National Report of Thailand

"Alternative Dispute Resolution in Administrative Matters"

by the Administrative Court of Thailand

Report to the 12th Congress of IASAJ

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Introductory Questions

1. *How do you define alternative procedures? How do you distinguish them from jurisdictional procedures and arbitration procedures?*

In the past two decade, "Alternative dispute resolution" has been introduced, promoted and implemented in Thai justice system. Under the Constitution promulgated in 1997, substantial changes have been made in Thai political, social and legal environments. The Administrative Court of Thailand was established by virtue of the Constitution along with the system of administrative justice. The ADR in "broader"[1] definition has been implemented in administrative level and alternative dispute resolution (ADR) in "traditional"[2] definition are encouraged and implemented to all civil disputes.

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). 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. Others arbitration institutes are simply in their embryonic

[1] ADR in broader definition included procedures conducted before the administration, prior to referral to the court and without the court participation, in form of obligatory or optional preliminary administrative recourse.

[2] ADR in traditional definition are arbitration, mediation or conciliation procedures conducted by the court and third parties.

stage. The existence of which are signs of development and for prestigious reason.[3]

Unlike the Administrative Court, the Court of Justice employed an adversarial procedure. 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 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?

To cope with this issue, the Court of Justice has adopted the inquisitorial procedure into its proceeding, creating a hybrid procedure which facilitated the use of mediation. Consequently, the Court of Justice has set up the Mediation and Reconciliation Center. Mediation is now practiced 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. Evidently, the implementation of ADR in the Court of Justice helps reduce the backlog problem of the court.

As for the Administrative Courts, Due to the fact that the inquisitorial procedure is employed by the Administrative Court. The fact-finding undertaking belongs to the judge (or so called Judge-Rapporteur) so as to render comprehensive necessary facts for the case. Such facts, therefore, will not be limited to those presented or alleged by the disputed parties. The judge thus carries out a very important duty in the proceedings by inquiring of the parties: the litigants and other relevant parties. The inquisitorial procedure that we use has given the judge a certain level of discretional power and created a very open procedure in our court. In order to avoid an overlapping procedure of the jurisdiction procedure and alternative procedures, the definition of "alternative procedures" in the Administrative Courts are defined in a traditional sense in a form of "Court annexed mediation" which not includes arbitration.

[3] Page 3 of IDE Asian Law Series No.19 "Alternative Dispute Resolution in Thailand" , Institute of Developing Economy (IDE-JETRO) March 2002

"Arbitration", a means by which parties in a dispute reach the settlement through the intervention of a third person without having recourse to a court of law is consider to be an out of court ADR. The court shall not intervene with arbitration process of the parties in the dispute.

2. *Do alternative procedures such as those defined above exist in your country? If no alternative procedures such as those defined above exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?*

The concept of using mediation in the administrative courts is a controversial one. Those who oppose it think that the dispute which concern with public interest cannot be mediate. By using mediation process will add more steps to court procedure and even create a longer time for adjudicating a case. As for those who support it see that mediation can be implementing in certain type of cases and it will help reduce the congestion of the case flow in the court. Although, the definition of ADR is commonly acknowledge as a court-annexed mediation, court-annexed mediation is not yet formally use in the administrative court nor explicitly stated in our law and regulation at the moment.

Amidst an argument both side agree upon one thing. If the authorities have discretional power, as long as it's not contradict with public interest, the issue arise from such power can be mediate within the scope of their competence.

Realizing the possibility of mediation in our court, the Technical Committee on Environment of the Administrative Court has been initiated seminars and trainings on mediation several times. The first seminar on mediation was sponsored by the National Health Foundation in December 2011. In this seminar the attendants have a chance to learn from the experiences of the local government in mediating for local disputes. And also has a chance to exchange ideas with court officials who graduated from the German and French school on the point of view on using mediation in administrative dispute.

