

# **Developments in Arbitration and Mediation as Alternative Dispute Mechanisms in Brunei Darussalam**

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## **1. Introduction**

Disputes arise in any situation where one lives in a community. The adage that 'no man is an island' rings true. Inevitably, disputes will arise in the course of relationships whether this relationship is personal or commercial in nature. Various methods of resolving disputes have been created. This discussion will look at developments in the area of arbitration and mediation in Brunei Darussalam. It will be seen that although arbitration has taken root in the arena of dispute resolution, issues may have arisen leading to the search for other available means dispute resolution, among which, mediation is a possible contender.

### **Arbitration in Brunei Darussalam**

- 2. Parties who have chosen to refer their agreements and disputes to arbitration always do so with the expectation of an efficient, fast and**

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certain conclusion of their disputes culminating in an arbitral award that is rendered by the tribunal. This expectation is true for both international and domestic arbitration. A successful party would then seek to enforce his award and reap the fruits of his labour after having undergone a laborious arbitration process.

### **3. A Part of the Drive towards Economic Diversification and Modernisation of its Arbitration Law**

Whilst Brunei Darussalam has been heavily and largely dependent upon its exports in the oil and gas industry to fuel its economic development, economic sustainability has now become a concern. As Brunei aims to diversify its economy and try to attract some of the large sums of direct foreign investment that have flowed into the economies of the other countries in the ASEAN region, it is understood that it is extremely important that both local and foreign investors who venture into Brunei will be guaranteed with a fast, cost effective and efficient manner in which to resolve their disputes which inevitably arise from time to time.

Generally commercial parties seek to resolve their disputes in a way that does not permanently destroy both the goodwill and the future cooperation between the parties. In this context, arbitration has been touted as a better form of dispute resolution process in comparison to litigation before state courts. It is stated to be a user friendly process and is a confidential process. It also allows foreign investors to feel that they are able to engage governments in a fair, neutral and an independent environment. This point takes on added importance since provisions for

the bringing of proceedings against “the Government or any officer, servant or agent” of the Government have not been made<sup>2</sup>. In order to attract foreign direct investment, it is important to encourage the development of an impartial, transparent and effective legal framework which has to be supported by an effective dispute resolution regime through which any aggrieved party, be it local or foreign, may seek assistance from to redress its problems.

Although Bilateral Investment Treaty arbitrations provide one means for parties to settle disputes, business parties tend to prefer using commercial arbitration as a quieter, cheaper and more expeditious manner of resolving disputes. Brunei Darussalam is a party to many bilateral investment treaties (BITs) and a Multilateral investment being the ASEAN Agreement for the Promotion and Protection of Investments is another example of a multilateral investment treaty<sup>3</sup>.

As Brunei Darussalam assumes the chair of ASEAN in 2013, the opportunity to establish itself as an arbitration centre has gathered pace, particularly with the ongoing territorial disputes in the South China Sea. Brunei Darussalam. The idea for the setting up of an arbitration centre was mooted in 2008 when Brunei Darussalam hosted an International Arbitration Conference and 2<sup>nd</sup> Regional Arbitration Institutes Forum. At that time, Brunei Darussalam still had its Arbitration Act which was based

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<sup>2</sup> Article 84B(2) of the Constitution of Brunei Darussalam

<sup>3</sup> <http://www.aseansec.org/12799.htm>

on the Hong Kong Arbitration Ordinance<sup>4</sup> and the Arbitration Act of 1950, 1975 and 1982 of England and Wales.

Brunei Darussalam was actively studying the UNCITRAL Model Law and was well aware of some of the progressive developments in the field of arbitration such the granting of interim relief by way of Mareva injunction in aid of foreign arbitral proceedings with no other connection with the country where the local court was seated. The Model Law was seen as the appropriate model for Brunei Darussalam's purpose of economic diversification and attracting FDIs. The Model Law also provided a modern approach to arbitration which has also served as a basis for the arbitration laws of numerous countries around the world<sup>5</sup>.

