**ALTERNATIVE DISPUTE RESOLUTION IN THAILAND –**

**AND OVERVIEW OF THE PAST, PRESENT AND FUTURE**

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# **Introduction**

When conflict occurs, there are various ways to resolve it. The parties can use in-court and also out-of-court. Although litigation is a common method of dispute resolution, Alternative Dispute Resolution (hereinafter: ADR) has gained in popularity these past decades. Whether one uses negotiation, mediation, conciliation, or arbitration, each method has different prominent points and solutions that can suit every specific dispute.

ADR gives parties the opportunity to solve and settle their disputes outside of the court system, which saves time and helps maintain parties' relationships. To have the parties resolve their differences by using ADR methods, an agreement shall have been made between them.[[1]](#footnote-1) Thus, the agreement between the parties is a key point that identifies ADR. ADR is mostly used in commercial disputes or to pursue civil claims. ADR also remains a method that does not have a binding system of precedent or jurisprudence, which could lead to inconsistent decision-making.[[2]](#footnote-2) Although ADR is widely used in commercial cases around the world, there is a lack of awareness among Thai people on this topic[[3]](#footnote-3). A major issue that Thailand faces with regard to ADR is parties are unaware of dispute resolution options other than the court. This paper aims to present the solution and procedure of the various ADR method, and the different options global and Thai markets have.

This article is divided into seven sections. We will introduce the background of ADR in Thailand with some historical aspects (*infra* I). Following that, we shall explain the distinction between litigation and alternative dispute resolution (ADR) (*infra* II). After this explanation, we will clarify the status and describe the negotiation method (*infra* III). Furthermore, we will define what is mediation (*infra* IV). Moreover, we will describe conciliation and share the differences it has with mediation (*infra* V). In addition, we will explore the most famous ADR method, i.e., arbitration (*infra* VI). As a final part of this paper, we will clarify the development of ADR in Thailand (*infra* VII).

# **The history of ADR in Thailand**

In the practice of dispute resolution, the majority of disagreements are settled through litigation. Therefore, the State always attempted to find mechanisms to settle disputes to conform to the needs of society. The latter requires efficiency and justice. In response to that, the State pursues the objective of protecting the fairness of their dispute resolution.[[4]](#footnote-4) In Thailand, mediation has been a method used to settle disputes for a long time. Its history can be traced back to before the Sukhothai period, up until Rattanakosit.[[5]](#footnote-5) Mediation and Arbitration are the most common forms of alternative dispute resolution. Nevertheless, conciliation is another dispute resolution procedure that is also practiced in Thailand.

ADR methods are becoming increasingly prominent in Thailand. It may provide a more immediate and regular resolution than the local state courts. In Thailand, there is special legislation pertaining to alternative dispute resolution, such as the Arbitration Act B.E.2530 (1987)[[6]](#footnote-6), The Court of Justice Regulations Pertaining to Mediation of B.E. 2544 (2001)[[7]](#footnote-7). The latest development of mediation in Thailand is the Thai Mediation Act, which entered into force in 2019. Its aim is to promote the use of mediation as an effective and efficient way of resolving disputes in Thailand.[[8]](#footnote-8)

The first traces of ADR appeared in Thailand, in B.E. 2438 (1895). Out-of-court mediation happens to be the first records of the dispute resolution process. King Chulalongkorn the Great (Rama V) has established the Ministry of Justice to organize various courts transferred to the same ministry. The Statute of the Rattanakosin District Court was promulgated to establish a standing court for judicial proceedings in the provinces.[[9]](#footnote-9) After this period, the law created a way for resolving disputes at the local level. For instance, the statute of the District Court, B.E. 2438 (1895)[[10]](#footnote-10), in category 6, gives the village chief the power to mediate disputes for "civil and small disputes". This alternative was suggested for situations where the amount in dispute or the contractual penalty exceeded 20 baht and for offenses without penalty. Following that stage, based on the Local Administration Act of B.E. 2457 (1914), the sheriff of each district has the power to mediate civil cases when the respondent has a domicile or a cause of action occurring in the area of this district and the capital of the dispute does not exceed 20,000 Baht (Section 108).[[11]](#footnote-11)