On 28th June 2013, the technical committee hosted a seminar on the Possibility on the Use of Alternative Dispute Resolution in Administrative Dispute. On this occasion the committee invited a judge from the Court of Justice to share his experience and knowledge in using mediation in the Court of Justice and participated in a group discussion in the afternoon session.

On July 2013, Prof. Dr. Roland Fritz, M.A., a former President of the Administrative Court of Frankfurt, has officially visit the Administrative Courts of Thailand for a three days 'intensive workshop on "A Demonstration in the Field of Mediation for Judges" supported by the National Health Foundation.

The technical committee later on conducts a 70 hours intensive training on mediation for administrative dispute at Max-Planck-Institut for European Legal History at Frankfurt, Germany. The training focus on the concept of mediation along with practical approach and techniques that the mediator uses. All of 7 committees member who attended the training course have gained a lot of knowledge and know-how on mediation in administrative dispute in Germany. The training program is of the same standard as the mediator in Germany has to attain under Germany mediation law (Mediationsgesetz – MediationsG).

In 2015 under technical cooperation agreement between the OAC and the Konrad Adenauer Stiftung, the Technical Committee on Environment has been hold three seminars on Mediation and Conciliation in May, June and July in 2015 at the Administrative Court premises. The purpose of the seminars is to develop the body of knowledge and understanding about mediation and conciliation as used in the Administrative Court of Thailand. The seminars will present and disseminate to the personnel of the Office of the Administrative Courts the mediation and conciliation techniques used in administrative cases in foreign countries by which the parties' disputes can be quickly settled. The seminars also provide an opportunity for participants to brainstorm ideas about methods of mediation and conciliation in administrative cases.

I. <u>The goals and the scope of alternative procedures</u>

1. *With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?*

Due to the fact that alternative procedure is not yet implements in our procedure, we cannot entirely identify the advantages and benefits of alternative procedures. Nonetheless, theoretically the adaptation of alternative procedure would help resolve the dispute more rapidly. Furthermore, the alternative procedure would help narrow the dispute issue in the case and help clarify the issue that both parties need the court to adjudicate.

2. *Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what*

is the proportion of the administrative disputes that are resolved each year by such procedures?

At the present, alternative procedure is not yet implements in our procedure. However, in Administrative level, the concept of using alternative procedure is widely encouraged. With the primary objective to reduce the increasing caseload and to provide an expeditious access to justice for Thai people, particularly in rural areas. The Public Administration Act (No. 7) B.E. 2550 (2007) recognizes that provincial authority has the duty assignment to provide protection, promotion and assistance for disadvantaged people and communities on an equal basis whether socially or economically. The law also states that quality public services shall be provided for the people equally and rapidly. Mediation and arbitration are commonly used at various levels.

At the investigation level

When a dispute occurs, litigants are summoned and investigated for the facts findings by an inquiry official. Cases concerning a compoundable offence not related to public order or sexual offences or civil offences with a fine exceeding Baht 2000 are allowed for a mediation practice. At this stage, if the dispute can be settled, the public prosecutor will not proceed the prosecution.

At the prosecutor level

Parties are proposed an invitation or the willingness to engage in mediation proceedings or to accept a proposal for settlement. The prosecutor can afterwards refer to settlement outcomes for a suspension of the execution of a judgment or a reduction of punishment. The use of mediation at this level has been used for quite some time now and regulated as prosecutor's performance guideline.

At the provincial authority level

The ministerial regulation on the practice of alternative dispute resolution becomes effective in 2011. The law also states measures governing the mediation and the training, professional and transportation fees of mediators working with District Chief Officer or Deputy District Chief Officer.

At the community level

The most effective use of mediation is at the community level, which have always been a part of Thai culture and society. The mediators are community leaders or the village elders who know the community members very well. The mediation at this level always gains more success than the court-

annexed mediation. Nevertheless, the impartiality is required for these traditional mediators.[4]

3. *Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?*

No explicit rule and regulation restrict the use of alternative procedure. The parties in the dispute are free to use alternative procedure (Out of court ADR) under the condition that both parties willingly taking those alternative procedure. However, the court is obligated to oversee that the decision of the parties to end their dispute outside of the trial is not the case which is concerned with the protection of public interest or the case in which further trial shall be of value to the public or in which the withdrawal of the plaint results from an inappropriate collusion[5]. The Court may issue an order rejecting the withdrawal if the court sees that such condition is happen.