The final push for adoption of the Model Law came in 2006 when Cambodia introduced its arbitration law based on the Model Law. Brunei Darussalam and Myanmar was quoted<sup>6</sup> as the 2 countries within ASEAN to have yet updated their arbitration procedures.

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<sup>4</sup> Hong Kong Arbitration Ordinance (Cap. 341) which incorporates Hong Kong Ordinances of 1963, 1975 and 1982.

<sup>5</sup>As of 25 January 2013 66 countries (including 30 states) have adopted the UNCITRAL Model Law. Source: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

<sup>6</sup>Global Arbitration Review *Cambodian arbitration act enters force*, [http://www.globalarbitrationreview.com/news/news\\_item.cfm?item\\_id=3529](http://www.globalarbitrationreview.com/news/news_item.cfm?item_id=3529) (last accessed 29 August 2006)

#### **4. Brunei's Arbitration Order 2009 and International Arbitration Order 2009**

Previously, the arbitration legislation in Brunei (formerly Cap. 173 of the Laws of Brunei) was essentially based on the 1950 English Arbitration Act which dealt with both international and domestic law. The law then was viewed as being outdated, allowing the courts to interfere with arbitral proceedings.

The Arbitration Order 2009 and International Arbitration Order 2009 came into force on 28<sup>th</sup> July 2009. Based on the UNCITRAL Model Law, the introduction of the International Arbitration Order 2009 enables Brunei to lay claim to be the first Asian country to adopt the provisions on interim measures which were introduced in 2006.

While the new international arbitration law permits the courts in Brunei Darussalam to support arbitrations, it places limits on its ability to interfere in arbitral proceedings. The new powers of arbitration tribunals in Brunei also include the power to issue injunctions, as well as orders such as those for security of costs, for discovery, and orders to protect potential awards from losing their practical value by the dissipation of assets. Appeals to the courts are not permitted, and the president of the Arbitration Association of Brunei Darussalam has been given the authority to appoint arbitrators should the parties fail to reach an agreement.

5. In the drafting of the new legislation, provisions from Malaysia, Hong Kong, New Zealand and Singapore were studied since all these countries share the same legal heritage based on English Common Law. As England itself in enacting the UK Arbitration Act 1996 departed slightly from the UNCITRAL Model Law, it had meant that the new English legislations were no longer a good benchmark with which could be compared with.

The new laws are very similar and have been based upon the models of the arbitration statutes in Singapore. Brunei Darussalam has however also adopted new provisions that had been adopted by the UNCITRAL Commission especially with respect to interim measures and looked at various decisions in different countries on this issue before coming to the current laws.

6. **Snap shot of one of the major provisions in the International Arbitration Order**

In addition to studying the various statutes of other Common Law countries, the recommendations made by the Working Group II (Arbitration) after reviewing the UNCITRAL Model Law and in particular at the controversial issue of *ex parte* interim measures were closely examined for its applicability in Brunei's context. After looking at the updated "*UNCITRAL Model Law on International Commercial Arbitration 1985 - With amendments as adopted in 2006*", and the commentaries made on

the reforms to the Model Law<sup>7</sup>, it was decided that Brunei was not ready yet to adopt all of the amended articles that had been set out by the UNCITRAL in the 2006 draft Model Law. However, having looked at decisions from other jurisdictions, primarily Singapore<sup>8</sup> on the issue of whether or not a local court had powers to grant interim relief by way of Mareva injunction in aid of foreign arbitral proceedings with no other connection with the country where the local court was seated and having looked at the judgment, it was thought that perhaps Brunei should adopt a more proactive stance in amending its international arbitration act to allow for Brunei Courts to be given the power to grant interim measures, including Mareva interlocutory relief, to assist foreign arbitrations.

On this point, it is interesting to note the recent case of *Matter of Sojitz Corp. v Prithvi Ifo. Solutions Ltd.*<sup>9</sup> in which a New York appellate court granted a pre-emptive attachment of assets in aid of an international arbitration in Singapore involving foreign parties, even though there was no connection to New York by way of personal jurisdiction or subject matter of the dispute.

