

ADR: Trends and Other Mechanisms

Brunei Darussalam's Perspective



Introduction

- Definition of Alternative Dispute Resolution (ADR)
- The word “Alternative” in ADR may refer to 2 perspectives:
 - ADR may mean an “*alternative*” to the formal court structure as a process for dispute resolution; or
 - ADR as alternatives or choices of the available processes of dispute resolution - mediation, conciliation or arbitration

Introduction (cont'd)

- The scope of this paper refers to ADR in the context of dispute resolution as an alternative to the formal Court structure as a method of dispute resolution.

Historical Context of ADR

- ADR is not new;
- The formal court structure in Brunei Darussalam was implemented in the days of Brunei as a British protectorate;
- The formation of the Magistrates, Courts, High Court and the Court of Appeal were made by legislation;
- The appointment of magistrates and judges as adjudicators of disputes was also made under their respective legislation.

Historical Context of ADR

- Prior to the legislation enacting the Court structure, disputes were resolved by traditional forms of resolution at various levels of society. Examples are:
 - Village Heads (*Ketua Kampong, Penghulus*)
 - Head of the Longhouse
 - Community Leaders (*Kapitans etc.*)
 - Religious Leaders (*Kadis etc.*)
 - The Sultan

Historical Context of ADR

- The traditional forms of dispute resolution employed the use of consultations and negotiations not unlike the *'modern'* forms of mediation and conciliation we are discussing today.

Historical Context of ADR

- These forms of dispute resolution were relegated to the background with the introduction of the formal Court structure.
- The possible reasons for this:
 - Formal Court structure provided applied the *common law* which introduced Courts of record;
 - The system of records and precedents provided a reliable system of reporting Court decisions which introduced certainty in dispute resolutions;
 - Courts Rules and procedures were formalised providing a system which became familiar and was internationally accepted by litigants;
 - The concept of independence of the judiciary provided the impression of fairness and independence of Magistrates and Judges appointed in the Court system.

Historical Context of ADR

- In contrast, the traditional forms of dispute resolution –
 - Were informal;
 - Decisions may not be based on precedents;
 - Process depended on the social status and level of respect commanded by the mediator;
 - Personal relationships, kinships in small communities etc. erode the independence of decision maker and decisions made.

Problems in the formal Court Structure

- As populations grew, the volume of dispute also increased exponentially.
- Increase led to delays in the formal Court structures resulting in backlogs.
- *“Justice delayed is Justice Denied”*
- This resulted in the need to look at *“Alternative”* forms of dispute resolution we have today.

ADR in current Brunei Legislation

- The use of mediation and conciliation has been preserved in various legislation enacted in Brunei Darussalam.
- Notably in the court procedures by way of Pre-Trial Conferences and in legislation applying Syariah principles in family and marital matters.
 - Islamic Family Law Order, 1999
 - Order 34A of the Rules of Supreme Court

Future Trends in ADR?

- It is ironic that the 'modern' forms of ADR as we discuss them today were applied before the introduction of the formal Court structure.
- Perhaps, the future trend in ADR is to look back at the institutions which existed before there were formal Court structures.
- Lessons may be learnt from past experience of traditional methods of conciliation.

Conclusion

“.....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 (the concept of *Melayu Islam Beraja* or *Malay Islamic Monarchy*), 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.”

- Alternative Dispute Resolution In Brunei Darussalam: The Blending Of Imported And Traditional Processes, Ann Black