4. *Do instruments organizing the use of administrative procedures in administrative matters exist in your country? If so, are these instruments legally binding(hard law/ soft law)*

As explained in (2.) alternative procedure is not yet implementing in our procedure (court –annexed mediation). However, in Administrative level, the concept of using alternative procedure is widely encouraged. There are laws and regulation promoting alternative dispute resolution (see (2.) for more detail). For example, in the dispute concerning civil and administrative dispute, the Ministry of Finance has issue rule and guideline on the appeal of the civil and administrative case in 2006, allowing administrative agencies to use its own discretion not to appeal the case to higher court when the value that the administrative agencies are obliged to compensate is not exceeding 10,000,000 Baht.

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[4] **Administrative Court of Thailand, Trimester Newsletter, Vol.3 July – September 2011**

[5] **Clause 82 paragraph 4 of the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure,B.E. 2543 (2000)**

"…..When a withdrawal of a case is made, the Court shall grant permission thereto and issue an order striking the case out of the Case-List as well as return to the plaintiff the whole or any part of Court fees. But, in the case which is concerned with the protection of public interest or the case in which further trial shall be of value to the public or in which the withdrawal of the plaint results from an inappropriate collusion, the Court may issue an order rejecting the withdrawal. The order rejecting the withdrawal shall be final."

In the case where the value of the dispute is exceeding 10,000,000 Baht due to the high amount of the compensation, the agencies are obligated to appeal the case first. However, if the agencies are of the opinion that it should not appeal to the higher court. It can send the case to Ministry of Finance to permit the withdrawal of the appeal later.

Nonetheless, this guideline and most of the guideline related to the use of ADR is optional and depend on the discretion of the administrative agencies. In practice, the agencies mostly use judicial review by the court to resolve the dispute to protect itself from being sued by third parties for the neglect of its duty or any liabilities that might occur from using ADR.

5. *If your State is a member of the European Union, how was the directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters transposed into national law?*

N/A

II. The stakeholders in alternative procedures

1. *What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them?*

At the present, alternative procedure is not yet implements in our procedure.

2. *Can the parties to an administrative dispute entrust the conducting of a mutual agreement procedure to a third party? What role is this third party called upon to fulfill?*

At the present, alternative procedure is not yet implements in our procedure.

3. *Do standards regulating the activity of these third parties exist in your country (required qualifications, continuing vocational training, remuneration, deontology etc.)? Do authorities with responsibility for the supervision of compliance with these standards exist (public bodies, professional organisations, non-profit organisations – possibly operating under license, etc…)?*

At the present, alternative procedure is not yet implements in our procedure.

4. *Can the administrative courts invite or oblige parties to litigation brought before them to pursue an alternative procedure? Can the administrative court entrust a mediation mission to a third party?*

At the present, alternative procedure is not yet implements in our procedure.

5. *Can the administrative courts itself conduct mediation proceeding? In your opinion, what are the advantages and drawbacks of a mutual agreement procedure conducted by a judge? In what types of litigation does direct intervention of a judge appear most appropriate?*

At the present, alternative procedure is not yet implements in our procedure.

III. The procedures of alternative procedures

1. *Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?*

The concept of using mediation in the administrative courts is a controversial one. Those who oppose it think that the dispute which concern with public interest cannot be mediate. By using mediation process will add more steps to court procedure and even create a longer time for adjudicating a case. As for those who support it see that mediation can be implementing in certain type of cases and it will help reduce the congestion of the case flow in the court. Due to the fact that the Administrative Courts of Thailand is not using alternative procedures yet, therefore we cannot know for sure whether using alternative procedure would be faster and/or cheaper than court procedure.