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<sup>7</sup> See Menon & Chao, *Reforming the Model Law provisions on Interim measures of protection*, (2006) 2 AIAJ 1.

<sup>8</sup> Swift-Fortune Ltd v. Magnifica Marine SA [2007] 1 SLR 629, Singapore Court of Appeal.

<sup>9</sup> 2011 WL 814064 (N.Y. App. Dic. Mar, 10 2011)

7. Below is a brief look at the international arbitration act and particularly on the point of the powers of the arbitral tribunal to grant interim relief, as per the recommendations of the revised Article 17 of the Model law.

***Powers of arbitral tribunal***

**15.** (1) *Without prejudice to the powers set out in any other provision of this Order and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —*

*(a) security for costs;*

*(b) discovery of documents and interrogatories;*

*(c) giving of evidence by affidavit;*

*(d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;*

*(e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;*

*(f) the preservation and interim custody of any evidence for the purposes of the proceedings;*

*(g) securing the amount in dispute;*

*(h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and*

*(i) an interim injunction or any other interim measure.*

(2) *An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.*



(3) *An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.*

(4) *The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1) (a) shall not be exercised by reason only that the claimant is —*

*(a) an individual ordinarily resident outside Brunei Darussalam; or*

*(b) a corporation or an association incorporated or formed under the law of a country outside Brunei Darussalam, or whose central management and control is exercised outside Brunei Darussalam.*

(5) *Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —*

*(a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court;*

*(b) may award interest (including interest on a compound basis) on the whole or any part of any sum which —*

*(i) is awarded to any party, for the whole or any part of the period up to the date of the award; or*

*(ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.*

(6) *An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*

*(a) Maintain or restore the status quo pending determination of the dispute;*

*(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;*

*(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*

*(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

### ***Conditions for granting interim measures***

**16** *(1) The party requesting an interim measure under Section 15(8)(a), (b) and (c) shall satisfy the arbitral tribunal that:*

*(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*

*(b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

*(2) With regard to a request for an interim measure under Section 15(8)(d), the requirements in paragraphs Section 15(8) (a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.*

### ***Applications for preliminary order and conditions for granting preliminary orders***

**17** *(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.*

*(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.*

*(3) The conditions defined under Section 15(6)A apply to any preliminary order, provided that the harm to be assessed under Section 15(6)A(1)(a), is the harm likely to result from the order being granted or not.*

### ***Specific regime for preliminary orders***

**18** (1) *Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.*

(2) *At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.*

(3) *The arbitral tribunal shall decide promptly on any objection to the preliminary order.*

(4) *A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.*

(5) *A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.*

### ***Modification, suspension termination***

**19.** *The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.*

### ***Provision of security***

**20** (1) *The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.*

(2) *The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.*

### ***Disclosure***

**21** (1) *The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.*

(2) *The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.*

### ***Costs and damages***

**22.** *The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.*

## **8. Taxation of Costs**

A decision on costs made by an arbitrator in a claim involving the Ministry of Defence of Brunei Darussalam was the subject of an originating summons brought before the court in Singapore<sup>10</sup>. The brief facts of the case are that the plaintiffs claimed \$927,000 from the defendant in the arbitration. Two defences and ten counterclaims were raised by the defendants amounting to \$20m. The arbitrator held, on an interim application, that he had no jurisdiction to deal with the counterclaims and stated that any payments due under any cross-claim established by the defendant would only go to diminish the amount to be awarded to the plaintiffs if they were successful in their claim. The defendant adduced

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<sup>10</sup> *VV & Anor. v VW* [2008] 2 SLR(R) 929

evidence on its counterclaim during the main hearing. The arbitrator went on to dismiss the plaintiff's claim. On the question of costs, he granted the defendant costs of the arbitration, including the costs of its counterclaim, which amounted to \$2.8m.