In the later period, there was not much information or allusion about ADR in Thailand until B.E. 2545 (2002). In 2002, the Arbitration Act B.E. 2545 (2002) was promulgated in the Royal Gazette (April 29, 2002).[[12]](#footnote-12) This Act is about ADR, in which the parties agree to settle disputes that have occurred or will occur in the future. The objective of this Act is to keep private parties from participating in the duty of considering and arbitrating disputes that mostly arise between private parties.[[13]](#footnote-13) Later, it was amended to Arbitration Act (No. 2) B.E. 2562[[14]](#footnote-14) on April 15, 2019, an amendment to the Arbitration Act. The Amendment introduced provisions expanding the ability of foreign arbitrators and representatives to act in arbitral proceedings.[[15]](#footnote-15)

# **The difference between litigation and ADR**

Litigation is a process of taking a case to the court of law or carrying on a lawsuit for settling controversies or disputes to come up with a judgment.[[16]](#footnote-16) The general courts in Thailand are Civil Courts, Criminal Courts, Provincial Courts, and Municipal Courts i.e., Kwaeng Courts. Furthermore, Thailand is a country governed by civil law. The Civil Procedure Code (hereinafter: CPC) governs most aspects of civil procedure. Precedents established by Supreme Court decisions are not formally recognized in the same way as those of common law countries are.[[17]](#footnote-17) Therefore, litigation is typically used as a last option to resolve disagreements. Most disputing parties attempt to avoid litigation entirely, knowing that pursuing recourse through the courts or arbitration may cause a disruption in commercial relationships, result in increased legal fees, and generally lengthen the period during which the disagreement stays unresolved. While some of these concerns are valid, litigation is sometimes the only way for a party to obtain relief. It is Promising for parties considering such recourse because the Thai judicial system is generally an accessible, neutral, and balanced mechanism for dispute resolution.[[18]](#footnote-18)

The advantageous aspect of litigation is that there is a body of substantive law and procedure that automatically governs a lawsuit, and parties do not have to construct the rules that will regulate the lawsuit.[[19]](#footnote-19) Another consideration is that the judge is required by law to be impartial, and the judge's income is not contingent on whether the parties ever utilize that particular court again.[[20]](#footnote-20) The outcome of the case has no personal impact on the judge. Either party of a dispute is entitled to appeal whole, or any part of the decision issued by trial/court of first instances.[[21]](#footnote-21)

On the other hand, ADR refers to any technique agreed upon by the parties to a dispute in which they use the services of a neutral party to aid them in reaching an agreement and avoiding litigation.[[22]](#footnote-22) Types of ADR include arbitration, mediation, negotiated rulemaking, neutral factfinding, and minitrials.[[23]](#footnote-23) The purpose of ADR, with the exception of binding arbitration, is to provide a forum for the parties to work toward a voluntary, consensual solution rather than having a court or other authority decide the dispute.[[24]](#footnote-24)

In the context of ADR, the parties usually exert a significant influence in shaping both the process and the ultimate outcome.[[25]](#footnote-25) In the majority of alternative dispute resolution (ADR) procedures, parties are afforded greater opportunities to present their perspectives compared to trial settings.[[26]](#footnote-26) Certain forms of ADR, such as mediation, provide parties with the ability to craft innovative resolutions that are not accessible within a trial setting.[[27]](#footnote-27) Other ADR processes, such as arbitration, allow the parties to choose an expert in a particular field to decide the dispute.[[28]](#footnote-28) In most trials, there is a winner and a loser.[[29]](#footnote-29) The loser is unlikely to be pleased, and even the winner may be dissatisfied with the outcome.[[30]](#footnote-30) ADR can assist parties in finding win-win solutions and achieving their true objectives.[[31]](#footnote-31) As a result, along with other potential advantages of ADR, this factor can enhance the overall satisfaction of the parties with both the process of resolving the dispute and the final outcome.[[32]](#footnote-32)

# **Negotiation**

## What is negotiation?

Negotiation means trying to reach an agreement through discussion. It will give an opportunity to resolve a dispute to parties who voluntarily use the method, are open-minded to talk and are looking for a solution to end the problem together. Through negotiations, the parties to the dispute will initially discuss and propose a solution. There will be no intermediaries to assist in discussions and dispute resolution.[[33]](#footnote-33)

## Type of negotiation

Negotiation is divided into two types.[[34]](#footnote-34) First, distributive negotiations are a type of negotiation in which each side attempts to maintain their own interests. Sometimes information is hidden, or there is an action that suggests power over another. Negotiators must be meticulously prepared. Acting firmly, convincingly, and always watching the other party's reaction. Second, integrative negotiation that takes into account the cooperation of all parties. Not focusing on standing but focusing on the needs and interests of each party. It will make a decision that will benefit all parties.[[35]](#footnote-35)

