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DEVELOPING BRUNEI DARUSSALAM AS AN ASEAN HUB FOR INTERNATIONAL ISLAMIC FINANCE DISPUTE RESOLUTION: OPPORTUNITY OR OVER-AMBITION?

NOBUMICHI TERAMURA*

I. INTRODUCTION

International dispute resolution is only at an early stage of development in Brunei. Although the government established the Brunei Darussalam Arbitration Centre (BDAC) in 2014 to provide domestic and international users with arbitration and mediation services, the institution has yet to attract a significant caseload.¹ This is in contrast with neighbouring countries such as Singapore (a regional hub for international dispute resolution) and Malaysia (an active and rising centre of dispute settlement). Their flagship arbitration institutions, the Singapore International Arbitration Centre (SIAC) and the Asian International Arbitration Centre (AIAC) (formerly known as the Kuala Lumpur Regional Centre for Arbitration), handle several hundred cases every year and have generated substantial cashflow into their respective legal sectors.² This trend has still to materialise in Brunei.

When an arbitral institution is behind the competition in the global dispute resolution industry, an option for the institution to catch up with front-runners would be a niche-marketing strategy.³ For example, Australia plans to take advantage of its expertise in the resources sector to attract high-profile arbitration cases.⁴ Japan has increased investment in intellectual property dispute settlement by establishing the International Arbitration Center in Tokyo.⁵ Brunei, as a Muslim state by its Constitution,⁶ is likely to have a competitive advantage in Islamic finance (IF). Islam strongly influences the way in which Brunei's business transactions, legal system and social institutions are conducted. IF is practised in the country⁷ and Brunei's lawyers

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¹ The author's interview with Bruneian legal practitioners. As for the BDAC, see <http://www.bdac.com.bn/Style/Home.aspx> (last accessed 28 December 2021).

² Singapore International Arbitration Centre, *Annual Report 2020*, available at https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf (last accessed 28 December 2021); Asian International Arbitration Centre, *Annual Report 2019 & 2020*, available at https://admin.aiac.world/uploads/ckupload/ckupload_20210727102858_34.pdf (last accessed 28 December 2021).

³ James Claxton, Luke Nottage and Nobumichi Teramura, "Disruption as a Catalyst for International Dispute Services in Japan: No Longer Business as Usual?" in Luke Nottage et al. (eds.), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer 2021).

⁴ WA Arbitration Initiative, *2019 WA Arbitration Report*, available at <https://static1.squarespace.com/static/59427471d2b857e78324f18f/t/5cc91aa6ee6eb061011dafb8/1556683450381/WA+Arbitration+Report+2019.pdf> (last accessed 28 December 2021); Luke Nottage and Nobumichi Teramura, "Australia's (In)Capacity in International Commercial Arbitration" (Kluwer Arbitration Blog, 20 September 2018).

⁵ See <https://www.iactokyo.com/> (last accessed 28 December 2021); Claxton, Nottage and Teramura, "Disruption as a Catalyst for International Dispute Services in Japan".

⁶ Constitution of Brunei Darussalam, art. 3.

⁷ <https://www.bdc.gov.bn/regulatory/islamic-finance/overview#:~:text=Brunei%20Darussalam's%20Islamic%20financial%20ecosystem,of%20the%20total%20ma>

are familiar with the common law and the Syariah.⁸ Thus, Brunei has the potential to become a centre for the resolution of Islamic finance and banking disputes.

This paper will examine Brunei's potential for Islamic financial dispute settlement (IFDS). It will compare Brunei's position with regional competitors (such as Singapore and Malaysia) and examine the advantages and disadvantages of Brunei's marketing itself as a centre for IF arbitration for the 275 million Muslims in Southeast Asia.

II. IS BRUNEI AN ATTRACTIVE DISPUTE RESOLUTION FORUM?

Brunei is not currently perceived as a leader in international commercial arbitration (ICA). There is a paucity of research assessing the country's arbitration-friendliness based on objective criteria. One may fill this gap by applying the arbitration reform model developed by Reyes and Gu.⁹ The model suggests that the essential ingredients for Asia-Pacific jurisdictions to become successful international, regional or quasi-regional arbitration centres are as follows:

- (1) adoption of the [UNCITRAL] Model Law [on International Commercial Arbitration] and the New York Convention [on Recognition and Enforcement of Foreign Arbitral Awards];
- (2) establishment of at least one national body (institution) to administer arbitrations;
- (3) an arbitration-friendly (or pro-arbitration) judiciary staffed with judges familiar with best practices in application of the Model Law and the New York Convention;
- (4) establishment of an arbitration community, that is, a sufficient number of arbitrators, lawyers, business persons and academics who are familiar with arbitration as a means of commercial dispute resolution;
- (5) a sufficient volume of existing or anticipated commercial activity to make use of (and justify the expense involved in establishing) a modern arbitration infrastructure within the jurisdiction; and
- (6) an openness to the introduction of further arbitration reform or innovation so as to keep 'one step ahead' of competing jurisdictions.¹⁰

According to Reyes and Gu, Singapore's success as a dispute resolution hub is underpinned by the state's fulfillment of all six ingredients.¹¹ Malaysia falls slightly behind due to legacy problems, such as corruption and its uncertain impact on the judiciary and arbitration reform. It is unclear whether Malaysia meets ingredient (3).¹² As those authors excluded Brunei from the scope of their research, this paper applies their reform model to the Sultanate and examines its level of actual and possible achievement. Unfortunately, the result is unfavourable to Brunei. Three of the six ingredients remain to be developed.

Brunei fully meets requirements (1), (2) and (3). On (1), the nation has been a party to the New York Convention since 1996.¹³ Its International Arbitration Order 2009

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(last accessed 28 December 2021).

⁸ Nobumichi Teramura and Salim Farrar, "Special Report on Online Legal Education in Malaysia, Brunei Darussalam and Singapore" (2021) The International Academy of Comparative Law's 2022 Congress, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918043 (last accessed 28 December 2021).

⁹ Anselmo Reyes and Weixia Gu, "Introduction: Towards a Model of Arbitration Reform in the Asia Pacific" in Anselmo Reyes and Weixia Gu (eds.), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing 2018).

¹⁰ *Ibid.*, at 4.

¹¹ Anselmo Reyes and Weixia Gu, "Conclusion: An Asia Pacific Model of Arbitration Reform" in Anselmo Reyes and Weixia Gu (eds.), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing 2018), 286-88.

¹² *Ibid.*, at 289-90.

¹³ <https://www.newyorkconvention.org/countries> (last accessed 28 December 2021).

follows the 2006 UNCITRAL Model Law.¹⁴ Hence, requirement (1) is met. On (2), the government of Brunei has provided strong support to the BDAC. The flagship arbitration institution is attached to the Prime Minister's Office (PMO), and its management team is comprised of senior officers from the PMO and other government ministries.¹⁵ On (3), the Brunei judiciary is supportive of ICA.¹⁶ Where the matter in dispute is subject to an arbitration agreement, the courts will normally stay judicial proceedings.¹⁷ If the parties intend to appeal against an arbitral tribunal's ruling on jurisdiction, they must apply to the Brunei High Court within 30 days of the receipt of the ruling. Further appeal to the Brunei Court of Appeal is permitted only with leave.¹⁸ Brunei's appeal courts are likely to be knowledgeable of ICA and to be arbitration-friendly, because major cases involving transnational issues are heard by judges drawn from the Panel of International Judges. The panel is composed of retired judges from former British colonies, such as Hong Kong and Singapore, who have substantial experience of commercial disputes.¹⁹ Other cases are handled by Bruneian judicial officers who normally have had legal training in the UK,²⁰ likewise an arbitration-friendly jurisdiction. Thus, Brunei has the basic legal infrastructure needed to bring in ICA cases. The difficulty is that the Sultanate is short of the other ingredients. On (4), it has yet to establish a thriving arbitration community despite the intensive efforts of the Arbitration Association Brunei Darussalam (AABD) – an independent non-profit making body founded in 2005 to promote alternative dispute resolution in Brunei.²¹ The current President of the AABD, Dr Colin Ong Q.C.,²² is passionate about helping Bruneian legal practitioners expand their arbitration-related networks in and out of the country.²³ Nevertheless, the size of the arbitration community will inevitably be modest due to the small legal profession. Only 36 law firms and 129 lawyers are registered with the Law Society of Brunei Darussalam,²⁴ in stark contrast to the number of legal practitioners in Singapore (6,333) and Malaysia (20,384).²⁵ Moreover, there is a limited diversity of professional background. For instance, Brunei only has

¹⁴ Ahmad Jefri Rahman, "Developments in Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Brunei Darussalam – Part 1: Arbitration" (2014) 16 *Asian Dispute Review* 68. See also https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 28 December 2021).