The plaintiffs filed an originating summons seeking to set aside the award under the International Arbitration Act (Cap 143A, 2002 Rev Ed). Three grounds were submitted to the Learned Judge: (a) the costs award was in conflict with the public policy in Singapore in that it offended against the principle of proportionality; (b) the arbitrator had no jurisdiction to award costs to the defendant in respect of counterclaims; and (c) the arbitrator acted in breach of natural justice when he awarded costs on a scale based on an alleged international arbitration practice on which no evidence was given.

In dismissing the application on all grounds submitted, Prakash J. held that it was not part of the public policy of Singapore to ensure that costs incurred by parties to arbitration were assessed on the basis of any particular principle, including the proportionality principle. The parties to the arbitration had contracted for disputes to be settled in that particular manner. The judge held that there was no public interest involved in the legal costs of parties to one-off and private litigation.

On the issue of the arbitrator's jurisdiction to hear evidence on the counterclaim and the decision to set-off the sums due therefrom, the judge found that once the plaintiffs submitted the claim to arbitration, the defendant was entitled to raise all defences that it possessed to the same, including any claims that could be set off against any award made in the plaintiff's favour. The merit or lack of merit of the counterclaims in so far as they constituted set-offs and the issue whether it was reasonable for the defendant to raise all of them could only go towards influencing the nature and quantum of the costs order. Due to the failure of the claim, it was unnecessary for the arbitrator to consider the merits of the set-off defences under which circumstances the arbitrator was not deprived of the jurisdiction which included the power to decide on how costs should be borne.

As to the argument on the requirement for the rules of natural justice to be observed, the judge found that this did not mean that every conclusion that an arbitrator intended to make had to be put before the parties. The assessment of costs was not something to which the rules of evidence applied so as to preclude the arbitrator from having regard to information that he had which had not been adduced by either party. At the costs inquiry, the arbitrator's views and experience were before the parties and the plaintiffs had every opportunity to address the same and thus there could not be said to have been a breach of natural justice.

The proportionality principle as noted by the Learned Judge, was not limited to a relationship between the amount involved in the dispute and the amount of costs awarded. The principle truly meant that when legal costs had to be assessed, all circumstances of the legal proceedings concerned had to be looked into, and not only the amount of the dispute though that was an important factor, especially when assessing whether the amount of work done was reasonable.

Although the government found itself at the right end of this decision, this case has highlighted the potential of facing an extremely steep bill in terms of costs. As shown in this case, such costs awarded may even be higher in value than that of the subject matter in dispute, though it must be said that it is often the case that a litigant will incur more in costs than is usually recovered in terms of taxed costs in proceedings brought before the courts. If the principle in *VV & Anor. v VW* is the standard applicable in the taxation of costs in arbitration proceedings, this potential liability must be taken into account in the assessment of whether to bring the dispute to arbitration and whether arbitration is to be used as a preferred method of resolution of disputes. The taxation of costs according to the scale of costs allowed under the rules of Court may appear to be a better alternative in the sense that the amount of costs is set by the scale stipulated in the rules. The ability to make the decision of preferring court proceedings over arbitration is currently curtailed in the context of the government of Brunei Darussalam due to the absence of legislation permitting suits against the government, hence the reason for inserting arbitration clauses

in all government contracts. It may be timely to consider alternative forms of dispute resolution in recognition of the fact that there can only be one winner in litigation and the loser faces the prospect of an order to pay costs far exceeding the value of the subject matter in dispute.

**9. Current Efforts at Strengthening Arbitration in Brunei Darussalam**

The Attorney General's Chambers is working with the Arbitration Association of Brunei Darussalam (AABD) to develop and enhance the infrastructure and human resource capabilities to facilitate arbitration in Brunei Darussalam. In order for there to be an efficient system and network of able and qualified professionals in Brunei Darussalam, AABD needs to absorb the best individuals available from all the various professional bodies in the country.

