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ALTERNATIVE DISPUTE RESOLUTION IN THAILAND *

by

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The past few years have been interesting years for Asia. We, Asian people have certainly lived through interesting times. To cite a celebrated Chinese saying, “*we are living in an interesting time*”, is perhaps appropriate. In 1997 Thailand and many countries in Asia witnessed the transition of their economy from phenomenal success and double-digit or near double-digit growth of the past few earlier years to near collapse verging on the state of bankruptcy in many important financial and business sectors. Lawyers, like any other profession, bear the burden of bringing Asia out of this predicament. This is a time for re-thinking, re-planning and re-structuring our legal as well as our social, economic and political infrastructure.

Under the new Constitution promulgated in 1997, substantial changes have been made in Thai political, social and legal environments. A Constitutional Court has been established. The system of administrative courts has also been established. In the field of criminal justice system, a human right oriented approach is preferred to the traditional strict appliance of ‘law and order’ approach. In the field of civil justice system, case management by the judge and alternative dispute resolution (ADR) are encouraged.

* This research is an undertaking by the Central Intellectual Property and International Trade Court in conjunction with the Institute of Developing Economies (JETRO-IDE) of Japan. Members of the working group for the research comprise of five judges from various courts of justice in Thailand, one Senior Public Prosecutor, six field researchers and two legal officers acting as secretariat and liaisons. Each member is assigned to write and lead a research on his/her expertise. A few meetings are conducted to interview players in each compartment of the legal profession. Field research in the form of questionnaires is conducted. All members are responsible for the final draft. *Justice Prasobsook Boondech*, Ex Chief Justice of the Central Intellectual Property and International Trade Court, now Senior Justice of the Supreme Court, has acted as the honorary advisor to the research programme.

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ADR in its official form has been a recent development in Thailand. The longest and most successful arbitration center is the Arbitration Office, Ministry of Justice (Now called the Thai Arbitration Institute).¹ In the first year of its establishment in 1990, there was only one arbitration case concerning a construction dispute. In 1999, there were a hundred cases involving disputes over constructions and breach of contracts filed at the Arbitration Institute. At the outset of the establishment of the Arbitration Office, it was hoped that arbitration would reduce the workload of court in civil cases. After ten years in operation and the caseload of approximately a hundred per year, it is hardly likely that arbitration would reduce any substantial number of cases going to court.² Other arbitration institutes are simply in their embryonic stage. The existence of which are signs of development and for prestigious reason.

ADR is a new terminology of an old concept. Non aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who bring ADR, with its famous '*win-win solution*' trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution. In Thailand as well as everywhere in the world, ADR represents a refreshing approach to litigation. It represents a new challenge to the legal profession. This paper proposes to examine some of the lessons we have learned from introducing or perhaps more accurately, reintroducing court-annexed ADR into dispute resolution mechanism in Thailand.

¹ Since the new Constitution (1997) and the introduction of separation of the Judiciary from the Ministry of Justice in accordance with the Constitution, the Arbitration Office of the Ministry of Justice has become the Thai Arbitration Institute, Alternative Dispute Resolution Office, Office of the Judiciary.

² The present figure stands at approximately 850,000 cases per annum. In 2000 AD there were 840,939 cases filed in the courts of first instance throughout the Kingdom. See www.judiciary.go.th for more detail.

I. Practice Guidance on Court-Annexed Conciliation and Arbitration

Similar to the English practice where the Lord Chancellor may issue *Practice Directions*, the President of the Supreme Court in Thailand may issue *Practice Guidance* for judges in order to achieve uniformity and fair dispense of justice. Influenced by the much publicized use of ADR in the United States³, in 1996, the President of the Supreme Court issued the Practice Guidance on court-annexed conciliation and arbitration.⁴ The Practice Guidance may be summarized as follows:

(a) In cases where the presiding judge is of the opinion that there is a reasonable chance of amicable settlement between the parties, the court shall initiate the conciliation process.

(b) In cases where the conciliation fails and the issue in dispute involves technical point of fact where the assistance of a neutral or an expert may be helpful in the speedy resolution of the case, the court, with the approval of the parties may appoint an arbitrator to rule on the matter given. The award thus rendered by the arbitrator, if approved by the court, shall be incorporated in the final judgment.

(c) In cases where the conciliation fails and the presiding judge considers that it might not be appropriate for him or her to continue sitting in the case, he or she may withdraw from the case except where it is contrary to the intention of both parties.

(d) Each court may designate a special room for conciliation purposes. The atmosphere shall be informal. The judge and the lawyers shall not put on their gowns.

³ Chief Judge Clifford Wallace formerly of the US Court of Appeals for the Ninth Circuit was a major stimulant in Thailand for this influence.