¹⁵ S. Rozaimarlenny Abdul Rahman, "Establishment of the Brunei Darussalam Arbitration Centre" (ZICO Law Blog, 29 March 2017), available at <https://zico.group/blog/legal-alert-brunei-establishment-brunei-darussalam-arbitration-centre/> (last accessed 28 December 2021).

¹⁶ Colin Ong, "Brunei" in Global Legal Group (ed.), *International Comparative Legal Guides*, 18th ed. (Global Legal Group 2021).

¹⁷ International Arbitration Order 2009, s. 6.

¹⁸ UNCITRAL Model Law on International Commercial Arbitration, art. 16(3); International Arbitration Order 2009, s. 12(1); Ong, "Brunei", 51.

¹⁹ <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Panel%20of%20International%20Judges.aspx> (last accessed 28 December 2021) (noting that the Court of Appeal consists of three international judges only).

²⁰ Teramura and Farrar, "Special Report on Online Legal Education in Malaysia, Brunei Darussalam and Singapore" (noting that having legal training in the UK is the norm among Bruneian legal practitioners).

²¹ <http://www.aprag.org/members/> (last accessed 28 December 2021). The President of the AABD has the authority to make the default arbitrator appointment in domestic cases: Arbitration Order 2009, ss. 13(3) and (8). Note, however, that the AABD is not an arbitration institution and does not administer arbitration proceedings.

²² <https://iclg.com/firms/dr-colin-ong-legal-services/colin-ong> (last accessed 28 December 2021).

²³ For example, the AABD hosted the Regional Arbitral Institutes Forum (RAIF) 2019 Conference in Brunei: <https://borneobulletin.com.bn/aabd-hosts-regional-arbitral-institutes-forum-2019-conference/> (last accessed 28 December 2021). On 5 October 2021, it jointly organised a webinar on "The Rise of Arbitration in Asia" with the Thailand Arbitration Center (THAC) as part of the THAC International ADR Webinar Series 2021.

²⁴ <http://www.bruneilawsociety.com/> (last accessed 28 December 2021).

²⁵ <https://www.lawsociety.org.sg/news-media/statistics/> (last accessed 28 December 2021); <https://www.malaysianbar.org.my/article/about-us/malaysian-bar-and-bar-council/about-us/figures/general-statistics> (last accessed 28 December 2021).

one full-time academic specialising in arbitration (this author).²⁶ On (5), Brunei has been experimenting with the inclusion of a dispute resolution clause designating the BDAC in new government contracts.²⁷ Despite this, arbitration remains little used by Brunei businesses. No statistics are available, although the number of arbitration cases referred to the BDAC is reportedly “very low”.²⁸ There is scant evidence of parties choosing Brunei as a seat of arbitration. Finally, on (6), the Sultanate has no plans to undertake a round of arbitration reform in the near future. The government-backed BDAC instead intends to increase its investment into mediation as a means of dispute resolution, although the Sultanate has not to date ratified the Singapore Convention on Mediation.²⁹ Hence, Brunei lacks strong support from domestic businesses and professionals for promoting arbitration as a means to resolve commercial disputes. That has possibly made the government hesitant to put forward further initiatives to transform the attractiveness and competitiveness of the country’s arbitration industry. Given such context, one might ask whether promoting IF arbitration can make a difference.

III. INTERNATIONAL ISLAMIC FINANCE: AN OPPORTUNITY FOR BRUNEI?

The world-wide expansion of Islamic financial institutions (IFIs) and the recent rapid growth of IF assets at a global level³⁰ have made stakeholders realise the need to build an appropriate dispute resolution mechanism for IFDS.³¹ Typically, IFIs tailor their products to conform with the Islamic laws and practices of the jurisdictions in which they operate. That requires them to come up with financial products, including associated dispute resolution mechanisms, that are Syariah-compliant.³² Although parties have opted in the past to litigate disputes concerning IF assets,³³ the popularity of lawsuits among Muslim businesses has been declining due to the reluctance of secular courts to recognise Syariah as a body of law capable of governing commercial transactions. Those courts have instead regarded Islamic law as a matter of religious belief and doctrine.³⁴ Accordingly, recent IFIs have preferred arbitration to litigation because arbitrators are allowed to apply Syariah as the applicable law of a dispute and because parties can appoint Syariah scholars as arbitrators.³⁵ The resultant awards can then be enforced through secular courts applying the 1958 New York Convention.³⁶ Thus, there is an increasing global trend towards IF arbitration.