- 10.** By default, the dispute resolution clause in Government contracts requires reference to arbitration, the place for the arbitration being Brunei Darussalam as it would save the parties much monies in not having to fly outside Brunei to resolve purely local disputes on agreements that are often subjected to choice of Brunei laws.

It has also been seen that by encouraging domestic arbitrations to be heard in Brunei Darussalam, there will also be an indirect contribution back to the country in the form of contributions that would be made by the



renting of conference meeting rooms and business centre facilities of local hotels, secretarial facilities, taxis and restaurants.

The immediate goal for the arbitration industry is now to find appropriate facilities to fully develop into a good and efficient arbitration centre. The continued improvement and training of AABD's members as well as the fact that there is a wide choice of diversity of leading international arbitrators who are currently mainly non-Brunei nationals, means that there is absolutely no reason why more domestic and international arbitrations cannot take place here in Brunei.

#### **The state of Mediation in Brunei Darussalam**

11. The parallel, but separate, systems of courts co-existing in Brunei today resulted from two distinctive influences. The English legacy is apparent in the Civil Court system while the Islamic inheritance is manifest in the system of Syariah Courts. The Application of Laws Act (Cap. 2 of the Laws of Brunei) is clear proof of the application of the common law of England and the doctrines of equity together with statutes of general application.

His Majesty's commitment to undertake reforms of the Islamic courts and of Islamic laws have signalled Brunei Darussalam's commitment to increasing their role and significance for Brunei's predominantly Malay, Muslim population. The most recent example being His Majesty's titah on

the introduction of an Islamic Criminal Act to deal with Islamic crimes while maintaining the implementation of existing civil and religious legislation<sup>11</sup>. This is consistent with the nation's ideology, *Melayu Islam Beraja* (MIB),<sup>12</sup> 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<sup>13</sup>.

Mediation has been long established in Brunei Darussalam, as a 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 imported western versions of alternative dispute resolution. 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, more consistent with Bruneian culture. The influence of local culture in styles of conflict management has seen the preference for using traditional processes over imported versions. This view is consistent with findings of research on the

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<sup>11</sup> Brunei Times, 16 March 2011, HM proposes Islamic Criminal Law <http://bruneitimes.com.bn/news-national/2011/03/16/hm-proposes-islamic-criminal-law> (last accessed 31 March 2011)

<sup>12</sup> Translates as Malay Islamic Monarchy

<sup>13</sup> Black, Ann: Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes. *Bond Law Review*: Vol. 13: Iss. 2, Article 4.

transfer of western ADR processes into different cultural contexts including Asia<sup>14</sup>.

12. Mediation in practice has a long history in Asian countries<sup>15</sup>. Brunei Darussalam is no exception, however, the practice of mediation seems to have drifted into the background in the face of other dispute resolution mechanisms, such as court based litigation and arbitration. A similar experience is shared in this respect in Malaysia<sup>16</sup>.
  
13. Mediation is a process in which a third person or persons seek to assist the parties resolve a dispute without imposing a binding decision.<sup>17</sup> 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.<sup>18</sup> The person who, by tradition, takes up the function of a mediator for local community disputes is typically the headman either of the kampong or village, called *penghulu* or *ketua kampong*. The headman is chosen on the basis of his standing and authority in that community and there is respect and deference accorded to one holding this position. The headmen also assumed preventative roles in their communities, to minimise the

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<sup>14</sup> Lee & Teh (Ed.): *An Asian Perspective on Mediation* : 2009 SMC, Academy Publishing,

<sup>15</sup> Law Siew Fong: *More than Collectivism – A Guanxi-oriented Approach to Mediation* in Lee & Teh (Eds.) *An Asian Perspective on Mediation*: 2009 SMC, Academy Publishing,

<sup>16</sup> Dato PG Lim, 'Mediation – A Slow Starter in Alternative Dispute Resolution' (2004) 1 MLJ xv

<sup>17</sup> Michael Mills, 'China: Some Lessons in Mediation' [1993] *Australian International Law News*, 31.