⁴ *Practice Guidance Concerning Conciliation dated 7 March B.E.2539 (1996)*. The Practice Guidance was issued by virtue of s 1 of the Statute of the Court of Justice (then in force) whereby the President of the Supreme Court was empowered, in the capacity as head of the Judiciary to lay down 'directions' for judges. In practice these 'directions' are invariably termed 'Practice Guidance'.

(e) Where a speedy settlement is achieved, the court may consider returning the court fees to the parties. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US\$ 5,300) payable at the filing of the Claim. This is designed as an incentive for settlement in certain cases.

Conciliation is now practised by courts of justice throughout the country with encouraging figures of success. Even cases at the appellate level may be settled by conciliation. It is widely used in the Civil Courts in Bangkok, in the civil jurisdiction of provincial courts throughout the country, in the juvenile and family courts for cases concerning family law, in the Central Labour Court for cases of labour disputes and in the Central Intellectual Property and International Trade Court for cases of intellectual property and international trade disputes.

II. Role of the Judge: Inquisitorial V. Adversary

Although the Thai legal system may be classified as belonging to the civil law tradition whereby the German *Bürgerliches Gesetzbuch* (BGB), the French *Code Napoléon* and the Japanese Civil Code played a dominant part in the formation of its Civil and Commercial Code. The English common law had a significant influence on the Thai Commercial law in particular on Book III of the Civil and Commercial Code entitling Specific Contracts. On the procedural side, with the influence of the English Inns of court and legal educational institutions where Thai judges of earlier times were exposed to, Thai procedural law may be described as adversary. This predicament may raise some jurisprudential problem.

There are two conflicting views as to the role of a civil court. The traditional English view is that the court should play a passive role and leave the conduct of the case to the parties; the court should act as an umpire to see that the parties play the game of litigation according to its rules and to give an answer at the end to the question 'who's won?' The continental view is that once the parties have invoked the jurisdiction of the court it is its duty to investigate the fact and the law and give a

decision according to its view of the justice in the case with regard to any public interest that may involved.

The question to ask is if a judge on the bench attempt to lead a negotiation towards settlement of the dispute, would he in any way be compromising or be seen as compromising his role as a passive neutral?

The truth is judges in Thailand have little or no difficulties on the problem raised. The reason may be based on the fact that on the true analysis, the Thai legal system is a blend between the civil and common law family. Thai judges are familiar with conciliation. The Civil Procedure Code, since its promulgation in 1935, prescribes in section 20 that the Court shall have the power, at any stage of the proceedings, to attempt compromise or conciliation between the parties on the issue in dispute.

The Thai courts, when conducting a conciliation process, will depart from their traditional passive role of a judge in the adversary system, to the role of a more active judge in the inquisitorial system. However, when the judge feels uneasy or inappropriate for him or her to continue sitting in the case, he or she shall withdraw. Otherwise the judge may be challenged on the ground of bias. However, the instance is very rare. The status of a judge, being in a position of respect, may actually assist the process of conciliation. In a case in the remote part of Thailand, the plaintiffs and the defendants are brothers and sisters involving in a bitter dispute on the matter of an inheritance where the father died intestate. After some lengthy session of arguments and allegations, the presiding judge, who acted as the conciliator, asked the parties in earnest. "Do you folks still offer merits to your father?" Both parties answered in an empathic "Yes". It is common indigenous belief that when one's elder dies, the living relatives shall offer merits to the dead for him to get on to a better life after death. The judge said in a loud voice. "Then don't bother to do any more merits. Your father cannot go anywhere. Actually, he is crying and suffering at the moment because you lot are fighting over his assets. He cannot rest in peace because of you." The dosage of "shock therapy" did catch the attention of the parties and led to amicable settlement. This is hardly the role of a judge in an adversary system. But the important thing is that it works.

In the process of conciliation, it is always helpful for the conciliator to refrain from making a statement or opinion. It is always more prudent to form a question than to make a statement. For examples, You don't suppose to have any problems on the Statute of Limitation? I suppose you can justify on the amount of damages claimed? Where does the burden of proof lie? Etc.

III. Some Techniques Used in Court-Annexed Conciliation

Recently, section 20 of the Civil Procedure Code⁵ which initiated court-annexed conciliation since 1935, has been amended to incorporate further modern techniques in conciliation. Three more paragraphs are added as follows:

For the purpose of conciliation, where the court deems appropriate or where on request of a party, the court may order that the conciliation be conducted behind closed doors in the present of all or any of the party with or without attorney.

Where the court deems appropriate or where on request of a party, the court may appoint a sole conciliator or a panel of conciliators to assist the court with the conciliation.

