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Looking Around: Should Thailand Promote Mediation Effectiveness and How?

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Abstract

Mediation as a form of alternative dispute resolution has many advantages compared to other dispute resolution methods, especially those of adjudicatory nature, such as litigation and arbitration. Thailand and Singapore share a similar policy of advocating the practice of mediation. That said, Thailand seems to focus principally on domestic mediation, while Singapore tends to position itself as a mediation hub for international disputes. In terms of the legal framework, both countries have enacted legislation and regulations that endorse, effectuate, and facilitate mediation. In both jurisdictions, these laws and regulations aim to uphold the principle of party autonomy, provide the necessary support, create a mediation-friendly climate, maintain the integrity of the process, and ensure the enforceability of valid mediated settlement agreements. This article, which is intended to be descriptive, discusses some important concepts and characteristics of mediation and explores the legal frameworks of mediation in Thailand and Singapore, as well as both countries' experiences in dealing with this non-adversarial dispute settlement mechanism.

Keywords: Mediation — Alternative dispute resolution — Thai mediation — Singapore mediation — Singapore Convention on Mediation

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I. INTRODUCTION

Today, it is axiomatically acknowledged that litigation is not the only way to resolve disputes and is definitely not the most effective dispute settlement method in all circumstances. This assertion is confirmed by the fact that alternative dispute resolution (ADR) has become more popular in the past decades. Whereas, in Thailand, where arbitration has generally been the focal point of discussion when relevant participants think of ADR, this assumption may no longer hold in recent years. Given the rising litigiousness and complexity of arbitration, which turns it into a time-consuming and costly process, more attention has turned to other modes of ADR, e.g., expert determination, dispute board, negotiation, and mediation.

Notably, as a result of many stakeholders' concerted efforts, the Dispute Mediation Act B.E. 2562 was enacted. The enactment represents Thailand's earnest attempt to promote the use of mediation. While there is no doubt that this is a great initiative, there may be several other things that can be done to achieve the goal. One possible shortcut is to look at and learn from other countries that have been through this process and have successfully established themselves as reputable dispute resolution hubs. Singapore is one of those jurisdictions. While Thailand has been relatively successful in promoting the use of mediation domestically, one has to admit that, compared to Singapore, the country is still far behind in establishing itself as an eminent international mediation center. Thus, this article aims to explore what Singapore has done with respect to the development of legal and non-legal mediation infrastructure.

Part II of this Article, which is intended to be descriptive, will present a brief overview of mediation. Due to the lack of English literature on Thailand's mediation landscape, the authors will provide a detailed survey of mediation in Thailand in Part III. Part IV will subsequently discuss the Singapore experience. Lastly, the authors will offer some reflections in Part V.

II. AN OVERVIEW OF MEDIATION

A. What is Mediation?

There is much academic writing about the definition of mediation, its benefits, as well as the styles and processes involved. This article does not pretend to present some new academic twist to the subject. Rather it is sought to present a practitioner's view of this exciting and developing field.

First, a client may ask, "What is mediation?" As a dispute resolution process, mediation has been described in many ways. Rather than debate about theories of mediation, let us look at what the law says mediation is. Article 2.3 of the UN

Convention on International Settlement Agreements Resulting from Mediation (otherwise called the Singapore Convention on Mediation)[1] provides that:

> Mediation means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Section 3 of the Mediation Act 2017 (Singapore) describes mediation as a process in which an independent and impartial conflict resolution practitioner (mediator) assists disputing parties to address their differences in a constructive manner and make informed choices for the future.[2] A mediator will generally assist parties to identify the issues in dispute, explore and generate options, communicate with one another, and voluntarily reach an agreement.

B. Mediation Compared with Other Dispute Resolution Processes

Then the client may ask, "what is the difference between mediation and other types of dispute resolution processes?" In particular, what makes mediation different from litigation in the courts, arbitration, negotiation, and conciliation?

1. Litigation in the courts.

Court litigation is a very formal dispute resolution process. How the claim is to be brought, the procedures, and the time frames to be followed are all governed by the applicable rules of the court. The process is not confidential. Very often, the media will pick up and report details of cases that they believe will be newsworthy.