<sup>18</sup> See generally Laurence Boule, *Mediation: Principles, Process and Practice*, (1996) 3.

escalation of conflict into a dispute. Because of long standing membership of that community, they used their cumulative knowledge of people and events to deal with grievances that experience suggests could turn into a dispute. When a dispute develops and intervention of a third party is sought, the parties in the dispute approach the headman directly, jointly or singly, or through another person in the community. Generally, the mediation will be informal, so that the venue and behaviour will be a matter familiar to the parties.

14. Despite its historical usage, the use of mediation as a method of dispute resolution has fallen into disuse due to various factors such as “dissensus, or divergence in values”<sup>19</sup>. There is little in the way of legislation which mandates the use of mediation, however, notable examples of this would include the appointment of a *Hakam* in the Islamic Family Law Order 1999, and the pre-trial conferences mandated in the Rules of the Supreme Court.
  
15. The Court on its own motion to appear before it in order to make “such order or give such direction as it thinks fit, for the just, expedition and economical disposal of the cause or matter”<sup>20</sup>. This example may not be entirely appropriate to be labelled a mediation as the pre-trial conference takes place after the parties have commenced litigation in Court.

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<sup>19</sup> Vilhelm Aubert, ‘Competition and Dissensus: Two Types of Conflict and Conflict Resolution’ (1963) 7 *Journal of Conflict Resolution*, 26. Cited in Black: *Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes*. *Bond Law Review*: Vol. 13: Iss. 2, Article 4.

<sup>20</sup> Order 34A Rule 1, Rules of Supreme Court

16. A *Hakam* may be appointed under Section 43 (2) of the Islamic Family Law Order, 1999 to mediate between a husband and a wife where there are “constant quarrels between” them. The *Hakam* is to endeavour to obtain full authority from both parties to consider and persuade the parties in their applications for divorce. Two *Hakams* are appointed, one acting for the wife and the other for the husband. The role of the *Hakam*, is to obtain full authority from both parties, if he is acting for the husband, for the pronouncement of *talaq* or to accept *tebus talaq*, while in the case of the *Hakam* acting for the wife, to secure acceptance of the *talaq* or to accept *tebus talaq*. This provision within the Islamic Family Law Order, 1999 remains the only legislative provision mandating what is understood as mediation.
17. The views espoused by Black are indicative of the state of mediation within Brunei Darussalam. <sup>21</sup> The lack of interest in using mediation is due to the absence of centres providing mediation services, and it was not widely regarded as a service to be offered by the existing law firms. Lawyers in Brunei see mediation as less effective than other processes offered in that the clients who come to law firms do so with the expectation of more typical legal services being provided. Additionally, as intervention by way of traditional mediation is seen as taking place informally in the social setting in which most disputes arise, it is less likely

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<sup>21</sup> In contrast Australian States have legislation providing opportunities for litigants to use ADR processes, rather than proceeding to trial.

to be viewed as an appropriate form of dispute resolution in a lawyer's office.

18. Nevertheless, this is not to say that mediation has no place in the scheme of dispute resolution in context of Brunei Darussalam. If the consequences such as those arising out from cases which are referred to arbitration as evidenced in cases such as *VV v VW* it is not unforeseeable that alternate forms of dispute resolution will be sought, mediation being a promising alternative.
  
19. The introduction of the Consumer Protection (Fair Trading) Order, 2011<sup>22</sup> gives the Small Claims Tribunal<sup>23</sup> the jurisdiction to deal with claims filed by consumers against unfair practices by suppliers providing services in the course of business. Section 12(1) of the Small Claims Tribunal Order describes the primary function of the tribunal as “(attempting) to bring all parties to a dispute to an agreed settlement”.
  
