

# ALTERNATIVE DISPUTE RESOLUTION IN ASEAN: A CONTEMPORARY THAI PERSPECTIVE

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In the administration of civil justice around the world, a phenomenon has occurred in many countries that endeavor to refine the delivery of justice to the people. Such phenomenon has interestingly and similarly occurred in the private sector that wants to eliminate their disputes and carries on with their business as usual. The common phenomenon is the widespread use of alternative dispute resolution (or “ADR”). By now, the term, in a broad sense, is well understood to mean any kind of mechanism used for settling disputes other than litigating the disputes in court of law.

## **1. ROOT CAUSES OF THE POPULARITY**

When we look at the root causes that create the popularity of ADR in various countries around the world, they look quite similar. However, each cause has different degree of influence in different countries, depending on economic and societal background of a particular country. In Thailand, ADR has gained popularity because of several reasons.

### **1.1 ADR and the Courts**

One of the reasons is to reduce the backlog in the courts. In the past decade, the number of cases litigated in courts has rapidly increased. The traditional approach to the backlog problem is to establish more courts and recruit more judges. Then, it is realized that the approach to the problem is not a sustainable one. In the long run, the fixed cost of judges' salary and benefits will consume a large portion of the court budget, and there will be little budget left for development in other areas. It is decided that the longer term solution to the backlog problem is, therefore, a better case management and the use of ADR to prevent disputes coming to the court in the first place and to help disposing of cases as soon as possible once the disputes are litigated in courts.

### **1.2 ADR and Business**

The phrase "Time is money" is still true in business community today as it has been throughout the history of business. The phrase applies with equal force in the context of dispute resolution, because the longer a dispute persists, the more damage it causes to both parties' business interest. Moreover, a mechanism like mediation provides parties in dispute an authority to decide the outcome of the dispute, instead of placing such power into the hands of a third party, and virtually being impossible to dictate the outcome. Moreover, ADR provides a forum to deal with the disputes without much publicity that can damage business reputation and credibility of the parties. Mechanism like mediation also provides the parties a chance to preserve their business relationship by resolving their difference in an amicable manner. Mediation not only helps the parties to settle their existing disputes, but also open the door for them to discuss about future relationship and business cooperation. Such kind of opportunity may not be found in litigation where the disputes are settled by considering only past incidents and

determining the rights and obligations under the existing legal relationship at the time of the disputes.

### **1.3 ADR and State Agencies**

Although, traditionally, state agencies have never been quick in adopting new approaches to their existing tasks and responsibilities, it is quite astonishing to see how quickly and enthusiastically state agencies in Thailand welcomes the use of ADR. ADR, especially mediation, has been used in various state agencies in Thailand. One of the primary reasons is that, in modern public administration thinking, there should be an “involvement” or “participation” of the people in public works, especially those effecting their lives and well-being. Such “involvement” or “participation” may occur from the beginning of the works when state agencies conceive a project or an initiative through the implementation stage. Once there is any disagreement or conflict between state agencies and the people in any stage, state agencies should not impose their will and authority on the people. Instead, they should have the people, especially those particularly affected, involve in the resolution of the disagreements and conflicts. Mediation provides a forum to consider the interests of all parties concerned and to mutually find a way to blend those interests into a single mutually-accepted solution that can further those interests. For example, the Ministry of Public Health employ mediation to settle the disputes between healthcare providers, either medical doctors or nurses, and patients and thereby prevent the disputes from being litigated in court. Such litigation will not only incur additional costs and expenses, but also distract healthcare providers from their works, consume a lot of time that should be used for providing healthcare services to other patients and discourage healthcare providers.

### **1.4 ADR and Community**

ADR like mediation has been used in Thai society for a long time. It has been traditional for those having disputes with their neighbors or other members in the community to ask the elders in their community to help the parties in amicably reconciling their differences. This tradition has still continued today. What has been changed in the past couple of years is the encouragement by various agencies and organizations to utilize mediation even more. This encouragement includes spreading the understanding of mediation throughout the community and helping natural leaders in

communities to develop more skills of conflict resolution. The main objectives in this campaign includes preservation of peaceful and harmonious communities and reconciliation of any difference at the earliest stage of conflicts before such difference develops into any full-blown confrontation, either in court or in any violent manner.

## **2. MEDIATION**

By any standard, it is now not an exaggeration to say that mediation is one of the fastest growing ADR mechanisms and possesses an enormous potential to grow still further. Mediation gradually plays an increased role in various sectors across the economy and the society in general. Its virtues have been increasingly recognized and appreciated. This phenomenon has occurred in Thailand as well. During the past decade, Thailand have seen various mediation centers being established, many training courses being organized, many mediators being recruited and trained and many disputes being mediated. This kind of movement stirs quite a widespread interest in mediation, and generates even more involvement with mediation in one way or another. Along this situation, there are several issues about mediation having been discussed and debated among those working in the field of ADR, mediation in particular. This paper will try to walk you through these various issues being discussed in Thailand.

### **2.1 Overview of Mediation in Thailand**

#### **2.1.1 Court-annexed mediation**

As mentioned above, mediation in Thailand has played an important role in various parts of the economy and society. The court of justice is one of the early users that incorporate mediation into its working process. The use of mediation has been prescribed in the Civil Procedure Code<sup>1</sup> since 1934, but the utilization of mediation in the court has been inconsistent. It generally depends on the policy of court executives at a particular period. In some period in the past, the court extensively promoted mediation to parties in litigated cases, and tried to encourage them to use mediation. However, once there were changes of court executives, the policy toward mediation would also be affected. Mediation has just been systematically developed and steadily grows when the

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<sup>1</sup> Thailand's Civil Procedure Code, Section 20 provides  
"The Court shall, at any stage of the trial, have power to try to bring about an agreement or a compromise as to the matters in dispute."

Office of the Judiciary, the administrative arm of the court of justice, has established the Alternative Dispute Resolution Office (or the “ADR Office”<sup>2</sup>) to be responsible for the development of ADR. The ADR Office has helped the courts of justice set up a mediation center to handle court-annexed mediation. In carrying out this task, the ADR Office also issued guidelines<sup>3</sup> for setting up mediation centers in order to bring practices of various courts throughout the country into the same line. This similar practice makes it easier for parties in litigated cases to understand the system and access to mediation service of the court. Cases being mediated in a mediation center of the court comprise almost all kinds of cases of civil and commercial nature, for example, cases involving loan agreements, hire-purchases, land disputes, credit card debt, estates of the deceased, family disputes etc.

### **2.1.2 Mediation in Healthcare**

In the past, disputes between healthcare providers and patients happened rarely, because patients and their relatives viewed the works of medical doctors and nurses with high respect. They believed that healthcare providers always tried their best to save patients’ life and well-being. Anything wrong happening to patients was something beyond capability of healthcare providers, and, therefore, were not their fault. This kind of attitude, however, started to change during the past several years. The works of medical doctors and nurses have become less sacred. Patients and their relatives begin to realize that healthcare providers are human who can negligently provide their services. For example, they may misinterpret the symptoms and other available information and erroneously diagnose the illness; they may negligently cause blood contamination; or, they had not conducted medical test that should have been done. Due to this change of attitude and view, patients and their relatives become more willing, or sometimes even eager, to take action against healthcare providers. Cases involving medical malpractice started to become regular news on the front pages of newspapers.