Court litigation is an adversarial process. Once court litigation is commenced, the process is taken out of the parties' hands. Generally, each aggrieved party will appoint their own lawyer to assert their legal rights in the matter. The parties do not communicate directly with each other but do so through their appointed counsel. The appointed lawyers will represent the aggrieved party to present their best case in the court through affidavits and submissions (both written and oral). The witnesses called by each party will be subject to cross-examination by the opposing party's lawyer in the court. The aggrieved party does not speak directly to the judge, but must speak through their lawyer. The judge is obliged to decide the case according to the rights and reliefs allowed by the law of the land. The outcome is imposed on the parties by the judge who issues a judgment.

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[1] Full text of the UN Convention on International Settlement Agreements Resulting from Mediation is available at <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf>.

[2] Mediation Act 2017, s 3 <https://sso.agc.gov.sg/Act/MA2017>.

The entire exercise is time-consuming and requires significant commitment from the parties. Cases begin with the filing of an originating process. Various court papers need to be filed and interlocutory applications may have to be argued before the case gets to a trial. The matter may go on appeal. After that, the winning party still has to take steps to enforce the judgment in order to secure payment. The process is a costly one, with parties having to pay their own lawyers and experts. The losing party will also be ordered by the court to contribute to the costs of the winning party.

2. Arbitration.

In the present day, many parties (typically in commercial and cross-border transactions) may have a clause in their contracts that says they agree to go for arbitration to resolve their dispute. In such a case, the parties have effectively contracted to resolve their disputes outside of the courts. They may choose to appoint one or three arbitrators. Typically, parties to an arbitration will also be represented by a team of lawyers. The process is formal and is governed by the rules of the institution. The process can be relatively faster than court litigation but not necessarily so.

Throughout the arbitration process, parties communicate through their lawyers. Typically, the parties' cases are presented to the arbitrators by their lawyers through formal papers and in an oral hearing. The arbitrators are obliged to decide the case presented to them according to the rights and obligations allowed under the prevailing law. The outcome is imposed on the parties by the arbitrators who issue an award.

Costs may be relatively higher as compared to court litigation. Apart from paying the lawyers and experts, parties also have to pay the institution and arbitrator fees. The award typically provides that the losing party will also contribute to the costs of the winning party.

3. Negotiation and conciliation.

Mediation is often confused with the processes of negotiation and conciliation. The key difference between negotiation and mediation is that the former can take place without involving a neutral third-party. In mediation, a neutral third-party helps to facilitate the communication between the parties. This is particularly important where trust has broken down between the parties.

Conciliation and mediation share many similarities. Indeed, UNICITRAL had proceeded on the basis that the terms "conciliation" and "mediation" were interchangeable.[3] Be that as it may, a key distinction between conciliation and mediation is that in conciliation, the neutral third-party "may adopt an advisory role

[3] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018) 16, 17.

in relation to the content of the dispute and its outcome or resolution."[4] Thus, it may be argued that conciliation and mediation are just part of a continuum of non-adversarial dispute resolution processes where the role of the neutral third-party varies in the degree of intervention and, in that sense, provides an alternative to the adversarial processes of litigation and arbitration.

C. Mediation: Advantages and Disadvantages

The client may go on to ask, "So what is it about mediation that makes it a better option as compared to the other dispute resolution processes?"

Mediation is a non-adversarial form of dispute resolution. Parties can communicate directly with each other with the help of a neutral third-party (the mediator). The mediator helps parties to focus on their interests underlying the dispute and to collaborate to develop options that may satisfy those interests. The mediator helps parties to reduce or even eliminate the friction of conflict. The mediator helps parties to focus on moving forward and on formulating solutions. In this way, the mediator is able to help parties to collectively reach an amicable outcome which not only takes care of the legal issues but often is business-friendly and practical as well.

As Mary Parker Follet observed:[5]

> As conflict – difference – is here in the world, as we cannot avoid it, we should, I think use it. Instead of condemning it, we should set to work for us . . . . So in business, too, we have to know when to try to eliminate friction and when to try to capitalise on it, when to see what work we can make it do.