# Mediation

## What is mediation?

Mediation is when a neutral third-party attempts to bring the parties together. A mediator's position is typically that of a non-partisan person that listens to both parties in order to uncover the facts of the case, identify the actual issues of the disagreements, and determine what the parties truly want from the dispute. The mediator works to bring the parties to an agreement by initiating communication. The agreement will be on the parameters agreed upon by the parties and will hopefully be less adversarial.[[36]](#footnote-36)

## Mediation in Thailand

Thailand has the Dispute Mediation Act 2019 (hereinafter: ACT).[[37]](#footnote-37) Once the mediation process leads to an amicable settlement between parties, a compromise agreement may be drafted and endorsed by a judgment from the court. Only certain civil and criminal disputes can be mediated under the Dispute Mediation Act.[[38]](#footnote-38) These include some specific criminal disputes and land disputes which are not ownership disputes.[[39]](#footnote-39) Many organizations, including the Thailand Arbitration Centre and the Thai Chamber of Commerce, are attempting to establish and promote neutral alternative dispute resolution, such as mediation by trained professionals. This has resulted in a large increase in mediation and alternative dispute resolution cases, owing to better facilities and well-equipped mediators who understand both the commercial sides and the alternative dispute resolution processes.[[40]](#footnote-40)

## Process of mediation

Mediation in Thailand takes both an in-Court and out-of-Court form. The CPC of Thailand empowers the court to order mediation in cases which are subject to a civil dispute.[[41]](#footnote-41) When the court deems it appropriate, or by the request of the parties. Court-annexed mediation is a non-adversarial, confidential method aimed to bring parties to an amicable resolution of conflicts.[[42]](#footnote-42)

The dispute Mediation Act of 2019 assigned the process of mediation in chapter two, part one. For instance, section 21 states that “If any party intends to have the dispute mediation, the party shall submit an application to an agency conducting the dispute mediation. The agency conducting the dispute mediation shall seek the other party’s willingness to engage in the dispute mediation […]” and section 22 states that “The parties shall agree to appoint one or more mediators from a list of mediators prepared by the agency conducting the mediation. If the parties fail to agree on the appointment of mediators, the parties may request the agency conducting the mediation to appoint mediators from such list, in accordance with the Rule prescribed by the agency conducting the mediation…”.[[43]](#footnote-43)

In short, the parties shall submit the application in person or by mail to the court of competent jurisdiction and scan the QR code separately by court through the CIOS system, according to CPC section 20ter.[[44]](#footnote-44) The mediation officer proposed to the judge that he considers an order to accept the complaint. The next step is for mediation center staff to send the request and documents by post or email, attaching an invitation letter to join the mediation, with a response within 15 days of submitting the request. In the case of acceptance, it means that you wish to mediate. The date and method of mediation will be clearly determined further in the process. In the event that you do not accept, it is considered that you do not wish to mediate and want the matter to be settled. The last solution of the mediation process is for parties to come to court, present themselves to the court, and appoint a mediator.[[45]](#footnote-45)

# **Conciliation**

##  What is conciliation?

Conciliation is an ADR method in which an independent third party, the conciliator, assists disputants in identifying the disputed issues, developing choices, considering alternatives, and attempting to reach an agreement.[[46]](#footnote-46) A conciliator might have professional experience in the subject matter under dispute and will generally advise on the issues and resolution possibilities.[[47]](#footnote-47) A conciliator, on the other hand, will not render a judgment or decision on the issue.[[48]](#footnote-48) Conciliation can be voluntary, court-ordered, or contractually required. It is frequently used as part of a judicial or government agency process.[[49]](#footnote-49)

## Conciliation in Thailand

In Thailand, there are two types of conciliation: conciliation in court and conciliation out of court. By means of conciliation out of court, the conciliation process is used before the dispute is brought to court. It which will allow the dispute to be settled. That is necessary to have a conciliator to enforce it. When parties agreed that they would accept a waiver for each other, there will be a settlement agreement.[[50]](#footnote-50) The conciliator participates actively in the debate to bring the parties to an agreement. A conciliator, as opposed to simply listening and being sympathetic, is usually an expert on the topic and will actively address the issue with each party. The conciliator strives to move the parties' focus away from what they "want" and toward what is likely to happen if the disagreement is heard in court. Section 22 of the Labor Protection Act outlines the conciliation procedure.[[51]](#footnote-51)