In coping with the above situation that is likely to worsen over time, the Ministry of Public Health has actively promoted mediation in healthcare service. In this effort, the

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<sup>2</sup> [Http://www.adr.or.th](http://www.adr.or.th)

<sup>3</sup> MANUAL FOR SETTING UP MEDIATION SYSTEM IN COURT (2004).

ministry has established the “Center for Peace in Health Care”<sup>4</sup> to promote mediation as a primary method to solve disputes between healthcare providers and patients. Personnel in state hospitals have been trained how to initially handle patients and their relatives’ dissatisfaction. If the initial handling cannot alleviate the situation, they will try to refer the conflict to the center for peace in that particular hospital for mediation. This kind of process helps reduce a number of disputes litigated in court.

### **2.1.3 Mediation in Environmental Issues**

A side effect of economic growth and development is the deterioration of environment. Such effect is caused by growing number of industrial factories that release significant amount of pollution, by exploiting natural resources without proper restoration plan and action, or by disrupting the ordinary way of living of people in the vicinity of the economic activities etc. The Department of Environmental Quality Promotion, Ministry of Natural Resources and Environment, has realized that such effect can easily cause conflicts between those who cause the detrimental effect on environment and those who suffer the effects. The conflicts, if not properly handled, can result in violent confrontation that produces nothing but rift in society while the deteriorated environment will only worsen. The department, therefore, has started their mediation program, by training mediators in environmental disputes and encouraging the use of mediation in environmental disputes. The program has been carried out relatively recently, but shown significant potential to reinforce the role of mediation in this area.

### **2.1.4 Mediation in Public Administration**

King Prajadhipok’s Institute, which is a research and development arm of the legislative branch responsible for promoting democracy and broadening political knowledge of the people, has established “Center for Peace and Good Governance” to promote understanding of mediation among public officials. The center has carried out several numbers of mediation training programs for public officials during the past several years. The works of the center, however, is limited only to training. It does not provide mediation service.

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<sup>4</sup> [Http://www.moph.go.th/ops/cphc/](http://www.moph.go.th/ops/cphc/)

## **2.2 Training of Mediators**

Just like arbitration is as good as the arbitrator, mediation is also as good as the mediator. The most important part of mediation is the work of the mediator. Good mediators can build a rapport between the parties in dispute and, thereby, encourage more exchange of information, feeling, emotion and understanding of each other. One of the reasons that hinder the development of mediation in Thailand in the past is the misunderstanding that mediation skills and ability was some kind of a gift. That special talent naturally belonged only to someone who was born to be a mediator. Knowledge, technique and skills needed to successfully carry out mediation were kept with those gifted mediators, and were virtually not conveyed from generation to generation. All of these misunderstanding have started to unfold during the latest movement in mediation practice in Thailand. Although not everyone can be a good mediator, anyone who is keen to become a good mediator can learn the necessary techniques and practice to gain more skills. Knowledge on how to successfully mediate can be conveyed from those “gifted” mediators to those who are not so gifted. Many organizations working in the field of mediation in Thailand have carried out training programs and courses to train how to be a good mediator. Among these program and courses, there are two approaches used to design the curricular.

### **2.2.1 Generalist Approach**

Under this approach, it is believed that the skills to successfully mediate are universal. If a mediator truly understands these skills, techniques and knowledge, he or she can mediate any kind of disputes, regardless of the specific nature of a dispute. The notion behind this approach is that a mediator is not a judge or an arbitrator who needs special knowledge on the subject matter in dispute to decide the outcome of the dispute; instead, the main duty of a mediator is to facilitate the exchange of information, feeling and understanding relating to a dispute, assist the parties to brainstorm the possible solutions available at the time of the mediation and help the parties design and decide on the solution which may or may not be the best, but which can mutually be accepted by all parties concerned.

In the training, trainees will gain knowledge of all aspects of mediation and ADR. For example, they will be taught about all possible ADR mechanisms that parties

to a dispute may use to settle their disputes, as well as the different characteristics among these mechanisms and the advantages and disadvantages of each mechanism. Then, trainees will learn the process and steps for carrying out mediation from preparation, opening statements, gathering information and understanding interests of the parties, caucus, brainstorming solutions and closing of mediation. Trainees will also be taught about various skills necessary to become a good mediator, for example, active listening, questioning, breaking impasse, building rapport and trust, brainstorming etc. A successful training program should utilize various methods of training from lecture, simulation, role play and group discussion. Simulation and role play has always been an excellent method of teaching someone to be a mediator, because these two methods open up a chance for trainees to express their understanding and interpretation of all information taught in class, as well as a chance for them to receive comments from trainers for further development.

### **2.2.2 Specialist Approach**

Under this approach, it is believed that training of mediators for a specific type of dispute needs a specific training course tailored especially for that kind of disputes. For example, a mediator for environmental disputes needs to have extensive background on environmental issues; a mediator for intellectual property disputes needs to have reasonable knowledge on the relevant intellectual property laws, and so on. They need to be trained on specific issues that are likely to occur in such kind of disputes.

However, even in these so-called special programs, the basic knowledge and techniques taught to carry out mediation are the same as those taught in any general course on mediation. The process and steps of mediation under these two approaches are not different in any significant aspects. Skills such as active listening, questioning, breaking impasse are also discussed and trained in these kinds of programs as well. The actual difference between these two approaches lies in the teaching of “language” of the disputes, i.e., specific terms that the parties use when they discuss about the disputes. This understanding of the “language” of the disputes is important because it enables the mediators to understand the nature of the disputes being mediated and thereby the interest of the parties. The understanding is also important in the sense that it builds trust in the mediator who presides over the mediation. If the parties feel that the mediator

does not understand what they discuss, it will be difficult for the mediator to lead the discussion into a fruitful way, since it is hard to believe that a person who does not understand the dispute will be able to provide a worthy recommendation. Having said all of these, when we look deeper into these two approaches, the differences are not as significant as they first look like. If a mediator who is trained under the generalist approach gains some knowledge about what the specific term or issue really means, the mediator will also be able to understand the dispute and successfully mediate the dispute, because the core principles and methods in any kind of mediation are not so different.

### **2.3 Relevant Legal Issues**

Although mediation itself is not a legal-intensive mechanism and focuses more on interests of the parties, rather than the right and wrong of each party's behavior, it still has some legal issues to ponder. These legal considerations may hinder the development and use of mediation if they are not well taken care of.

#### **2.3.1 Statute of Limitation**

Almost every legal system in the world has similar provisions in the laws that prescribe periods of time within which a person with a claim against another person has to initiate an action in court. Otherwise, their claims might no longer be enforceable in court. If the claimant takes an action in court within such period, the limitation period will usually stop running. Under the Thai laws, if the disputed contract contains an arbitration clause and the claimant commences an arbitral proceeding, the limitation period will stop running as well. However, if the claimant takes the dispute to mediation, rather than to arbitration or the court, the claimant will not enjoy such privilege. Therefore, in case where the parties are willing to negotiate or mediate their dispute, but the limitation period is going to elapse, the party with a claim will have no choice but take an action in court to preserve his or her right. Although taking an action in court does not prevent mediation, if the parties still wish to do so, it does change the landscape of the dispute and the atmosphere between the parties. Moreover, in taking an action in court, the parties will incur additional costs and expenses which will affect the terms that are negotiated, since the parties who incur such costs and expenses have to take them into consideration and have to decide who should bear which costs and expenses. Once an action is taken in court, the court procedure will usually continue as it

has been prescribed by law. The parties, hence, will also have to participate in such court proceeding. Otherwise, they might risk losing some rights. As a practical matter, all parties will not take such risk and participate in court proceedings. Such proceeding may distract the parties from the amicable negotiation in which they have engaged prior to the action. Such proceeding will also create a hostile atmosphere between the parties that will make it more difficult to reach an amicable solution.