Rules and means of court-annexed conciliation, the appointment, powers and responsibilities of conciliators shall be governed by Ministerial Regulations.⁶

Furthermore, section 19 of the Civil Procedure Code empowers the court, for the purpose of conciliation, to order litigants in the proceedings to be present in court, although legal representation is appointed. The sanction for disobeying the court order to make a personal appearance is contempt of court. (section 31(5))

There are some practical points used in court-annexed conciliation where the judge acts as conciliator in Thailand:

⁵ As amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

⁶ No such regulations have yet been formulated.

- Conciliation is conducted in a conference room not in the court room. Formalities are dispensed with. Secrecy is enforced. Public and the press are barred from witnessing the conciliation proceedings.
- Non-disclosure agreement is made. Without prejudice condition is added to facilitate the invention of options for compromise.
- Although the law allows conciliation without attorney, in practice the conciliator never discourages the present of an attorney. Attempt to do so is likely to have an adverse effect on the trust of the parties in dispute towards the conciliator. The decision to exclude attorney should come from the party itself. It is the conciliator who should say, attorneys are welcome.
- Caucuses with each of the parties to the exclusion of the other are helpful; sometimes to dilute some of the less-than-reasonable claims or to increase some of the more-reasonable offers. Although the law allows the use of caucuses, it is best policy to obtain the consent of the parties first.
- An atmosphere of joint effort to solve the problem is perhaps the best environment to create in conciliation. Parties are invited to present options to settle the dispute. Each option caters for the mutual interests of the parties. Conciliator to be sensitive to the need and legitimate interest of each party.
- Conciliator to be careful about objectivity and neutrality. Instead of making a statement in the affirmative. Asking a question is more “politically correct” and may achieve the same result.
- Refreshments, coffee breaks, (good) working lunch or even a few jokes of the day do help the atmosphere in a negotiation. Miracles sometimes happen during these “time-out”.
- It is arguable the wisdom of forcing litigant to appear in conciliation with the threat of contempt of court. The device is sometimes used in consumer claims where the defendant is a corporation.

- Under a recent amendment to the Civil Procedure Code, conciliation is compulsory in small claims disputes⁷.

IV. Court-Annexed Arbitration

Court-annexed arbitration is a welcome development of 'case management'. It helps solve the problem of backlog of cases. It is particularly useful in construction cases where the services of an expert are of great importance. It can save days, weeks or even months of court time in the testimony of expert witnesses. Court-annexed arbitration often occurs at the pre-trial conference where a difficult question of fact is singled out for special consideration by a specialized arbitrator.

The advantages of arbitration compared to litigation are traditionally listed as follows:

- (a) Privacy.
- (b) Tribunal of the parties' choice.
- (c) Informality of proceedings.
- (d) Speed and efficiency.
- (e) Lower costs.⁸
- (f) finality of the award.

⁷ Section 193 paragraph two of the Civil Procedure Code as amended by the Civil Procedure Amendment Act (No. 17) B.E. 2542 (1999).

⁸ In many cases whether arbitration incurs lower costs than litigation is debatable. With respect to one of the direct costs - filing fees and other tribunal fees - arbitration can be more expensive than all other forms of dispute resolution including litigation. Since in most jurisdictions filing fees and court fees are nominal. In Thailand, court fee is calculated at 2.5% of the amount in dispute but not exceeding 200,000 baht (approx. US\$ 5,300). The International Chamber of Commerce (ICC) Court of Arbitration's filing of registration fee is US\$ 2,000 and an additional administrative charge, a percentage of the amount in dispute is added. In an apparent effort to counter its reputation for being too expensive, the ICC announced that the administrative charge is now capped at US\$ 50,500 regardless of the amount in contention. Attention must also be given to the fact that while judges work may be described as public service most arbitrators charge for fees. Two other factors must also be taken into consideration. First, attorney fees can be huge if the trial lasts a long time. Secondly, in comparing arbitration costs to litigation costs, one must remember that arbitral awards are not themselves enforceable and if the losing party does not voluntarily pay, additional costs for a judicial enforcement proceeding will be incurred.

The ultimate end of both litigation and arbitration from the plaintiff's or claimant's point of view is the effective enforcement of the judgment or award. The most certain method to ensure the enforceability of a judgment is to litigate in the national court of the defendant. But most international businessmen and their lawyers are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national court of the plaintiff or, possibly, in a neutral country. Unless the defendant has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. In case of arbitration, if the respondent does not voluntarily pay, the claimant will have to seek judicial assistance in the enforcement of the award regardless of where the arbitration took place.

Court-annexed arbitration has been included in sections 210 - 222 of the Civil Procedure Code since its publication in 1935, but the provisions have never been used until very recently when ADR is seriously considered and practised. Court-annexed arbitration arises when the parties fail to put an arbitration clause in the contract and later bring a civil action in court. At the pre-trial conference when considering the issues in dispute, the judge may, in consultation with and by consent of the parties, refer complicated technical issues on question of fact to arbitration. This is seen as a means of involving a judge in case management. Most of the advantages of arbitration as a means of dispute resolution can be obtained by court-annexed arbitration. However since the award is incorporated into the final judgment of the court, it loses the enforceability of the award abroad under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958. Since the incorporation of arbitration clause in a contract is of recent phenomenon in Thailand, many commercial disputes that would have gone to arbitration were brought to courts of justice creating a great amount of backlog. Referring some of the issues to arbitration is a welcome option for judges at the pre-trial conference.

