family Law) Order 1999* s 43(7).

13. *Emergency (Islamic Family Law) Order 1999* s 43(3). The order uses the term *qarabah qarib* which means a family member based on lawful blood lineage.

14. Abdul Latif bin Haji Ibrahim 'Cultural and counter-cultural forces in contemporary Brunei Darussalam' in Thumboo E *Cultures in ASEAN and the 21st Century* University of Singapore Press Singapore 1996 p 23.

15. As above.

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