### **2.3.2 Protection of Confidentiality**

One of the crucial aspects of mediation that facilitates the exchange and flow of information among parties concerned during a mediation session is the confidentiality of the disclosure of such information. Mediators will be able to effectively help the parties reaching an agreement only when the mediators truly understand the nature of the disputes, actual interests of the parties which may or may not be the same as those expressed in a formal document submitted to the court, arbitral tribunal or others, the tentative proposal as well as any compromise that the parties wish to offer to settle the dispute. These kinds of information will not be disclosed or shared by the parties if they feel that the information may be adversely used against them in court or other proceedings in cases where the parties cannot settle their disputes in mediation. For example, a proposal to pay another party a sum of money, if its existence is allowed to be adduced in court, may be used to support an argument that the party has admitted his or her guilt in other proceeding; such risk will discourage the party from proposing any offer at all even though the proposal is made solely because the party no longer wants to involve in the dispute and want to settle everything once and for all without considering himself or herself guilty; the amount proposed is just worth paying when compared to all troublesome proceedings to be carried out later as well as the costs and the risk of uncertainty in the final outcome.

Presently, parties to a mediation process protect the confidentiality of the information disclosed in a mediation process by agreeing at the beginning of the mediation not to use any information or proposal disclosed in the mediation in any other proceedings, either in court, arbitration or otherwise. The agreement is certainly a lawful and binding agreement. However, the manner in which such agreement will be enforced is still uncertain. On the one hand, it might be argued that the agreement is just another

kind of agreements; if there is any breach of any provision in the agreement, the party whose rights are infringed has to take a separate action to enforce the agreement and claim for any damages that the party incurs due to the breach. In this case, the party will face additional costs and troublesome proceedings while the amount of damages is, in reality, difficult to prove in court. On the other hand, it may be invoked in the court cases in which disputes are pending, and the parties may ask the court to enforce such agreement by disallowing any adduction of confidential information agreed by the parties not to be disclosed in court. Under this application of the laws, any harm that might occur from the disclosure can be avoided in the first place. However, if there are any argument regarding the existence and enforceability of the agreement not to disclose information, the court may need to conduct a hearing on this particular issue and, thereby, prolong the original action. Regardless of the way in which the laws should be construed, it is still necessary to have a certainty as to the rules to be applied in this situation so that all parties concerned will be able to appropriately plan their course of action.

Another issue that is relevant to the confidentiality of information disclosed in mediation is the authority to summon persons participating in mediation, including mediators, to testify in court, because, although there is a rule preserving confidentiality of information disclosed in mediation, the rule may be circumvented by summoning those who are aware of such information to testify before the court. Such testimony will, in effect, reveal all information that is meant to be kept secret. Any law or rule to govern confidentiality in mediation should, therefore, deal with the issue of summoning persons like mediators to testify. Those countries that have evidence laws prohibiting evidence under privileges or immunity like attorney-client or doctor-patient privilege may extend such kind of privileges to mediators. Currently, Thailand does not have such rules in place.

### **2.3.3 Enforcement of Compromise Agreement**

Once mediation bears fruit, the parties will usually enter into an agreement that specifies all terms and conditions to govern the conducts of the parties thereafter. If a party to such agreement fails to comply with any terms or conditions, the other party will have to enforce the agreement by taking action in court, except that there is already a

judgment on agreed-terms or a consent arbitral award regarding such agreement. This will entail another cumbersome process. To reduce the burden and induce parties to refer more disputes to mediation, it might be helpful to streamline the enforcement process by emulating the process of enforcement of arbitral awards with clear and specific criteria for refusal of enforcement of this kind of agreements.

#### **2.4 Promotion of Mediation**

Those who are familiar with mediation and its benefits are willing to turn to mediation when they face disputes. For those who are not so familiar, they are quite reluctant to resort to mediation even though their disputes are those kinds of disputes that can be resolved by mediation without difficulty. They may even be skeptical about mediation if the other party in dispute suggests or proposes the use of mediation in their disputes. This lack of familiarity and understanding of mediation is one of the obstacles that limit the potential of mediation. To overcome this obstacle, efforts and contributions from various sectors are needed.

One of the groups of professionals who can significantly contribute to the success of mediation is lawyers. When a person faces a dispute, especially that with high value in dispute, he or she tends to go to a lawyer or attorney whom he or she trusts. Any recommendation or suggestion by lawyers will usually be followed, or, at the very least, taken seriously, by the clients. Otherwise, the clients will not go to see the lawyers in the first place. In Thailand, lawyers still prefer litigation to mediation. This view is understandable because litigation and the courts are the places where lawyers can demonstrate their client their worth to the fullest extent and they are more familiar with all procedures in court. Moreover, the method of calculating attorney fees may be in proportion to the length of time spent in handling cases. The longer the cases go, the more fees are generated. Therefore, the traditional recommendation of lawyers to their clients is litigation. This situation in Thailand has, however, gradually changed, and lawyers or attorneys are now more willing to recommend and participate in mediation than in the past. From Thailand's experience in this matter, we need to give opportunity to lawyers to have a reasonable role in mediation process, and make sure that resorting to mediation will not cut off lawyers from the resolution of disputes. When they are confident that mediation still offers opportunities to demonstrate their capability useful

for their clients, lawyers will be more willing to recommend mediation to client. Another related issue is that of calculation of fees. Lawyers in Thailand now start to fix a special lump-sum rate that is not based on the length of the proceedings, if the disputes are settled in mediation. Therefore, they can charge a reasonable fee even though they did not litigate the dispute in court. An understanding needed to be clarified with lawyers is that, by resorting to mediation, they can increase the turn-over of cases that they can handle, because settling disputes by mediation uses relatively short period of time; so, when a dispute is settled, they can move their attention to the next dispute waiting in line. Moreover, when a dispute can be settled within short period of time, it means that the lawyers have completed their works; therefore, the billing time will come sooner, not later. From a business perspective, this will generate more cash flow for the firms.

Although lawyers have recommended mediation to clients, the final word still rests with the clients, especially those in the decision-making rank. To convince these decision-makers to use mediation, it is necessary also to convey all benefits that they can obtain in mediation to these decision-makers, especially the opportunity in mediation to control the outcome of the disputes, the speed of the process, the saving of costs and expenses and the avoidance of bad publicity etc.

Another aspect relating to promotion of mediation to both lawyers and business persons is the inclusion of alternative dispute resolution like mediation into the main stream curricular in higher-education institutions. This channel can reach a vast majority of persons involved in any kind of disputes, regardless of their roles in the disputes. The more they know and become familiar with dispute resolution mechanism, the more they are willing to use mediation as a mechanism to settle their disputes. Although this channel might not be able to provide in-depth understanding and knowledge of ADR to the extent that they can practice the mechanisms by themselves, it, at least, plants a seed of awareness that is ready to grow still further if we nurture it with more information and understanding.

## **2.5 Channeling Disputes into Mediation Process**

Notwithstanding all efforts to promote mediation, it is a futile effort if there is no mediation service available, or there is no route to bring the parties to mediation. From Thailand's past experience, especially in the context of court-annexed and court-referred mediation, mediation has been a part of court procedure for a long time. One of the reasons that it has not been used so often is that the parties do not know where and how to pursue their interest in mediation, since there is no separate mediation service available for the parties. After the setting up of mediation centers in courts of justice around the country, the number of cases referred to mediation increases dramatically. The sheer presence of the centers creates interest by the parties, and they know exactly where to turn to if they want to have their dispute mediated. Moreover, there should be a clear work-flow for all parties and officials concerned to know how to proceed when the disputes go to mediation as well as when the disputes need to go back to court proceedings. This strategy has been carried out in various organizations that want to promote mediation within the scope of their responsibilities. They have installed a system that can help bringing disputes to mediation.