## Differences with mediation

The difference between mediation and conciliation is the role of intermediator in each process. For conciliation, it has a conciliator who may resolve the issue by communicating the needs of each side without finding a solution for the parties. However, mediation employs a mediator who can suggest a solution to resolve the conflict rather than simply converse. In Thailand, there is no clear information about the difference between conciliation and mediation. The reason is that in Thailand, we use conciliation and mediation to describe forms of dispute resolution in court and out of court. Therefore, a combination of these methods is used.[[52]](#footnote-52)

# **Arbitration**

## What is arbitration?

Arbitration is an alternative method of resolving disputes. The parties involved in a dispute agree to submit their case to an arbitrator or a panel of arbitrators for a binding or non-binding decision. It is a private, confidential, and less formal process than going to court.[[53]](#footnote-53)

## Arbitration in Thailand

Under Thai law, parties to a dispute can agree to submit their dispute to arbitration, either in Thailand or abroad, by including an arbitration clause in their contract or by entering into a separate arbitration agreement. The arbitration agreement must be in writing and must specify the rules and procedures to be followed in the arbitration. Arbitration in Thailand is conducted by a sole arbitrator, or a panel of arbitrators appointed by the parties or by an arbitral institution.[[54]](#footnote-54) The arbitral tribunal has the power to determine its own jurisdiction, to conduct hearings, to order discovery, and to make an award. Thailand has several well-established arbitral institutions, such as the Thailand Arbitration Center (THAC)[[55]](#footnote-55) and the Thai Arbitration Institute (TAI)[[56]](#footnote-56), which provide a range of arbitration services and support to parties involved in disputes. Arbitration is a well-established form of alternative dispute resolution in Thailand, with a legal framework that is governed by the Thai Arbitration Act of 2002.[[57]](#footnote-57)

## Arbitration’s structure/procedure

Arbitration’s structure specified in Thailand Arbitration Center Rules on Arbitration B.E.2558 (2015).[[58]](#footnote-58) Initiation of arbitration is the parties have agreed to use arbitration in the contract in which the dispute arises. When dispute had occurred, the party initiating the arbitration sent the notice of arbitration to the other party and any statement, communication, or request or any document shall be submitted to the registrar according to article 4. In case it has two parties called claimant and Respondent. If the parties submit the notice of arbitration completed, the registrar shall proceed to form the Arbitral Tribunal according to article 16. The arbitrator holds a preliminary conference to discuss procedural matters, such as the timetable for the arbitration, the scope of the dispute, and the exchange of evidence. Such as witness statements and documents, in preparation for the arbitration hearing. The arbitrator holds a hearing where the parties present their case and evidence, and the arbitrator ask questions and hear testimony from witnesses. After that, the arbitrator makes a decision, either immediately after the hearing or at a later date and issue an award in writing. The award sets out the findings of fact, conclusions of law, and any damages or relief awarded. If the award is binding, the parties must comply with the award. If there is a dispute over enforcement, the award can be enforced through the Thai courts.[[59]](#footnote-59)

## Arbitration Agreement

Drafting an arbitration agreement should specify the subject matter or issue that both parties allow to be settled in arbitration.[[60]](#footnote-60) An arbitration agreement is important to make clearly because you and the disputing parties have agreed to choose arbitration in resolving the dispute. Arbitration can go forward.[[61]](#footnote-61) In an arbitration agreement, the key is drafting two issues. The first issue is the seat of arbitration, whether it will be decided by the disputing parties themselves or by the arbitration center. The next issue is governing rules. The draft must clearly state the applicable rules, as each center and institution have their own rules.[[62]](#footnote-62) The parties may specify the following arbitration clauses in the contract or make another arbitration agreement: “*Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Thailand Arbitration Center for the time being in force and the conduct of the arbitration thereof shall be under the administration of the Thailand Arbitration Center.*”[[63]](#footnote-63)

## Arbitration Award

An arbitration award is the arbitrator’s final decision on the dispute.[[64]](#footnote-64) An arbitral award is made by an arbitral tribunal. It is similar to a court judgment. Therefore, it is binding on and enforceable against the parties.[[65]](#footnote-65) Under Thai law, an arbitration award must be in writing and signed by the arbitrator or arbitrators. The award must also specify the reasons for the decision and the date and place of arbitration according to Arbitration Act B.E. 2562, which amends Arbitration Act B.E. 2545 (hereinafter: AA).[[66]](#footnote-66)