2. *Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeal exist? How are they organized? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourse to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?*

Section 42 paragraph[6] two of Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) provides that

> "*In the case where the law provides for the process or procedure for the redress of the grievance or injury in any particular matter, the filing of an administrative case with respect to such matter may be made only after action has been taken in accordance with such process and procedure and an order has also been given thereunder or no order has been given within a reasonable period of time or within such time as prescribed by law*".

in the case where the law provides for the process or procedure for the redress of the grievance or injury in particular matter, the filing of an administrative case with respect to such matter may be made only after the process or procedure has been proceeded, a plaintiff is obliged to exhaust such remedy before exercising his/her rights to file the case with the Administrative Court. Hence for most of the disputes, it is mandatory to use administrative appeal first. It's not optional. The law divides the process and procedure before filing a case to the Administrative Court into two cases;

1) In case that there are specific laws requiring a particular process or procedure for redressing the aggrieved or injured, the plaintiff shall proceed such process and procedure specified by law. Then, such person shall has the rights to file a case with the Administrative Court. The provisions concerning to environmental issue are provided in various laws such as Section 87[7] of

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[6] **Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999)**

In the case where the law provides for the process or procedure for the redress of the grievance or injury in any particular matter, the filing of an administrative case with respect to such matter may be made only after action has been taken in accordance with such process and procedure and an order has also been given thereunder or no order has been given within a reasonable period of time or within such time as prescribed by law."

[7] **Enhancement and Conservation of Nation Environmental Quality Act, B.E. 2535 (1992)**

Section 87 "The owner or possessor of the point source of pollution, the Service Contractor licensed to render services of wastewater treatment or waste disposal, the Monitoring Control Operator or any other person who is not satisfied with the order of the pollution control official under Section 82 (2), (3), (4) or (5), is entitled to challenge such

Enhancement and Conservation of Nation Environmental Quality Act, B.E. 2535 (1992) which allow the challenge of the order by filing a petition to the Pollution Control Committee within thirty days from the date of receiving the order of the pollution control official and appeal to the Minister within thirty days from the date of receiving Notification of the Pollution Control Committee's decision. Or

2) In case that there is no specific law providing for the process or procedure for the redressing of grievance or injury as in any particular matter, in Thai administrative legal system, the plaintiff shall appeal to the officer who issues the administrative order within fifteen days from the date of receiving the administrative order. Section 44[8] of Administrative Procedure Act, B.E. 2539 (1996) is the standard law that provides the process or procedure for the redress of the grievance or injury before filing a case to the Administrative Court.

However, there are cases for ordering revocation of administrative orders which are not appealed to the administrative agency before filing with the court, for instance,

1) In case of the revocation of an administrative order issued by the Minister under Section 44 of Administrative Procedure Act, B.E. 2539 (1996).

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order by petition to the Pollution Control Committee within thirty days from the date of receiving the order of the pollution control official.

If the petitioner does not agree with the decision of the Pollution Control Committee, he shall appeal to the Minister within thirty days from the date of receiving notification of the Pollution Control Committee's decision.

The decision of the Minister shall be final."

[8] **Administrative Procedure Act, B.E. 2539 (1996)**

Section 44 "Subject to Section 48, in the case where any administrative act is not issued by a Minister and there is no law specifically providing for an administrative appeal proceeding, the participant may appeal against the administrative act by filing the appeal with the issuing official within fifteen days as from the date he or she is notified thereof.

The appeal shall be made in written form specifying the cause of dispute and the facts or legal grounds referred to.

The appeal shall not stay the enforcement of the administrative act unless an order to stay the enforcement is made under Section 56 paragraph one"

2) In case of the revocation of an administrative order of the various committees, whether it is established by the law, under Section 48[9] of Administrative Procedure Act, B.E. 2539 (1996).

3) In case of the revocation of the general administrative orders or other orders of Administrative Agency (or State Official) such as a lawsuit for ordering the revocation of Notification of Hin Lek Fai Sub-District Administrative Organization regarding to the investigation of the prices of the underground water supply construction, which considered as a general administrative order. The Plaintiff, therefore, filed a case with the Administrative Court without an appeal (Supreme Administrative Court Judgment No. A. 138/2549).