## **2.6 Mediation of Disputes in State Contracts**

When a state agency becomes a party to a dispute, mediation in this kind of disputes poses a distinct issue not so common in disputes between private parties. In the bureaucratic process in Thailand, the Office of the Auditor-General is responsible for examining the receipt and payment of money of all state agencies and providing opinions whether the transactions are in compliance with the relevant laws and regulations. If there is any irregularity regarding the transactions, there will be a process to find an official who is responsibility for such irregularity and will be liable for any damages incurred due to such irregularity. The process is formed with commendable objectives to protect the public interest and prevent corruption. It, however, causes concerns to officials who negotiate in a mediation process on behalf of a state agency. They are usually afraid that if they give in something or compromise the rights and benefits of the state in mediation in order to reach a mutually-accepted agreement to settle the disputes, they might become liable later. Hence, in the process of negotiation, it is rare that state officials agree to compromise with private parties unless there is a clear and

unambiguous rule or regulation allowing or supporting for such compromise. It is a norm that disputes involving state agencies will end up in arbitration or court, depending on terms and conditions in the relevant contracts.

The problem has been alleviated recently, albeit to some limited extent. In 2005, the Ministry of Finance has issued a notification to all state agencies that permits state agencies to enter into compromise agreements with private parties if the amount in dispute is less than 2,000,000 Baht, and the state agencies and the public attorneys who are responsible for the disputes agree that such agreements are appropriate in light of public interest in that matter without having to request for prior approval from the Ministry of Finance. This breathing space accommodates and encourages mutual settlements in mediation, as well as speeds up the process of approval of the settlements. However, a large portion of disputes between state agencies and private parties of which the amount in dispute exceeds 2,000,000 Baht still waits for further flexibility.

Another approach that has been used to alleviate concerns of public officials is to record the reasoning and information that can demonstrate good faith of all parties concerned in reaching a mutual settlement, so that, when the transactions have later been examined, there will be sufficient proof to dispel any doubt that may happen to examining officials. This approach is useful to some extent, but it might work in contrary to a basic notion in mediation where the norm is confidentiality of information exchanged in the mediation process, and record is ordinarily quite scarce. This approach in the context of disputes involving state agencies is, therefore, extremely exceptional.

## **2.7 Mediation-like process in criminal cases**

Recently, there is an interesting movement in the administration of criminal justice in Thailand. The movement is known in other countries as the “restorative justice” process. The process, in essence, tries to shift the focus of the criminal justice from the guilt of the accused or defendant to focus more on the “victim”. On the victim side, it is aimed at trying to heal victims mentally, emotionally and, sometime, financially. On the accused or defendant side, the process tries to make the accused or defendant aware of the consequence of his conduct that causes suffering to the victim, and involve the accused or defendant in the process of healing the victims’ suffering. This process

may sound quite a whole new procedure that has nothing to do with mediation as we know it. What happens in Thailand is that we adapt the mediation process to serve additional purposes required by this “restorative justice’ movement. The reasons that make this adaptation possible are some similarity in the restorative justice process and that of mediation.

To understand the nature of this adaptation, we first have to look into the detail of what actually happens in the restorative justice process. In the restorative justice process, if both the victims and the accused or defendants agree to participate in the process, the so-called RJ facilitator will make an appointment with both parties to meet face-to-face. In the meeting, the facilitator will let both parties express their information regarding incidents in the case, consequences effecting life and well-being of each party and each party’s feeling toward the incident. This process is more or less similar to what happen in mediation when a mediator lets the parties express their information regarding the dispute in question in order to learn the actual root causes of the disputes and the real interests of both parties. Although, in mediation, the mediator may use the so-called shuttle diplomacy method to convey the message back and forth between the parties in order to prevent harmful confrontation, the mediator may also let the parties exchange their information face-to-face. If we closely examine this process, we will find out that all essential skills a mediator needs in carrying out the exchange of information between the parties, for example, listening skill, questioning skill and other communication skills, are necessary for the facilitator in restorative justice process as well. Once all information, consequences and effects endured by both parties have been shared and understood, all parties will discuss about how to heal such consequences and effects. In this process, the facilitator will brainstorm the possible conducts by both parties in order to help both the victims and the accused reintegrate themselves into their family, community and society. This process is quite similar to what happens in mediation when a mediator helps the parties to find out the possible solution to their disputes that can satisfy both parties real interest and is acceptable by all parties concerned. Again, the necessary skills that a mediator needs in the process are similar to what a facilitator needs in restorative justice process. Due to the similarities in skills used by both mediators and facilitators, in Thailand, we train mediators to be facilitators in restorative justice process by educating

the additional knowledge specially needed to successfully achieve the goal of restorative justice process, for example, their roles in the administration of criminal justice.

What is the crucial difference between those two distinct-but-similar processes is the goal and emphasis of each process. For mediation, the primary task of the mediator is to help the parties settle their disputes. If he or she can bring about the settlement, his or her task is virtually completed. For restorative justice, the agreement to compensate for damage by the accused or defendant is not the primary goal of the process. Instead, the facilitator should help the accused or defendant understand the consequences of his or her conduct, and thereby avoid any future incident. Moreover, the facilitator should help the victim heal the wound caused by the accused or defendant's conduct; in the healing process, the facilitator should help the defendant find his or her proper roles to rectify the consequence of his or her misconduct. In essence, restorative justice emphasizes less on settlement, but more on reintegrating both victims and defendants into community.

### **3. ARBITRATION**

Along side mediation, arbitration has always been a widely-used alternative dispute resolution mechanism. The benefits of arbitration have vastly been recognized, especially in the business community. It almost becomes a standard way for settlement of commercial disputes, both domestic and international. However, the degree of popularity of arbitration, in Thailand, is not consistent in all levels of business and commercial transactions. It can be fairly said that arbitration is more popular in high-value transactions, less used in transactions with relatively not so high value. This is understandable because, in arbitration, there are some costs and expenses that the parties have to consider in determining its cost-effectiveness in that particular transactions, such as the arbitrators' fee and the institution fee etc. It might be beyond the scope of this paper to discuss in detail of various aspects of arbitration in Thailand. Therefore, in this part, we will take a look at the Thai arbitration law in order to understand the framework within which arbitration is practiced in Thailand. After that, this paper will give you a glimpse of some interesting aspects of arbitration law and practices in Thailand.

### **3.1 Brief Overview of Thailand's Arbitration Law and Framework**

#### **3.1.1 Background of the Arbitration Law**

Arbitration has been a part of the Civil Procedure Code since 1934. The code has provided for two kinds of arbitration, i.e., court-annexed and out-of-court arbitration. In 1987, Thailand enacted the Arbitration Act of 1987 which separately prescribes the laws on out-of-court arbitration, while court-annexed arbitration is still governed by the Civil Procedure Code. The act helps instigate the practice of arbitration in Thailand due to its arbitration-friendly approach. In 2002, the new Arbitration Act has been promulgated. The Arbitration Act of 2002 is based mainly on the UNCITRAL Model Law on International Commercial Arbitration.

The Act applies to both domestic and international commercial arbitration alike. The main reason causing Thailand to adopt a single framework for both types of arbitration is the increasingly intermingled nature of trade and investment transactions in today business community renders it practically complicated to differentiate between domestic disputes and those with international character. Having different laws for different kinds of arbitration will trigger more arguments and controversies as to the applicable law.