V. The Establishment of the Central Intellectual Property and International Trade Court

Although litigation is not considered as an ADR, modern techniques learned from ADR could be valuable for judicial reform of civil litigation. This is particularly true in Thailand with the recent establishment of the Central Intellectual Property and International Trade Court (IP&IT Court) whereby ADR methods are adopted to a large extent. ADR, originally conceived as means for alternative dispute resolution has now been accepted as method for litigation in court. The significance of ADR has turned a full circle. It is proposed now to examine some salient points of this court.

In late 1996, the Act Establishing the Intellectual Property and International Trade Court and Its Procedure 1996 was passed by the Parliament. The Act was the culmination of a joint effort between the Ministry of Justice and the Ministry of Commerce in the wake of negotiations between Thailand and the United States as well as the European Countries on trade related aspects of intellectual property rights. The Court is established to create a ‘user-friendly’ forum with specialized expertise to serve commerce and industry. International trade is added to the jurisdiction of the court for the reason that in a country like Thailand specialized Bench and Bar in intellectual property and international trade should be grouped together for easy access and administration. This is also seen as an answer from Thailand to the problem of delay and lack of expertise in civil litigation.

The followings are some of the prominent features in the new court system:

- Liberal use of Rules of the Court to facilitate the efficiency of the forum.
- Exclusive jurisdiction in the enforcement of arbitral awards in intellectual property and international trade matters.
- Panel of three judges to constitute a quorum. Two of whom must be career judges with expertise in intellectual property or international trade matters. The third member of the panel shall be an associate judge who is a lay person with expertise in the matters. A double guarantee of specialization.

- Availability, for the first time in Thai procedural law, of the ‘*Anton Piller* Order’ type of procedure.
- Possibility of the appointment of expert witness as *amicus curiae*.
- Leap-frog procedure where appeals lie directly to the Intellectual Property and International Trade Division of the Supreme Court.
- Use of pre-trial conference.
- Use of court-annexed conciliation.
- Use of court-annexed arbitration.
- Use of videoconference for witness abroad.
- Continuous trial.
- Subject to the consent of the parties, documents in English do not have to be translated into Thai.
- Use of written statement in conjunction with oral cross- examination and re-examination.

While establishing a new court is not an easy task, the promotion of it to international commerce and industry is most difficult. One will have to create the right ‘legal environments’ to attract international commercial litigation. Reputation, integrity, expertise, convenience, accessibility, expenses, respect and the enforceability of judgment in jurisdictions where it matters most are some of the criteria one considers hard when choosing a forum to conduct international commercial litigation.

With the expansion of trade and investment in the Asia-Pacific region and the growing needs for effective mechanism and management for international commercial dispute resolution. Many arbitration centres have been established in the region in direct competition with the more established centres in Europe and America. One sees an increasing attempt to create and promote ADR. Prospective claimants will have more opportunity than in the past for forum shopping. A predictable phenomenon in the climate of free market economy. The more difficult question is ‘quality control’.

VI. Scope of the Present Research

The present research will focus on legal and empirical analysis of ADR in Thailand. Three major areas are focused: consumer protection, labour disputes and environmental disputes. Dispute resolution in these areas need delicate, good understanding and almost tailor-made procedure effectively to redress the problems arisen. Most consumer protection regimes in the world are in the form of small claim court or tribunal whereby participation of the consumers themselves is encouraged but legal representation discouraged. Conciliation is somewhat seen as having better rate of success in that mode. It is almost like a DIY (Do it Yourself) dispute resolution. Labour disputes in Thailand is resolved through a panel of tri-partie judges: a career judge, a judge from the employers' associations and a judge from the employee's associations. The rate of success in conciliation in the Labour Courts of Thailand is phenomenal and exceeds the success in other courts of justice. Environmental Disputes on the other hand are quite new here. Dispute Resolution in environmental matters is at present rested in the traditional court system and procedure. However, the brighter side is that, Thailand has now more and more legal scholars in the field of environmental law. We only need them to switch their emphasis more on dispute resolution matters. This is exactly what this research is trying to achieve.

We hope that this research, the contents and researchers of which are listed in the appendices, will be able to shed some light on and contribute to the growing phenomenon of alternative dispute resolution in Thailand. Three areas of concentration: consumer, environmental and labour protections are singled out for empirical treatment. We hope to finish the research by January 2002.