Some other advantages of mediation are party autonomy, confidentiality, efficiency (in terms of process, time and costs), and the possibility to preserve business relationships.[6] Let us examine each in turn.

1. Party autonomy.

Mediation is entirely consensual. Parties come voluntarily to mediation to seek an amicable resolution to their dispute. In the mediation, the mediator facilitates the communication between the parties, helping them to identify their interests and explore solutions. As a result, the outcome is something that the parties arrive at themselves, rather than having an outcome imposed upon them, as may be the case

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[4] Nadja Alexander, Joel Lee, and Kit-Wye Lum, *Singapore Mediation Handbook* (2019) 23. See also Gregory Vijayendran, "Considering Conciliation" *The Law Society of Singapore* <https://v1.lawgazette.com.sg/2017-07/1897.htm>.

[5] See E. M. Fox and L. Urwick (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follet* (London: Pitman, 1973) 1–2. Follet first presented the paper in 1925.

[6] See, e.g., "Mediation" *Singapore Law Watch*, s 2B <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation>.

in litigation or arbitration. The outcome is entirely up to the parties and the mediator has no power to impose an outcome on the parties.[7] Parties remain in control throughout the entire process.

The other spin-off from party autonomy is that since the parties are responsible for and invested in the outcome, there is greater "buy-in" and less likelihood of default. This results in more sustainable outcomes as compared to adjudication where, because the decision is imposed on parties, there is often a need to subsequently take enforcement proceedings against the losing party to enforce the judgment or award.

2. Confidentiality.

The mediation process is confidential. This is attractive for parties in a dispute who may not wish to have the details of their disagreement made the subject of press coverage or social media. Being in the safe space of a mediation setting may also encourage the parties to be more willing to talk about their differences and collaborate to find ways to resolve their dispute.

3. Efficiency.

We can look at efficiency from the standpoint of process efficiency, time efficiency, and cost efficiency. Parties can choose to mediate their dispute at any time—before commencing litigation or arbitration proceedings, and even in the course of litigation or arbitration. Being able to commence a mediation by consent means that even parties who are embroiled in litigation or arbitration can choose to bring their dispute to a mediation instead. If the dispute is amicably resolved in a mediation, the need for litigation or arbitration ends. Being able to talk directly with each other (with the help of the mediator) in a safe mediation setting makes the communication more effective. Parties can hear for themselves the other parties' viewpoint and they can discern for themselves the other parties' willingness to do a deal.

Often, the mediation can be convened in a short time. While more complex cases may take several mediation sessions to reach a resolution, a mediation hearing typically lasts for one day, with parties reaching an amicable resolution of their dispute at the end of that hearing day.[8] Parties can resolve their whole dispute or only selected issues within the dispute. As one can imagine, this would result in the saving of much time on the part of disputants who would otherwise have to prepare for and endure litigation or arbitration procedures.

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[7] The reader who wishes to have a fuller exposition comparing the different forms of dispute resolution may read Alexander, Lee, and Lum, *Singapore Mediation Handbook* (n 4) 36–43.

[8] "The Singapore Mediation Centre (SMC) [has] mediated over 4,000 matters to-date. The settlement rate is approximately 70%, with more than 90% of the settled disputes resolved within a day." Patrick Tay B.B.M., "Testimonials" *Singapore Mediation Centre* <https://www.mediation.com.sg/about-us/testimonials/#:~:text=the%20Singapore%20Mediation%20Centre%20(SMC,disputes%20resolved%20within%20a%20day>.

Being able to convene a mediation efficiently results in the saving of much process costs. Being able to resolve a matter through mediation in one day will save much money as compared to having to fund a multi-day trial in court or a hearing in arbitration. Being able to bring an end to on-going adjudication with their associated high costs is also a definite advantage.

4. Relationships.

Fostering and preserving relationships is critical in the increasingly interconnected business environment today. An adversarial dispute resolution process where parties focus on their respective rights and entrench themselves into a process where one party must "win" and the other "lose" does not support the fostering of good business relationships. Mediation facilitates the parties to think "win-win." Mediation can allow parties to reach an amicable resolution of their dispute with creative solutions. When the parties are able to put away the burden of their past dispute, they can move forward to seize new opportunities.

