

# **Brunei Legal Regime on ICT : Are our laws conducive enough?**

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## **INTRODUCTION**

### **The Legal System in brief**

1. Due to Brunei's special relationship with Great Britain, the legal system has developed along the lines of the English legal system.<sup>2</sup> The legal system is based on the English common law. All laws are either derived from written laws in the form of statutes (Enactments, Acts, Emergency Orders, Orders and subsidiary regulations). Decisions of the higher courts in the British Commonwealth especially those from Singapore, Malaysia and UK have persuasive authorities and are often used by the Brunei courts in statutory interpretations. Islamic Sharia law supersedes civil law in a number of areas especially those relating to Islamic family laws.
2. Brunei Darussalam has a written Constitution and there are provisions governing the 3 branches of government, the Executive, The Legislative and The Judiciary. The Legislative Council was however temporarily suspended and hitherto all laws are now passed by His Majesty in the form of Orders as provided by Section 83(3) of the Constitution.<sup>3</sup> However there is now efforts by the Government to revive the Legislative C

## **B LEGAL APPROACH ON ICT AND E-COMMERCE**

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<sup>2</sup> see The Legal System of Brunei Darussalam by Ahmad Basuni Abas and Dy Hasnah Hassan published in ASEAN Legal Systems by Butterworths Asia

<sup>3</sup> Ibid p 9

3. There is no single legal blueprint on how laws are enacted to support ICT in Brunei. As laws are often drafted to support each individual policy of a Government body or Ministry, laws are often drafted on a piecemeal approach or a case by case basis. Therefore a number of laws that are seen to be ICT related were enacted on the needs to regulate a particular activity. For instance the enactment of the Internet Code of Practice, a subsidiary to the Broadcasting Act was enacted to regulate internet content which was seen at the time of enactment, in need of regulation.
4. However, with the setting up of the Brunei IT Council (BIT) and the various committees, a more structured approach on the development of laws to support ICT in Brunei were initiated. The Attorney General's Chambers was invited to become members to these various bodies, namely the eGovernment Program Executive Committee and when the Brunei National IT Plan was established, specific legal recommendations were made.
5. The specific recommendations include the enactment of a specific law to support e-commerce which would include a commercial code to support business transactions conducted by electronic means, that will support and enable the electronic applications, filings and licenses for the public sector and the whole Brunei Government (the E-Government provision) and provisions on public key infrastructure. The second recommendation was the introduction of a comprehensive penal code to cover computer related offences in order to ensure that the Internet and Information Technology will be a safe media to conduct legitimate business transactions. The third recommendation was to introduce strong copyright legislation in line with the recommendations of the WTO in the TRIPS Agreement. This recommendation was intended that the IPR rights holders are protected in the electronic environment and it is hoped that by legally recognising the rights of authors in Brunei, the strong copyright law will encourage local innovation as well as FDI in the ICT sector.

## ***C THE INTRODUCTION OF ICT AND E-COMMERCE RELATED LAWS***

### **Earlier adoption**

6. Our attempt to introduce "ICT-friendly" legislations to address any legal hurdles that impede the use of information communications technology went back for several years. For instance The Emergency (Evidence Act) (Amendment) Order

1997<sup>4</sup> was introduced to allow admissibility of computer evidence in any proceedings in court. Another example was the amendment to the High Court Rules through the Brunei Rules of the High Court (Amendment) (No. 2) Rules 1999<sup>5</sup> which came into force on 1st June 1999. This has a provision to allow for the establishment of an electronic filing service whereby specified court documents can be filed or served via electronic transmission. This is an important milestone that marks the judicial readiness to be more “ICT-friendly” the rules governing the filing and acceptance of courts documents which will pave the way the establishment of the delivery of online services offered by the courts in Brunei similarly along the line taken by the Singapore Courts through their LawNet Project.