4) An order which is clearly and seriously erred. It deems that the order is not even issued. The Supreme Administrative Court Judgment No. A. 47/2546 has laid out a principle that the act which can be clearly and seriously erred in terms of law. It deems that it was not even issued. Thus, the Plaintiff has the right to file a case without appeal.

5) The administrative order which states that those who do not agree with the administrative order can file a case with the court without appeal. The Supreme Administrative Court Order No. 565/2546 ruled that the Defendant issued an order for the Plaintiff to pay compensation to the Defendant within forty five days from the date of the receipt of the order. If the Plaintiff did not agree with this order, the Plaintiff shall file a case with the Administrative Court within ninety days. As stated in the order, the plaintiff directly filed a case with the Administrative Court without appeal. If the court considered this reason not to accept the Plaintiff's filing, it will be unfair to enforce the law. Hence, the Court accepted the plaint for consideration.

[9] **Administrative Procedure Act, B.E. 2539 (1996)**

Section 48 "The participant shall have the right to appeal against the administrative act of any committee, whether or not established by law, to the Petition Council under the law on the Council of State both on matter of facts and matter of law within ninety days as from the date he or she is notified of such act. If such committee is a quasi-judicial committees, the right to appeal and the period of appeal shall be in accordance with the provision of law on the Council of State.

For the cases which are not mandatory to appeal to the administrative agency before filing with the court, if the parties wish to use alternative procedure (out of court procedure), it has to be done voluntarily and mutually agreed upon by both parties. And it shall not constitute a suspension or interruption of periods of limitation and time limits for judicial appeals.

Due to the fact that the inquisitorial procedure is employed by the Administrative Court, The fact-finding undertaking belongs to the judge so as to render comprehensive necessary facts for the case which will not be limited to those presented or alleged by the disputed parties. Therefore, the lodging of an administrative appeal does not modify the conditions governing the filing and review of subsequent recourse to the court.

3. *What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc…)? How much autonomy do parties have with regard to the organization of the deployment of an alternative procedure?*

At the present, alternative procedure is not yet implements in our procedure or explicitly state in our law and regulation. Any type of ADR conduct by the parties is considered to be out of court ADR. Therefore any type of alternative procedure or general principle that applies to such ADR that the parties decided to use is completely voluntarily and mutually agreed upon by both parties. Nonetheless, the court is obligated to oversee that the decision of the parties to end their dispute outside of the trial is not the case which is concerned with the protection of public interest or the case in which further trial shall be of value to the public or in which the withdrawal of the plaint results from an inappropriate collusion.

4. *Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?*

At the present, alternative procedure is not yet implements in our procedure or explicitly state in our law and regulation. Any type of ADR conduct by the parties is considered to be out of court ADR and shall not constitute a suspension or interruption of periods of limitation and time limits for judicial appeals.

5. *Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?*

At the present, alternative procedure is not yet implements in our procedure.

IV. The efficacy of alternative procedures

1. *Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?*

At the present, alternative procedure is not yet implements in our procedure.

2. *What is the proportion of administrative disputes that are definitely resolved by alternative procedures? What are the factors in success, or failure?*

At the present, alternative procedure is not yet implements in our procedure.

3. *What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?*

At the present, alternative procedure is not yet implements in our procedure.

4. *What instruments and procedures are available to the parties in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?*

At the present, alternative procedure is not yet implements in our procedure.

5. *Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?*

Alternative procedure is a controversial issue in our court and it will remain that way for the near future. Even so, we confidence that this congress would create an open forum for all members to exchange and share experiences concerning alternative procedure. Supposedly, the adaptation of alternative procedure would help resolve the dispute more rapidly. Furthermore, the alternative procedure would help narrow the dispute issue in the case and help clarify the issue that both parties need the court to adjudicate. Evidently, it would be great opportunity to explore what is the most suitable form of alternative procedure for our court.