The client may say, "This all sounds very rosy, but what is the catch? Are there any disadvantages to mediation?"

Despite its advantages, mediation may not always be suitable for every dispute or disputant.[9] Mediation is a voluntary process, so parties cannot be compelled to mediate. Or the parties may not come to the mediation in good faith. Instead, they may merely be seeking to use the process to "fish for information" in order to learn more about the other parties' case.

In some cases, the parties may need to establish a right or precedent. For example, there is a need to interpret or clarify the meaning of a contractual clause in the parties' long-term supply contract. Or in a trademark dispute, there is a need to establish whether there is infringement and there is also the need to make such right known. In such cases, there may be no room for compromise and the confidentiality of mediation will not be suitable.

Perhaps the greatest disadvantage of mediation is the perceived lack of enforceability (as compared to a court judgment or arbitration award).[10] However, as we shall see below, this is not necessarily the case and steps are underway to clear this misconception as well as increase the enforceability of mediated settlement agreements.

III. THE THAILAND EXPERIENCE

[9] See, e.g., "Mediation" *SG Courts* (2022) <https://www.judiciary.gov.sg/alternatives-to-trial/mediation/what-is-mediation-(from-1-april-2022)>.

[10] See the observations expressed in Eunice Chua, "Free the Earth Move – Shifts in the International Dispute Resolution Landscape" *Singapore International Dispute Resolution Academy* (2018) <https://sidra.smu.edu.sg/feel-earth-move-shifts-international-dispute-resolution-landscape>.

A. A Brief Account of Mediation in Thailand

Mediation has been practiced in Thailand (or Siam) since time immemorial. Similar to what has happened in other societies,[11] at first, community leaders and elders customarily played a crucial role as mediators in resolving disputes, usually in an informal manner.[12] A very first legal document that can be found to formally endorse the use of mediation was the Three Seals Law (กฎหมายตราสามดวง). The legislation, which was a product of an accumulation of the laws in force in the Ayutthaya Kingdom, was codified at the inception of the Rattanakosin era. In its chapter on the court officer (พระไอยการลักษณะตระลาการ), Som-ma-ni-ko (สมมานิโก) was described as a court officer who is impartial and acts as a middleman who facilitates the disputing parties in resolving disputes.[13] Various modes of mediation were also mentioned, including Sang-ka-ha-ga-ro (สังคหกาโร), which may be comparable to facilitative mediation, and Sat-tae-ya-vaj-sa (สัทเธยวัจสา) which may be comparable to evaluative mediation (conciliation).[14]

Notwithstanding its long existence in Thailand, mediation had remained informal and casual for most of its existence. It was not until the 1990s, arguably, that mediation in Thailand became standardized, with the main push coming from the judiciary.[15] Due principally to the fact that the number of cases submitted to the court was about to exceed its capacity,[16] the judiciary developed a new practice of formally separating mediation from adjudication.[17] Since then, mediation has caught the attention of many industries. Several pieces of legislation and state organs have adopted mediation as part of their dispute resolution mechanisms.

In this Section, the authors will thus explain these recent developments concerning civil mediation.[18] The court-annexed mediation will first be explored. Subsequently, mediation under selected legislative regimes will be discussed. Lastly,

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[11] Teh Hwee Hwee, "Mediation Practices in ASEAN: The Singapore Experience" (2012) 1 <https://docplayer.net/61740617-Mediation-practices-in-asean-the-singapore-experience-teh-hwee-hwee.html>.

[12] Chalat Pratheuangrattana, "The Development of Mediation in Thailand from the Past to Present toward the Future" (2021) 19 King Prajadhipok's Institute Journal 114, 120.

[13] Nopporn Bhotirungsiyakorn, "History of Alternative Dispute Resolution" (2020) 67 Journal of the Court of Justice 1, 3–5.

[14] ibid 7–8.

[15] Tawan Manakul, "Mediation in Thailand" (National Health Foundation) 4.