The Act, in essence, replicates all vital principles of the UNCITRAL Model Law. It gives the parties the autonomy to frame arbitral proceedings according to what they deem the most efficient way for carrying out their arbitral proceedings. The Act also provides protection for all parties to ensure that the arbitral proceedings offer the parties a reasonable opportunity to be heard and present their claims and arguments.

#### **3.1.2 Thailand and the New York Convention 1958**

On December 21, 1959, Thailand accessed to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the New York Convention 1958. On March 20, 1960, Thailand ratified the convention without making any reservation. Since then, enforcement of foreign arbitral awards has become part of the Thai arbitration regime. Many foreign arbitral awards have been constantly enforced by the Thai courts without any undue difficulty. The current Arbitration Act 2002 also explicitly provides

for enforcement of arbitral awards, regardless of the place where the awards were made.<sup>5</sup> The grounds for refusal of enforcement of foreign arbitral awards are the same as those of domestic awards. The act adopts the grounds for refusal of enforcement from the New York Convention 1958 almost verbatim. The criteria, in general, have been strictly applied and construed.

The party wishing to enforce an arbitral award may request the competent court to do so within the period of 3 years from the date on which the award may be enforced. If the obligation to pay occurs immediately after the award becomes binding, the period will commence immediately. If the debtor has a grace period to repay their debt because of, for example, the terms in a consent award, the period will commence after the expiration of the grace period, because during that period the award may not be enforced against the debtor.

The competent court for enforcing foreign arbitral awards is the Central Intellectual Property and International Trade Court, which has been established to handle disputes and cases that are internationally oriented and give more consideration to trade practices and customs. Judges in this court will sit along side lay judges who have extensive backgrounds in trade or business. The process for enforcing an arbitral award is much more uncomplicated than those of ordinary cases. The party wishing to enforce an award has to file a request with the court asking for the enforcement. The request has to be accompanied by relevant documents, such as a copy of the award, a copy of the arbitration agreement and the translation of such documents into Thai. The court will then serve a copy of the request as well as the relevant documents on the other party, and will conduct an enquiry as to the enforceability of the award. The order of the court cannot be appealed unless it falls into some very limited grounds prescribed by the law<sup>6</sup>.

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<sup>5</sup> Section 41 of the Arbitration Act 2002 provides

“Subject to Section 42, Section 43 and Section 44, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding on the parties, and upon petition to the competent court, shall be enforced.

In case where an arbitral award was made in a foreign country, the award shall be enforced by the competent court only if it is subject to an international convention, treaty, or agreement to which Thailand is a party. Such award shall be applicable only to the extent that Thailand accedes to be bound.”

<sup>6</sup> Section 45 of the Arbitration Act 2002 provides

“No appeals shall lie against the order or judgment of the court under this Act unless:

### 3.1.3 Practice of Foreign Arbitrators and Attorneys

Since the year 2000, there is no restriction or limitation as to nationality of persons whom the parties intend to appoint as arbitrators due to the modification on the law governing occupations and professions that can be done by foreigners in Thailand. Therefore, parties can appoint whomever they deem appropriate to be the arbitrators, regardless of their nationality. Regarding lawyers to represent parties in arbitral proceedings, foreign lawyers can represent their clients as such if the laws governing the disputes are foreign laws, or the award will be enforced in other countries. There is, however, a practice of allowing parties to appoint their representatives who look after their interests but do not act as lawyers in arbitral proceedings even though the persons may have educational or practical backgrounds in laws.

## 3.2 Arbitration Institution and Practices in Thailand

Arbitration has drawn a lot of attention from many corners in Thailand, since the enactment of the then-new Arbitration Act of 1987. The attention has been shown through the implementation or adoption of some kind of arbitration programs by various agencies and organizations to promote the use of arbitration in their works or business. Arbitration then continually grows in Thailand.

### 3.2.1 Thai Arbitration Institute (TAI)

The first organization to start the wave of attention toward arbitration under the Arbitration Act of 1987 is the Thai Arbitration Institute (TAI). The Institute is first established under the umbrella of the Ministry of Justice which, at that time, was responsible for the administration of the courts of justice in Thailand. The reason that this Institute was established within the framework of the Ministry of Justice was to lend the credibility of the courts that have long been recognized by the general Thai public to

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- (1) The recognition or enforcement of the award is contrary to public policy;
  - (2) The order or judgment is contrary to the provisions of law concerning public policy;
  - (3) The order or judgment is not in accordance with the arbitral award;
  - (4) The judge who sat in the case gave a dissenting opinion; or
  - (5) The order is an order concerning provisional order measures for protection under Section

16.

The appeal against the court's order or judgment under this Act shall be filed with the Supreme Court or the Supreme Administrative Court, as the case may be."

the newly established organization the work of which was virtually unknown to the business community and the legal profession at that time. When there was a separation between the Court of Justice and the Ministry of Justice in 2000, the Institute was assigned to be under supervision of the Court of Justice ever since.

Since its inception, the Institute has promoted arbitration to the business community and legal profession through publications, seminars and training programs. This campaign aimed at resolving the root cause of unpopularity of arbitration in the past, i.e., the lack of knowledge and understanding of arbitration laws and arbitral proceedings to the extent that the parties and their lawyers can comfortably participate in the proceedings. Over the years, these courses and programs have significantly increased the number of arbitration practitioners as well as the number of contracts stipulating arbitration clauses.

Throughout its 16 years of operation, the Institute has handled a significant number of arbitral proceedings in Thailand. Virtually, almost all high-profile disputes in Thailand required to be settled by arbitration have been administered by the Institute. In 2004, there were 128 newly-filed arbitration cases, with the monetary amount in dispute totaling 133 billion baht (approximately more than 3.5 billion US dollar<sup>7</sup>) In 2005, the number of new arbitration cases went up still further. The Institute received 136 new arbitration cases in 2005. The monetary amount in dispute totals 74 billion baht (approximately almost 2 billion US dollar). The number of newly-filed arbitration cases in 2005 represents a 112.5 % increase<sup>8</sup> from the number five years ago.

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<sup>7</sup> Calculated at the exchange rate of 1USD = 38 Baht.

<sup>8</sup> Compared with the number of new arbitration cases at the end of the year 2000.

<b>Year</b>	<b>Number of New Arbitration Cases</b>	<b>Monetary Amount in Dispute (in Baht)</b>	<b>Monetary Amount in Dispute (in USD)</b>
2000	64	38,456,196,870	1,012,005,180.79
2001	46	11,893,101,982	312,976,367.95
2002	49	22,627,766,527	595,467,540.18
2003	72	5,386,931,850	141,761,364.47
2004	128	133,140,758,810	3,503,704,179.21
2005	136	74,691,706,043	1,965,571,211.66

### **3.2.2 Thai Arbitration Committee, Board of Trade of Thailand**

The Board of Trade of Thailand has also been one of the pioneers in the arbitration field in Thailand. It has established the first arbitration institution in Thailand since 1968. The Committee has constantly been active in promoting arbitration among the business community in which it plays a key role and has closely worked with business entities and organizations. Several years ago, the Committee has significantly improved its arbitration practice by adopting a new set of arbitration rules and refurbishing its facilities to accommodate arbitral proceedings under its auspices.