20. Although the term agreed settlement is not defined, it is not doubted that an agreed settlement is the by-product of a successful mediation process, the emphasis being on the “agreed” nature of the settlement as opposed to

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<sup>22</sup> which came into force on 1 January 2012

<sup>23</sup> The Small Claims Tribunals Order 2006 is not yet in force at the time of writing. However, efforts are underway to put this Order in place to complement the application of the Consumer (Fair Trading) Order 2011.

a decision being imposed by an arbitrator or a court. With a majority of claims being likely to comprise of small claims, namely those below \$10,000, mediation practice will be given a boost by the mandate given by the operation of the Consumer Protection (Fair Trading) Order, 2011 and the Small Claims Tribunal Order.

21. Still, challenges remain in the form of resistance from the legal profession in promoting mediation as a direct competitor to the resort to litigation as a method of dispute resolution. Nevertheless, the nature of the small claim may still tempt practitioners to steer such claims towards mediation while concentrating their efforts for claims and disputes of larger value and complexity.
  
22. Sufficient publicity of the availability of the scheme will also inform and educate the public of this alternative form of enforcing their rights without the attendant costs of full blown litigation. Businesses should also be brought on board by promoting the use of mediation to resolve disputes with their customers. Such a scheme may be promoted by the Economic Development Board as a badge of good trading practice among businesses in Brunei Darussalam.
  
23. With the cooperation of the legal profession, businesses and the public, the use of mediation should see an increase. After all, it is within the

culture of Bruneians to prefer to resolve a matter amicably and use litigation only as a last resort.

## **Conclusion**

22. Galanter's views on the proportion of cases resolved by ways of formal court proceedings are instructive. He noted that: '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'.<sup>24</sup> It is arguable that the nature of society in Brunei Darussalam still maintains a 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, in the absence of reliable statistics, remain perceptibly small. The lawyer's role is more clearly delineated in commercial and business transactions rather than in family and community issues where the majority of disputes arise.
23. Arbitration may also be seen as existing within the realm of commercial and construction disputes. Given the general level of satisfaction and confidence in the Courts of Brunei Darussalam, this mitigates against the

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<sup>24</sup> Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1, 24. Cited in Black: *Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes*. *Bond Law Review*: Vol. 13: Iss. 2, Article 4.



use of arbitration as a preferred course of dispute resolution. Even in the setting of government contracts where arbitration is mandated due to the absence of legislation providing for proceedings against the government, issues such as costs and the need to pay for everything in the arbitral setting from arbitrator's fees and fees for the venue, is starting the search for other viable means of dispute resolution.

24. Mediation is emerging as a front runner especially in the context of family law and consumer protection. The introduction of the Consumer (Fair Trading) Order 2011 may yet provide such an impetus. This view is in keeping with the perspective that Bruneians wherever possible will prefer to avoid adversarial means, so that business and social relationships can be preserved. The small role that mediation has been playing in marital and family disputes is revitalised by the Islamic Family Law Order, 1999.
  
25. It is essential to note that the success of any alternative dispute resolution mechanism requires the co-operation and buy-in of three essential players – the courts, the lawyers and the consumers<sup>25</sup>. The combination of their efforts in recognising and promoting these alternate dispute mechanisms as viable alternatives is crucial in ensuring its take up, much like the early days of arbitration. A change in mind-set of legal practitioners and also amendments to the law mandating the use of mediation may be necessary.

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<sup>25</sup> For an interesting discussion on the development of mediation in Malaysia and the essential ingredients of ensuring its take up and implementation, see Dato PG Lim, *Mediation – A Slow Starter in Alternative Dispute Resolution (2004) 1 MLJ xv*

26. Coupled with the efforts undertaken by the government of Brunei Darussalam to preserve a Bruneian's identity, the prioritising and retention of 'inherent norms of our own internal lifestyle that is collectively practiced by our society'<sup>26</sup> may yet be the impetus for seeing the development of mediation as a viable mechanism for dispute resolution.

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<sup>26</sup> Abdul Latif bin Haji Ibrahim, 'Cultural and Counter-cultural Forces in Contemporary Brunei Darussalam' in Thumboo (ed), Cited in Black: Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes. *Bond Law Review*: Vol. 13: Iss. 2, Article 4.