[16] Sorawit Limparangsri, "Alternative Dispute Resolution in ASEAN: A Contemporary Thai Perspective" (2007) 2 Thai Arbitration Institute Journal of Arbitration 13, 13.

[17] Chalat, "Development of Mediation in Thailand" (n 12) 117.

[18] Subject to certain restrictions, mediation can also be used to resolve criminal and administrative disputes in Thailand. However, such kinds of mediation will not be the subjects of discussion in this article. Nonetheless, concerning the practice of the mediation in the administrative court, readers may find the following materials useful: Srunyoo Potiratchatangkoon, "Mediation in the Administrative Court of Thailand: Experiences and Current Situation" (2021) <https://www.admincourt.go.th/adminCourt/en/article_detail.php?id=439>; see also "Part 2/1 Mediation" added into the Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (1999) in 2019.

a survey of the Dispute Mediation Act B.E. 2562 (2019), which is the country's latest significant attempt to encourage the use of mediation, will be made.

B. Thailand's Civil Mediation

1. Court-annexed mediation.

Since 1934, the Court of Justice has possessed authority to incorporate mediation into its working process. Section 20 of the Civil Procedure Code ("CPC"), when it was first enacted in B.E. 2477 (1934), provided that regardless of how the case has proceeded, the Court of Justice shall be entitled to encourage the parties to settle disputes. One may note, however, that the term "mediation" was not expressly mentioned. Section 19 also bestowed upon the court the power to summon the parties themselves to appear before the court so that a settlement could be encouraged.

Despite these provisions, Judge Sorawit Limparangsri[19] observed that the use of mediation had been inconsistent, as it was generally up to the court executives' perception on mediation at a particular moment as to whether to recommend the practice.[20] The sign of a much-awaited lasting change eventually came when the Civil Court issued the Rules of the Civil Court on Mediation B.E. 2537 (1994) and other courts followed suit. On 29 May 1995, the Ministry of Justice[21] circulated a letter to courts urging the use of mediation. The President of the Supreme Court later issued the Recommendation of the President of the Supreme Court on Mediation B.E. 2539 (1996).[22] The CPC was amended in 1999 to sanction this progress. Thus, Section 20 stipulates that the court is authorized to "mediate" the dispute. In addition, Section 20 Bis, which concerns the court-annexed mediation process, was inserted. This new provision allows the court to appoint a person or persons to be mediator(s). In general, the mediation can be conducted only on a voluntary basis, except for certain petty cases[23] whereby the court is directed to mediate the dispute in the first meeting.[24]

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[19] At the time of this writing, Judge Sorawit is the Chief Judge of the Office of the President of the Supreme Court and a member of the Board of Directors of the Thai Arbitration Institute. He has published widely on alternative dispute resolution.

[20] Sorawit, "Thai Perspective" (n 16) 15.

[21] The Court of Justice used to be part of the Ministry of Justice. However, to ensure its independence from the Government, the court was separated from the Ministry by the Constitution B.E. 2540 (1997). The Judicial Administration Act came into force on 20 August 2000. The Office of the Judiciary was thus established to serve as the administrative organ of the court.

[22] Chotechuong Thapvongse, "Court-Annexed Mediation" in *Collected Essays: Mediation and Introduction to Relevant Laws* (Alternative Dispute Resolution Office, Office of the Judiciary, 2002) 56–57.

[23] Civil Procedure Code, s 183.

[24] Civil Procedure Code, s 193.

On 20 August 2000, with the enactment of the Judicial Administration Act B.E. 2543 (2000), the Court of Justice became independent from the Ministry of Justice. As a consequence, the Office of the Judiciary (สำนักงานศาลยุติธรรม) was established to serve as the Secretariat of the Court of Justice. A year later, the Alternative Dispute Resolution Office (สำนักระงับข้อพิพาท) was set up as part of the Office of the Judiciary. Apart from its aims to promote and develop the use of ADR,[25] it was tasked to administer court-annexed mediation.[26] The Judicial Administration Commission (คณะกรรมการบริหารศาลยุติธรรม) later changed the name of the ADR Office to the Office of Judicial Affairs (สำนักส่งเสริมงานตุลาการ) in 2016.[27]