### **3.2.3 Office of Arbitration, Department of Insurance**

The Department of Insurance has recognized the potential of arbitration in reducing the number of disputes litigated in court regarding insurance claims and, at the same, providing more protection for beneficiaries under insurance policies by accelerating the claim process. It has set up the Office of Arbitration to handle arbitral proceedings relating to claims under insurance policies. It has also imposed a regulation requiring all insurance companies to include an arbitration clause in their policies. The clause allows beneficiaries of insurance policies to choose to process their claims through arbitration, or pursue their claims in court, at his or her discretion. It is, however, mandatory for insurance companies to participate in arbitral proceedings if the beneficiaries decide to refer their claims to arbitration. In terms of number of new arbitration cases, the Office received thousands of cases each year.

### **3.2.4 Other Arbitration Organizations**

Other than the previously mentioned organizations, there are a couple of other organizations working in the field of arbitration in Thailand. The Security and Exchange Commission has established its arbitration service in 2001 to handle arbitral proceedings regarding claims under its laws on security and exchange. Many brokerage firms have participated in the SEC arbitration program by unilaterally agreeing to participate in arbitral proceedings if their customers pursue their claims through arbitration.

The Department of Intellectual Property has set up its arbitration service in 2002 to handle arbitration relating to disputes in intellectual property rights which have significantly increase recently. The department provides both arbitration and mediation

services to those who request for its services. Mediation is, however, more successful in this area, because, in this kind of disputes, the parties did not have any binding arbitration clause between them. It is, therefore, difficult to convince the parties to agree to arbitration after the disputes have already erupted. In few cases, the parties agree to settle their claims through arbitration.

### **3.3 Interaction of Court and Arbitral Tribunal in Thailand**

Under the Arbitration Act 2002, arbitral proceedings and the courts will interact throughout the proceedings. In framing the rules governing this delicate relationship and interaction between courts and arbitral proceedings, the Act tries to strike a balance between giving the court the necessary authority to supervise arbitral proceedings to ensure the fairness of the proceedings, and freedom of the parties to carry out arbitral proceedings as they deem appropriate as well as their will to have their disputes settled by arbitration. Moreover, the Act also entrusts the court with the duty to assist and support arbitral proceedings when the court's authority is needed.

From the beginning, the court is responsible for enforcing arbitration agreements if a party to an arbitration agreement fails to comply with the agreement by litigating their claims in court. The court will dispose of the cases if it is found that there is a binding arbitration agreement between the parties in the cases and the relevant claims have not been arbitrated.<sup>9</sup> In case where the parties fail to appoint arbitrator(s) according to the agreed procedure, a party may request the court to appoint arbitrators on behalf of the party who did not comply with the procedure, or on behalf of both parties in case of appointment of a sole arbitrator.<sup>10</sup>

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<sup>9</sup> Section 14 of the Arbitration Act 2002 provides

“In case where any party to the arbitration agreement commences any legal proceedings in court against the other party thereto in respect of any dispute which is the subject of the arbitration agreement, the party against whom the legal proceedings are commenced may file with the competent court, no later than the date of filing the statement of defense or within the period for filing the statement of defense in accordance with the law, a motion requesting the court to issue an order striking the case, so that the parties may proceed with the arbitral proceedings. Upon the court having completed the inquiry and found that there are no grounds for rendering the arbitration agreement void or unenforceable or impossible to perform, the court shall issue an order striking the case.

While the motion filed in accordance with paragraph one is pending before the court, either party may commence the arbitral proceedings, and the arbitral tribunal may continue the proceedings and render an award on the dispute.”

<sup>10</sup> Section 18 of the Arbitration Act 2002 provides

The Act did not provide for interim or provisional measures of protection ordered by arbitral tribunals, because it is more effective to let the party wishing to have a provisional measure in place to directly request the court to order such measure<sup>11</sup>. If the party has to request the arbitral tribunal to order such measure and the other party refuses to comply with the order of the arbitral tribunal, the requesting party still has to ask the court for enforcement of such order. Until that time, it may become futile to have a provisional measure because the other party has already irreversibly changed the circumstances to the detriment of the party requesting for such measure. Furthermore, the order of the arbitral tribunal is, by no means, binding upon a third party to the disputes in case where such third party possesses the asset that the party intends to protect and preserve, while a court order can do just that.

The most delicate part of the relationship and interaction between courts and arbitration is probably that relating to the enforcement of arbitral awards, because the

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“Unless otherwise agreed upon by the parties, the procedure for appointment of the arbitral tribunal shall be as follows:

(1) Where the arbitral tribunal shall be a sole arbitrator, if the parties are unable to agree on the arbitrator, either party may file a motion with the competent court requesting an appointment of the arbitrator.

(2) Where the arbitral tribunal shall consist of more than one arbitrator, each party shall appoint an equal number of arbitrators; and the appointed arbitrators shall appoint an additional arbitrator. If either party fails to appoint the arbitrator within thirty days after receipt of the notification from the other party or if the party appointed arbitrators are unable to jointly appoint the chairman of the arbitral tribunal within thirty days from the date of their appointment, either party may file a motion with the competent court requesting an order appointing the arbitrator or the chairman of the arbitral tribunal.

If, pursuant to the appointment procedures under paragraph one, no other procedures for successful appointment of arbitrators are provided, either party may file a motion with the competent court to appoint the arbitrator as it deems appropriate in the following cases:

- (1) A party fails to act as required under such procedure;
- (2) The parties, or the party appointed arbitrators, are unable to reach an agreement expected of them under such procedure; or
- (3) A third party, including an institution, fails to perform any function entrusted to it under such procedure.”

<sup>11</sup> Section 16 of the Arbitration Act 2002 provides

“A party to an arbitration agreement may file a motion requesting the competent court to issue an order imposing provisional measures to protect his interest before or during the arbitral proceedings. If the court views that had such proceedings been conducted in court, the court would have been able to issue such order, the court may proceed as requested. The provisions governing provisional measures under the Civil Procedure Code shall apply *mutatis mutandis*.

Where the court issues an order at the party’s request pursuant to paragraph one, if the party filing the motion fails to carry out the arbitral proceedings within thirty days from the date of the court’s order or within the period prescribed by the court, that order shall be deemed cancelled upon the expiration of such period of time.”

roles of the court in this aspect may substantially affect the whole purposes of arbitration. The Act adopts the same framework and criteria under which courts review arbitral awards under the New York Convention 1958 and the UNCITRAL Model Law. In essence, the court will primarily look into the process of arbitral proceedings to ensure that there is a binding arbitration agreement between the parties, all parties have been given opportunity to be heard and present their claims and arguments, the appointment of arbitral tribunals is in accordance with the agreement and the applicable laws,<sup>12</sup> the dispute is arbitrable<sup>13</sup>, and the award is not contrary to public policy. The court may not intrude into the area that is within the exclusive realm of the arbitral tribunals' discretion such as the determination of damages, the construction of contractual terms and conditions etc. The court may not also refuse to enforce and recognize arbitral awards on other criteria that are not prescribed the law.

As a general practical matter, it is fair to say that Thai courts have been facilitative to arbitral proceedings when arbitral tribunals need any support and assistance such as summoning witnesses to testify before the arbitral tribunals, providing provisional

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<sup>12</sup> Section 43 of the Arbitration Act 2002 provides

“The court may refuse enforcement of the arbitral award, irrespective of the country in which it was made, if the person against whom the award will be enforced furnishes proof that:

(1) A party to the arbitration agreement was under some incapacity under the law applicable to that party;

(2) The arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under Thai law;

(3) The party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;

(4) The award deals with a disputed not falling within the scope of the arbitration agreement or contains a decision on matter beyond the scope of the arbitration agreement. However, if the award on the matter which is beyond the scope thereof can be separated from the part that is within the scope of arbitration agreement, the court may set aside only the part that is beyond the scope of arbitration agreement or clause;

(5) The composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, in accordance with this Act; or

(6) The arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where it was made. Save where the setting aside or suspension of the award is being sought from the competent court, the court may adjourn the hearing of this case as it thinks fit; and if requested by the party making the application, the court may order the party against whom enforcement is sought to provide appropriate security.