### **Regulating Internet content**

7. In the area of content regulation, there are already existing bodies of laws that can be used to regulate Internet content. Although these laws were enacted before the era of the Internet and modern information technologies but because of their technology-neutral provisions, these laws are still good law for the purpose of regulating Internet content. These laws include **Section 292 of the Penal Code** (Chapter 22) that prohibits the sale or distribution of obscene article (pornographic materials) and the **Common Gaming House Act** which has been used to prosecute offenders who conducted illegal online gambling.
8. Other already existing legislations that are thought to be relevant in regulating Internet content include the following legislations:
  - **Censorship of Films and Public Entertainment Act (Cap 69)**
  - **Sedition Act (Cap 24)**
  - **Undesirable Publications Act (Cap 25)**
  - **Public Entertainment Act (Cap 181)**
  - **Defamation Act (Cap 192)**

### **Broadcasting (Class Licence) Notification, 2001<sup>6</sup>**

9. The Broadcasting (Class Licence) Notification, 2000 is a subsidiary legislation under the Broadcasting Act (Chapter 180) and it introduces a new Class Licensing Scheme, which covers the following licensable broadcasting services: Value Added Network (VAN) Computer on-line services that are provided by Internet Content Providers and Internet Service Providers.
10. This subsidiary regulation introduces a simple licensing scheme for the Internet and Internet related services, specifically for Internet Access Providers and Internet Content Providers.

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<sup>4</sup> Notification Number S. 29 Government Gazette No 21 dated 20<sup>th</sup> December 1997

<sup>5</sup> Notification Number S. 8 Government Gazette No 5 dated 27<sup>th</sup> February 1999

<sup>6</sup> subsidiary regulation of Broadcasting Act (Cap 180)

The licensing scheme automatically licences Internet access services providers and internet content providers. For internet access service providers, either ISPs or Internet resellers (like cyber cafés), they are no longer required to apply for a licence to carry out their businesses, but they are required to register with the Director of Broadcasting. Registration involves filling in a form and (where applicable) paying a nominal licence fee.

11. For internet content providers, the class licence automatically licences them. They do not need to register with the Director of Broadcasting unless their web pages are primarily set up to promote political or religious causes, or unless they are required by the Minister responsible for broadcasting matters to register. Registration means that they are responsible for the content they put up. In any case, all Internet content providers are required to abide by the Internet Code of Practice. Failure to comply can incur sanctions and fines on the providers.

### **Internet Code of Practice**<sup>7</sup>

12. The Internet Code of Practice Notification is a subsidiary legislation the Broadcasting Act (Chapter 180). The Internet Code of Practice is introduced to ensure that content on the Internet provided in Brunei Darussalam is not against the public interest or national harmony or which offends against good taste and decency. The Broadcasting Authority in Brunei Darussalam is concerned that content provided on the Internet from Brunei Darussalam comply with a set of basic content requirements that are in line with Brunei Darussalam's religious values, social and societal mores and that the content do not offend the Islamic religion, society and do not incite social disharmony and instability in Brunei Darussalam.

### **Computer Misuse Order 2000**

13. The Computer Misuse Order was introduced to computer related offences such as unauthorised access to computer material, access with intent to commit or facilitate commission of offence, unauthorized modification of computer material, unauthorized disclosure of access code, unauthorized obstruction of use of computer. Has separate enhance punishment for offences involving “protected computers”.

### **Copyright Order 1999**

14. The Copyright Order 1999 defines computer program and database which is a table or compilation of data or other material,

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<sup>7</sup> S 12/2001

whether machine readable or other form, original by reason of the selection or arrangement of its contents as “literary work” entitled for copyright protection.

15. The number of successful prosecutions and civil actions undertaken have proved that the law has been working. However the author notes the problem of copyright piracy still remains very high. Discussions are still currently ongoing whether or not to strengthen the regime on this area of the law. One difficult challenge for the law enforcement agencies is to gain the “buy in” from the public on the need to fight copyright or Intellectual Property Rights piracy. The usual public sentiment is that there is a great disparity between the price of original works and that of of pirated works. This public sentiment will always remain for so long as the country lacks the capacity to produce enough pool of innovators and IPR creators. When a country has sufficient pool of innovators and IPR creators, support for the enforcement of IPR regime will be high.
16. The author therefore recommends for a national blueprint to promote local innovations to increase our capability to produce innovators and IPR creators. In the ICT sector, the topic of this paper, the need to establish ICT hubs and incubators must be given top priority. One example is for the Government to put aside “innovations funds” to support local software developers and programmers. The introduction of Asia Pacific Information Communication Technology Award (APICTA) and Brunei Information Communications Technology Award (BICTA) to encourage innovations are few laudable examples.