The process of court-annexed mediation was systematically prescribed in detail for the first time in the Rules of the Judicial Administration Commission on Mediation B.E. 2544 (2001). Overall, the process is based on three fundamental principles.[28] First, separate the persons-in-charge: the judge and the mediator should be different persons to avoid bias resulting from the fact-finding process in mediation. Second, separate the dockets: the facts found in mediation cannot be used in the court proceedings.[29] Third, separate the rooms: mediation should take place in a venue that is suitable for the purpose.[30]

In 2008, Section 20 Bis was amended so that the President of the Supreme Court, upon the approval of the Supreme Court general meeting, can prescribe regulations on how to conduct court-annexed mediation. Thereafter, the Regulation of the President of the Supreme Court on Mediation B.E. 2554 (2011) was issued.[31] Some inventions can be found therein. For instance, Chapters 5 and 6 affirm that mediation can also be applied in the courts of appeal and the Supreme Court. Chapter 9 provides that a court mediation center for each court shall be established to provide administrative support to the mediation taking place in such court.[32]

Should the court-annexed mediation succeed, the parties will have several options. First, the parties may withdraw the case. Second, the parties may enter into a settlement agreement in accordance with Sections 850–852 of the Civil and Commercial Code ("CCC") and withdraw the case. Third, the parties may enter into a

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[25] Sorawit Limparangsri and Prachya Yuprasert, "Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective" (2003) 203 <https://coj.go.th/th/file/get/file/20181122649840e5fdaea8a5c1378bd6c83a9570084334.pdf>.

[26] Sorawit, "Thai Perspective" (n 16) 15.

[27] "Office of Judicial Affairs" (2018) <https://oja.coj.go.th/th/content/page/index/id/56>.

[28] For other general practices, see Vichai Ariyanuntaka, "Court-Annexed ADR: A New Challenge" (2002) 4 <https://coj.go.th/th/file/get/file/20181122cc23400755be6e9d60e67eb10c2284da084331.pdf>

[29] Judicial Administration Commission Rules on Mediation B.E. 2544, Rule 26.

[30] Chotechuong, "Court-annexed Mediation" (n 22) 60–61.

[31] An unofficial English translation of the Regulation of the President of the Supreme Court on Mediation B.E. 2554 can be found at <https://oia.coj.go.th/th/content/category/detail/id/8028/cid/9673/iid/178511>. The Regulation was subsequently amended in 2017. The modifications do not affect the essence of the Regulation, however.

[32] Regulation of the President of the Supreme Court on Mediation B.E. 2554, Arts. 62–64.

settlement agreement and request that the court render a consent judgment pursuant to Section 138 CPC.[33] In most instances, the parties will opt for the third alternative as one of the most important advantages of having a court-annexed mediation is to have a readily enforceable judgment in case a party fails to perform its obligation under the settlement agreement. In other words, the consent judgment can be immediately executed in case a party fails to comply with it. The situation is different for an out-of-court settlement agreement. For the latter, if a party does not comply with the agreement, the other party's only option is to file a new claim to the court asking the court to enforce the settlement agreement in a usually prolonged trial, the process of which is similar to the enforcement of any other contract.

As such, the unique benefit of having a consent judgment was limited to the parties who are able to settle the dispute after their claim has already been filed to the court. This means the court fees must have already been paid before the judgment is rendered, although the court would have discretion to return the paid fees wholly or partially in case the parties settle.[34] The situation has been changed since 2020 when Section 20 Ter was added into the CPC. The provision allows a person to submit a mediation request to the competent court "prior to the submission of claim." The court may then seek the other party's consent to mediate. If the consent is given, the court shall appoint a mediator. Should a settlement agreement be reached, the parties may request the court to render a consent judgment. No court fees are required. Moreover, in order to avoid the problem concerning legal prescription in case the parties fail to reach a settlement,[35] as the prescription is not interrupted in this instance, Section 20 Ter paragraph 5 ensures that a party will have at least another 60 days after the mediation is terminated to submit the dispute to the court.