²⁶ As for the curious lack of diversity in the proliferating discussion about the lack of diversity in international arbitration, see Luke Nottage, Nobumichi Teramura and James Tanna, “Developing Diversity within Diversity Discourse: Remembering Non-Lawyers in Arbitration” in Shahla Ali et al. (eds.), *Sustainable Diversity in Arbitration* (Edward Elgar 2022).

²⁷ The author’s interview with local practitioners.

²⁸ The author’s interview with local practitioners.

²⁹ <https://www.singaporeconvention.org/jurisdictions> (last accessed 28 December 2021).

³⁰ Sona Tsaturyan, “Litigation vs. Arbitration & ADR for Islamic Finance Disputes - Theory & Practice” (2021) *Transnational Dispute Management* (projecting that total IF assets will increase from USD 2.88 trillion to USD 3.69 trillion between 2019 and 2024).

³¹ ICC Commission on Arbitration and ADR, *ICC Commission Report: Financial Institutions and International Arbitration*, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf> (last accessed 28 December 2021), 18-19.

³² Adnan Trakic, John Benson and Pervaiz K. Ahmed, “In Search of an Effective Dispute Resolution Mechanism in Islamic Finance” in Adnan Trakic, John Benson and Pervaiz K. Ahmed (eds.), *Dispute Resolution in Islamic Finance: Alternatives to Litigation?* (Routledge 2020), 1.

³³ *Ibid.*

³⁴ *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd.* [2004] EWCA Civ 19; [2004] 1 W.L.R. 1784.

³⁵ Tsaturyan, “Litigation vs. Arbitration & ADR for Islamic Finance Disputes”; M.H. Taviana, “Sharia as the Applicable Law in Islamic Finance Disputes” (2021) *Transnational Dispute Management*.

³⁶ *Musawi v R E International (UK) Ltd.* [2007] EWHC 2981 (Ch).

Responding to that important need could help Brunei motivate domestic businesses and legal professionals to participate in further arbitration reform with the objective of transforming the Sultanate into a leading IFDS centre for Muslim merchants in Southeast Asia. Such status might in turn contribute to the domestic economy, including hotels, conference facilities and ancillary services.³⁷

Bandar Seri Begawan can become the “go to” neutral forum for Muslim parties from Indonesia and Malaysia, since Brunei’s culture and religion is similar to that of neighbouring states. Brunei is a Malay Muslim country where Bahasa Melayu is used in business transactions and legal proceedings. Like most parts of Indonesia and Malaysia, Brunei follows the Shafi’i madzhab Islamic school of jurisprudence and the centralised Syariah Financial Supervisory Board supports the implementation of Shafi’i principles in business by advising on Syariah issues related to IF transactions.³⁸ Brunei would not be without competition. Malaysia appeals as an IFDS hub because of its Islamic background and the AIAC’s promotion of IFDS under its innovative i-Arbitration Rules.³⁹ However, Malaysia cannot function as a neutral “third” country in a dispute between Indonesian and Malay parties. Brunei’s cultural and geographical situation will assist in positioning the country as a regional IFDS centre and will be in line with the government’s vision of growing domestic IF industries.⁴⁰

The opportunity might also lead to further institutional reforms in Brunei. For example, the BDAC and AABD could establish their respective rules on IF arbitration. Each could publish a list of its IF arbitrators. Moreover, the small legal profession will be interested in requesting the Justice and Education Ministries to provide for more lawyers trained in IF law. Initiatives such as these will not necessarily be costly and could pave the way for Brunei to appear on the ASEAN map of key ICA jurisdictions.

³⁷ Rahman, “Developments in Arbitration and Mediation as Alternative Dispute Resolution Mechanisms in Brunei Darussalam”, 72.

³⁸ Syariah Financial Supervisory Board Order 2006.

³⁹ Nobumichi Teramura, Shahla Ali and Anselmo Reyes, “Expanding Asia-Pacific Frontiers for International Dispute Resolution: Conclusions and Recommendations” in Luke Nottage et al. (eds.), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer 2021).

⁴⁰ <https://www.bdcg.gov.bn/regulatory/islamic-finance/overview> (last accessed 28 December 2021) (noting that Islamic finance assets occupy more than 50% of the total market share in Brunei).