### **Electronic Transactions Order 2000 (ETO)**

17. This legislation was recommended to be introduced mainly to address the issues pertaining to the conduct of online business transactions.
18. The main objectives of this Order among others include enabling and facilitating the use of electronic signatures and providing equal treatment to users of paper based documentation and users of computer-based electronic documentation. It is intended that this legislation can spearhead Brunei to foster the delivery of both public and private sector services online . The ETO was specifically made to ensure that an electronic transaction shall not be treated as legally invalid simply because it was made electronically. This media neutral approach reflects the principle of non-discrimination between information supported by a paper medium and information communicated or stored electronically. The legislation provides a code of commercial practice for business transactions done electronically by providing, inter alia, legal recognition to electronic signatures,

the retention of records by electronic means, giving legal validity to electronic contracts, legislative framework for Certification Authorities (CAs) and use of digital signatures, cross-certification of foreign CAs and it has a special omnibus e-government provision that allows the public sector agencies to accept filing, application and payment of licences or permits electronically.

**Authority for Info-Communications Technology Industry of Brunei Darussalam Order (wef 1<sup>st</sup> January 2003)**

19. The enactment of the Authority for Information-Communication Technology Industry of Brunei Darussalam Order which came into effect on 1<sup>st</sup> January 2003, marks another important legislative development in Brunei to support the ICT sector. This legislation creates a super body known as AiTi which regulates both the ICT and telecommunication sectors.
20. The Order provides wide ranging powers to AiTi, which amongst others include powers to liberalise the ICT sectors in Brunei.

**D. THE REAL CHALLENGE IN ENACTING CONDUCTIVE LAWS: HOW DO YOU ADDRESS CONVERGENCE OF ICT TECHNOLOGIES AND BROADCASTING?**

21. The telecommunication industry in most countries including Brunei is often typified as monopolistic or state-owned industry. This is fairly understood. Putting up such infrastructure is very expensive business and because of that it needs to be protected. Because of this in most countries including Brunei, such industry starts off as a regulated industry. In Brunei, the telecommunications sector is governed under the Telecommunications Act (Cap 54). This Act was enacted solely to ensure this monopolistic status quo would remain. That is the reason our telecommunication service started off as a Government Department. (JTB)
22. The IT industry on the other hand is a direct opposite. It is unregulated and is often driven by creativity and innovation. Perhaps the most obvious reason why such an industry lacks regulation is the rapid evolvement of the technology which makes regulation difficult if not unworkable.
23. The Broadcasting industry on the other hand is like the telecommunication industry. Like in most countries it has its origin of state-owned monopoly meant to serve as a public means of communication. It is source-centric, one-to-many and based on the “push technology” which in other words it is affected by a central source that broadcast content according to its

programming to all the public receivers. The recipients are passive with no control or choice over the transmitted content. Like in most countries it often starts off as a regulated industry and often closely guarded by Governments as it is the key or means to disseminate public information. In Brunei this is governed by a separate legislation called the Broadcasting Act. It has a separate regulator.

24. The Internet has however blurred the distinction between these specific industries and has made regulating these three specific industries not a simple task to the policy maker. The Internet and its related technologies have blurred the distinction between the characteristics of the above industries and will continue to do so at a fast rate. We have now seen the development of Web TV, Internet Radio and soon Internet TV and Movies . A PC for instance can now be used not only for your normal word-processing tasks, but because of the “always on” feature of ADSL and its high bandwidth, we can now use it to listen to our favourite radio, watch Internet TV, play internet games, make a call to a long distant friend and read our favourite newspapers or magazines on line.

25. The Internet (with its TCP/IP protocol and newer protocols VoIP) and coupled with the wireless new Internet protocols such as WAP and the 3G protocols (such as WCDMA, CDMA and UTRA TDD) have converged the three industries into one- Information Communication Technology Industry. Much hype has been heard on the introduction of 3G Mobile or wireless communications and the rich Internet multimedia content they promise to deliver. Thus your mobile phone will not only be your “phone”, but your “radio”, “TV”, “newspaper”, “inbox”, “web-browser”, word processor and because of digital encryption and use of digital signatures, it will become your “electronic wallets” or your “electronic credit cards”, put together!.

26. I think consideration to merge the ICT regulator with the broadcasting regulator is now timely. The formation of AiTi under the AiTi Order is a step in that direction. Section 6(2) d of the Order clearly provides that in “discharging the functions and duties imposed on it by section (1), the Authority shall have regard to the convergence between broadcasting services and other services using information and communications technology and the need to accommodate technological change”. The law has clearly anticipated this convergence of technologies, it is now high time that the regulators to sit down and consider such “marriage” a possibility.