<sup>13</sup> Section 44 of the Arbitration Act 2002 provides

“The court may dismiss the application for enforcement under Section 43 if it finds that the award involves a dispute not capable of settlement by arbitration under the law or if the enforcement would be contrary to public policy.”

measures of protection etc. In this era, the courts, in general, fairly understand the essential roles of arbitral tribunals and the separation of power between those of the arbitral tribunals and those supportive and supervisory roles of the courts. Having said that, it is not meant to say that there is no atypical case where it is dubious about the exact domain of power and the inherent tension of separation of duties between courts and arbitral tribunals. Such cases, however, is not the norm and cannot be treated as a precedent due to their uncharacteristic nature of the disputes in question.

### **3.4 Public Policy in the Enforcement and Challenge of Arbitral Award**

Among the laws and treaties on arbitration and enforcement of arbitral awards, one of the perennial dilemmas is the application of “public policy” in refusing enforcement and recognition of arbitral awards which is identically provided in the New York Convention 1958<sup>14</sup> and the Thai Arbitration Act 2002.<sup>15</sup> It has long been the subject of debates as to its scope of construction and application. It has been proposed to construe the terms to mean only the so-called “international public policy” which essentially may include only those grave abuses of power and irregularities in arbitral proceedings. The construction has, however, still not been widely adopted in many countries. The terms have also created difficulties in its application in Thailand as well.

Since the Arbitration Act 1987 came into force, there are many cases involving enforcement and recognition of arbitral awards, both domestic and foreign. In vast majority of such cases, the courts have recognized and enforced arbitral awards without any undue intrusion into the discretion of the arbitral tribunals if there is no undue irregularity in arbitral proceedings as prescribed by the laws. Some of such cases involve high-profile disputes between state agencies and private investors or contractors. In a dispute involving construction of toll-way between a state agency and the private contractor, the court enforced the arbitral award ordering the state agency to pay a

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<sup>14</sup> Article V Section 2 of the New York Convention 1958 provides

“2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

<sup>15</sup> See Note 11.

record amount of damages when the court was satisfied that the arbitral proceeding was properly carried out and the award contained no serious flaw. Recently, however, there is a case<sup>16</sup> involving arbitration on dispute relating to concession to operate a television station in which there have been questions as to the construction and application of the terms “public policy” in the law.

In the case, the arbitral tribunal awards the private investor a significant amount of damages and determined the disputed terms of the concession for the parties to comply for the rest of the concession term. The award was challenged in the newly-established Administrative Court. The court then set aside the arbitral award on the ground of “public policy” violation. According to its reasoning, the arbitral award was based on a particular terms of the concession contract in dispute. The terms were inserted after the original concession contract was entered into by an agreement to modify the original contract. The agreement, however, was not obtained the compulsory approval from the cabinet. The court reasoned that the modified and inserted terms were not binding and enforceable under the principles in the public laws. The arbitral award that was based on such terms was, therefore, contrary to the principle of “public policy” and should be set aside. An interesting aspect of this case is that the parties themselves have never disputed over the existence and binding effect of the modified and inserted terms. The court found such irregularity from its own enquiry into the facts in the case. Such enquiry is a part of the ordinary process in administrative cases in which the courts take quite an active role in summoning evidence and witnesses to gather all necessary information on its own initiative.

Questions that have arisen from this case comprise how the problem of enforceability of a contractual term should be considered, and who should have the discretion to determine the question. In a line of reasoning, the enforceability of a contractual term is within the authority of the arbitral tribunal just like any other questions involving interpretation and construction of contracts and laws. If this discretion to interpret the contracts and laws can be reviewed by a national court, then almost all parts of arbitral awards that inevitably relate to interpretation and construction of contracts and laws can also be reviewed. Such situation will significantly undermine

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<sup>16</sup> Case No. 584/2549 of the Central Administrative Court.

the enforceability of arbitral awards. Moreover, in the particular fact of this particular case, the court implicitly reasoned that although the failure to obtain the compulsory approval from the cabinet was an internal process of the government, the private party should have known the fact because the concession and the dispute was such a high-profile instance that all relevant facts become known to the public via various media. The private party, therefore, was estopped from invoking the fact that the failure was an internal process of the government which was beyond its control. The fact, however, may also be looked at from another point of view. The fact that the modification of the concession contract was not approved by the cabinet, if the private party should have known the fact, should also become known to the cabinet itself because they acquiesced with the same set of facts as the private party, and even more. Nobody has ever challenged or even questioned the enforceability or binding effect of the clause in dispute until the court raised the issue. The case is currently under the process of appeal to the Supreme Administrative Court. So, it still waits to be seen the final outcome and interpretation of the relevant laws.

It is unclear at the moment as to the effect of this way of reasoning on other cases involving recognition and enforcement of arbitral awards. However, if we take into consideration the peculiar nature of the facts surrounding this particular case, it is highly unlikely that the case will be established as a general precedent for other cases.

### **3.5 Arbitration Roles in FTA, Trade and Investment Disputes**

Another sphere that has seen growth in arbitration in Thailand is the free trade agreements (FTA) and the bilateral investment treaties (BIT). Over the past decade, Thailand has entered into many bilateral investment treaties with various countries to promote the flow of investment between the contracting states. More recently, Thailand has embarked on the FTA movement by entering into several free trade agreements and been in the negotiation process with several others. One important issue that keeps coming up in the negotiation of such agreements and treaties is the mechanism to settle disputes between nationals of a contracting state with the other contracting state. It has

become a well-accepted practice in the agreements and treaties to incorporate arbitration as a main mechanism to settle such disputes<sup>17</sup>.

In most of such treaties and agreement, arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) has been frequently adopted. However, since Thailand has only signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 but yet to ratify the convention, most of such treaties and agreement stipulate either the *ad hoc* arbitration under the UNCITRAL arbitration rules or the additional facility of the ICSID as another alternative. The investors in dispute with the government of another contracting state will have the discretion to choose the forum in which they would like to pursue their claims. Although the treaties and agreement usually stipulates the court or other competent tribunals of the contracting states as a choice to choose from, as a practical matter, investors are likely to prefer arbitration to national courts.

In the course of negotiating such treaties and agreement, the issue of ratification of the ICSID convention has often been asked. So far, the responsible authority has raised the issue to consult with other organizations and the public from time to time.

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<sup>17</sup> For example, the bilateral investment treaty between the Kingdom of Thailand and Bulgaria 2004 provides

**“Article 9 Settlement of investment disputes**

1. In case of dispute with respect to investments between an investor of one Contracting Party and the other Contracting Party, consultation shall take place between the parties concerned with a view to solving the case amicably.

2. If these consultations do not result in a solution within three months from the date of request for settlement, the investor may submit the dispute in respect to Article 4, 5, 6 and 7, at his choice, for settlement to:

(a) the competent courts of the Contracting Party in the territory of which the investment has been made; or

(b) the International Centre for Settlement of Investment Disputes in case both Contracting States are Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of other State, opened for signature at Washington, D.C. on 18<sup>th</sup> March, 1965; or

(c) an international *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Each Contracting Party shall give its consent to the submission of a dispute to international arbitration under subparagraphs b) or c) of this paragraph.

3. The arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of the Contracting Party, which is a party to the dispute, the provisions of the present Agreement, as well as applicable rules of international law.