The form of arbitration award is written and signed by members of the arbitration tribunal. The award must contain a clear statement of the reasons for making each of the decisions in the award unless otherwise agreed by the parties, according to Section 37 of the AA. When the party would like to enforce an arbitral award, it must file an application with the competent court within three years from the date on which the award is enforceable. The application must be accompanied by the following documents: The first document is the original or certified copy of the arbitral award and a Thai translation. The second document is the original or certified copy of the arbitration agreement and a Thai transition. The date on which the award is enforceable is the date on which all the parties start to have duties to comply with the award, according to Article 42 of the AA. In order to enforce an arbitration award in Thailand, the prevailing party may need to take legal action in court to obtain a judgment confirming the award. Once a court judgment is obtained, the prevailing party can enforce the award through various means, such as attaching the assets of the losing party or seeking an order for specific performance.[[67]](#footnote-67)

# **Development of ADR**

## The Present of ADR in Thailand

ADR is becoming increasingly popular in Thailand as an alternative to traditional litigation. Nowadays, more disputes arise from online transactions. In addition, electronic commerce (e-commerce) tends to grow, such as on the website, Facebook, Instagram, or Line.[[68]](#footnote-68) Therefore, the dispute resolution model has been developed to keep up with the times and situations. In Thailand, online dispute resolution (hereinafter: ODR) has been implemented to resolve issues arising from electronic transactions.[[69]](#footnote-69) The Thailand Arbitration Center (hereinafter: THAC) has developed a system called “TalkDD.”[[70]](#footnote-70) TalkDD is the platform for arbitration, mediation, and negotiation.[[71]](#footnote-71) However, the use of ADR in Thailand is especially common in commercial disputes, where parties often prefer to avoid lengthy and expensive court proceedings. ADR is also being used in other areas, such as labor disputes, family disputes, and environmental disputes. The ADR is the most developed and widely accepted. There is an international treaty for the recognition and enforcement of foreign arbitral awards (New York Convention 1958)[[72]](#footnote-72). Thailand has been enacting laws promoting the arbitration system as an alternative justice system since 1987, which is now the Arbitration Act 2002.[[73]](#footnote-73)

## The Future of ADR in Thailand

The THAC collected data between 2019 and 2020 and used the geometric mean to analyze the consolidated index. Furthermore, the survey discovered that awareness index arbitration The arbitration perception index for 2019 was 59.35, and the arbitration perception index for 2020 was 59.61, a 0.44 percent rise from 2019. We can evaluate trends and the direction of situations by analyzing the situation and arbitration direction using that index number. According to the arbiter, the domestic arbitration scenario is improving.[[74]](#footnote-74) In order to develop and promote the arbitration system to have standards and build credibility to investors. It is thus necessary to develop knowledge of arbitration. This is because the arbitration process is one of the most significant tools for promoting domestic economic development, building confidence, and promoting the arbitration process. As a result, it is speculated that it has an incredibly crucial role.[[75]](#footnote-75)

# **Conclusion**

Through the study of ADR in Thailand, we have examined its development and background. It provides insights into the past, present, and future of ADR, highlighting interesting details from each period. In the past, ADR's background in Thailand was shaped by the state's recognition of the need to establish a framework for resolving disputes outside of court, driven by limited public access to the court system during that time. Presently, the circumstances of ADR have undergone changes primarily due to the influences of globalization, including advancements in technology and international relations. Looking ahead, the focus of ADR will shift towards the implementation of the awareness index arbitration, based on data collected between 2019 and 2020.

Each ADR method brings its own solution to specific issues and disputes. For instance, negotiation does not require an intermediary to communicate between parties. Furthermore, negotiating is the initial method of resolving disagreements, which everyone can do more readily than others. The reason is the parties to the dispute should first negotiate before agreeing to stipulate for the use of an intermediary to determine their needs. The most popular arbitral institutions in Thailand, namely THAC and TAI.

Regarding the ARD’s current situation in Thailand, there are multiple areas to be improved. Particularly, the lack of popularity and the lack of awareness. We are well-aware that many arbitrations institution in Thailand are resolving these issues by offering lecture, seminar, and training. To push Thailand to become an arbitration-friendly country, there need be a massive support from the government and the national court. The future will answer the following question: "How will Thailand grow in such a competitive market?". It is only with innovative ideas and by sharing information and advantages that Thailand will rise to the level of world-class institutions.

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