4. All arbitral awards shall be final and binding on the parties to the dispute and shall be enforced in accordance with the laws of the Contracting Party to the dispute.

5. All sums received or payable as a result of a settlement shall be freely transferable in a freely usable currency.”

Given the negative public sentiment toward arbitration in disputes involving state agencies caused by several high-profile cases in which state agencies are ordered to pay a hefty amount of damages to private parties, it may take a lot more time for Thailand to ratify the convention. What concerns the most about ratification of the convention is the relinquishing of supervision and review on the arbitral awards which may drastically affect the public interest of the Thai public. Moreover, in the views of many, the benefits that Thailand can reap from such ratification are minimal, if any. There is no substantiated proof to show that ratification of the convention will induce more investment. Although it may be one of the factors that investors take into consideration when they decide on where they want to put their money in, it is more likely that they will place more weight on other factors and the determinative factor is usually where they can generate the most rate of return on investment. Thailand may finally ratify the convention, but it will surely require more and more consideration until it is certain that the benefits engendered by the ratification outweigh any drawback that the convention will trigger.

### **3.6 Proposal for “ASEAN Panel of Arbitrators”**

As it has been shown from various sources, arbitration in Southeast Asia is doing well. Several countries have embarked on the bandwagon of promoting the practices of international commercial arbitration with a mixed success. Each country and each organizations carrying out this challenging task all has their own way of implementation of this inspiring goal. The action plan of each organization is inherently based on the social and economic condition of their respective country as well as their familiarity of arbitral practices. It is quite observable that each organization as well as each country in which they operate possesses some comparative advantages of their own.

In the long run, however, to promote arbitration further in this lovely and ever dynamic region, some infrastructure of arbitration has to be strengthened to lay a solid foundation that can accommodate future boundless achievement for all members of ASEAN. One specific area that can mutually be developed and nurtured is those involving arbitrators. In the meantime, every organization can handle arbitral proceedings with their own set of arbitrators. There is no obstacle to carry on the development of arbitration in this tradition. It is certain that all organizations and

countries can handle their arbitration practice without undue difficulty. But if we take a look further about what is better for arbitration, it should be clear that the larger pool of arbitrators that parties can choose from, the better the parties will become more comfortable with arbitration. At least, they will not feel constraint of having to choose arbitrators from the oligopoly of elite arbitrators. Although there are no restrictions as to the qualifications or nationality of arbitrators as long as they are impartial and independent to make their own informed decision, it is very difficult for newcomers to establish themselves in the field of international commercial arbitration. Usually, parties will be likely to appoint someone who has experience in arbitration to be arbitrators in their disputes, but such experience cannot occur in the first place if he or she has not been appointed in a case. Moreover, even if a party wants to appoint a newcomer as an arbitrator, the party may not have sufficient resources to consult with in the quest for seeking a qualified person to be the arbitrator, especially if they want to look beyond their economy.

A non-complicated, but useful, endeavor that can be implemented in this area is the creation of a “ASEAN Panel of Arbitrators” or whatever name it may take. It is essentially a compilation of qualified persons in various fields and possessing some experience in arbitration practice to the extent that they can handle efficient arbitral proceedings. Having included the criterion of “experience in arbitration”, it is not intended to create a barrier to entry for newcomers as mention earlier. It is included solely to distinguish between the qualifications for newcomers in international commercial arbitrators and those for domestic arbitrators. To ascend to the upper playing field, it is necessary that the players have proved themselves in their initial arena that they possess essential qualifications to be promoted to another playing field. If they have not been entrusted in their domestic arena, how can they convince parties from abroad to believe in their qualifications? This ASEAN Panel of Arbitrators can at the very least inject some rookies who have been veterans in their own economies to the field of international commercial arbitrators.

This joint Panel will encourage more exchange of arbitrators across national borders. Another side benefits that can be generated from this increase in the exchange of arbitrators is the exchange of knowledge and experience in handling arbitral

proceedings as well as their jurisprudence. Each arbitrator will bring with them, when they cross border, their knowledge and experience which may be drawn from their educational and practical background in either common law or civil law tradition. They will also inject international perspective into the analysis on some common problems or issues. This subtle process will gradually blend perception toward such problems or issue until, someday, we have a unified view that we voluntarily create by a voluntary process.

Creating this kind of list of arbitrators from various economies is a delicate, but manageable, process. To come up with names of qualified persons, it may need some help from various organizations working in the field of arbitration in all member economies, because these organizations own such invaluable information as to who have the essential qualifications and should be nominated into the Panel. These organizations may be familiar with the work, experience and attitude of many arbitrators not only once, but maybe several times. So, they know quite well who are qualified to deliver an efficient and just proceeding.

#### **4. CONCLUSION**

The past decade is arguably the most vibrant period for alternative dispute resolution in Thailand. A lot of radical changes and developments keep happening. The landscape of ADR practice looks remarkably nice. The statistics have shown impressive numbers, and the graphs are heading north. It is certainly enjoyable to watch this growth, especially if you work in this field. Given this spectacular growth, it is even more excited, and can hardly wait, to see the future to come and how this phenomenon will evolve over time. This radical and swift change causes practitioners and those who work in this field to become more pro-active and be prepared to absorb any changes and information that are caused by this evolution.

In all ASEAN economies, I believe similar incidents have also occurred. We have all been trying to cope with this evolution of ADR practice. We all have our own way to deal with this issue and to develop the practice further. These distinctive approaches inevitably reflect, in whole or in part, our own history, social values, current and past economic situation, traditions, religions and education. I believe that these distinctive approaches are valuable in their own rights, because they have been moulded from such

various factors and become particularly workable in their settings and circumstances. It is quite unfortunate that we, member of ASEAN economies, have a few chances to exchange such valuable information. Moreover, when we really need that information and knowledge collected by our colleagues from other economies over a long span of experience, there is no resource to consult with. It is, I believe, that if we can make an ensemble of information and knowledge from trial and error, it will enable our colleagues in other economies to become more adaptable to changing circumstances, because, from time to time, we will find that our peculiar obstacles and problems are not that peculiar and have previously confronted by other colleagues who have tried to promote ADR in their countries. It is, therefore, beneficial to have some kind of **“ASEAN ADR Knowledge Centre”** to collect these information, resources and knowledge for all ASEAN members as well as those from other parts of the world to learn more about ASEAN ADR. With today convenient information technology that tends to become even more convenient in the future, this Centre can also work as a forum to exchange views and ideas about various issues, by means of blogs, web boards, video conference and even instant messaging. It looks quite complicated at first sight. It is not that complicated in practice, taken into account today technology and the level of knowledge of information technology of new generation of workforce.

Last, but by no means the least, ADR have proved itself to be a very useful tool for settling disputes and preserve peaceful atmosphere in society. Its unused potential is still enormous, and waits for further cultivation. What makes ADR methods such as mediation become very popular in our ASEAN economies is not so surprising, because it is just a kind of rediscovering our own self. We have long accustomed to peaceful way of solving conflicts and harmonious society, since our long history has been recorded. When our economies grow sometimes so speedy that we cannot keep pace with this fast changes, we forget this admirable past and become entangled with advocating our positions and litigating everything. Once this dormant character is waken up, it is painless to assimilate the idea and put it into practice. However, to press this development further in today society, what is needed is more than pure instinct and traditional practice. It needs a careful and forward-looking planning and modern management, in terms of organizations, personnel, public relation and advertisement, training and knowledge

management as well as conflict management. Otherwise, we will not be able to tap the hidden potential of ADR for years to come.