In addition to the CPC, which applies to general civil disputes, mediation has also been adopted specifically in the Consumer Case Procedure Act B.E. 2551 (2008). Given the recognition of the actual imbalance between business operators and consumers, this Act aims to facilitate consumers in pursuing their claims. In addition, the parties are forced to mediate before the commencement of the court's adjudicatory process. Section 24 provides that once a claim is received, the court shall promptly designate a meeting between the parties in which there shall simultaneously be a mediation, a submission of defence, and an examination of witness(es). Section 25 prescribes the mediation process. It stipulates that, on the meeting date when both parties are present, a court officer or another person designated by the court or agreed by the parties shall mediate the dispute. More details on this process are to be prescribed by the Regulation of the President of the

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[33] Neti Kitkoson, "Problem Regarding the Use of Alternative Dispute Resolution in Court: Mediation on Civil Dispute" (Master Thesis, Faculty of Law, Thammasat University 2013) 75.

[34] Civil Procedure Code, s 151.

[35] According to Section 193/14 of the Civil and Commercial Code, legal prescription shall be paused when the case is submitted to the court. Entering into a mediation does not interrupt prescription.

Supreme Court.[36]A similar procedure can be found in labor disputes submitted to labor courts.[37]

Statistics on court-annexed mediation in recent years (2018–2020) evince a remarkable success.[38] In 2018, 330,397 civil and consumer disputes pending in the courts of first instance were mediated, of which 281,462 were settled.[39] In 2019, 318,030 civil and consumer disputes pending in the courts of first instance were mediated, of which 259,847 were settled.[40] In 2020, 257,598 civil and consumer disputes pending in the courts of first instance were mediated, of which 235,151 were settled.[41] The mediation success rate is thus very high: 85.2% (2018), 81.7% (2019), and 91.3% (2020). These numbers show that, first, being properly used, mediation can be an effective tool that can substantially reduce the court caseload. Second, for disputes in which the parties show their willingness to resolve disputes amicably, there is a high probability that the use of mediation will lead to successful outcomes.

2. Out-of-court mediation.

Although court-annexed mediation has been a focal point of discussion in Thailand, when one thinks of mediation, the court is by no means the only venue in which the practice has been developed. Much legislation has included mediation as an option to resolve various kinds of disputes in different forums. Some important examples are disputes in local communities, intellectual property disputes, consumer disputes, insurance disputes, and telecommunication disputes. In addition, several institutions have offered professional mediation services to disputing parties, or organized training courses to those interested in becoming a qualified mediator. These institutions include the public prosecutor office, the Lawyer's Council, Department of Rights and Liberties Protection, and the Thailand Arbitration Center (THAC).

The following section will briefly discuss some of the mediation-related legislation and institutions. Last but not least, it will explore the Dispute Mediation Act B.E. 2562 (2019), Thailand's latest statute aiming to systematize and promote the use of state-affiliated mediation.

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[36] The current Regulation in force is the Regulation of the President of the Supreme Court on Court on the Proceedings and the Discharge of Duty of Case Affairs Officer in Consumer Cases B.E. 2551 (2008). An unofficial English translation can be found at <https://oia.coj.go.th/th/content/category/detail/id/8/cid/9673/iid/235937>.

[37] The Act on Establishment of Labor Court and Labor Case Procedure B.E. 2522 (1979), s 38.

[38] See also Thanee Vorapatr and Wichet Sinprasitkul, "Compilation of Cases on Enforcement of Settlement Agreements Resulting from Mediation in Thailand from B.E. 2557–2561" *Thailand Arbitration Center* (2019) <https://thac.or.th/v1/file/20200225%20โครงการวิจัยเรื่องการบังคับตามสัญญาประนีประนอมยอมความช่วงปีพ.ศ.2557-2561.pdf>.

[39] Office of the Judiciary, Statistics Report of the Court of Justice Cases B.E. 2561, p.104 (2018) <https://oppb.coj.go.th/th/content/category/detail/id/8/cid/2085/iid/142443>.

[40] Office of the Judiciary, Statistics Report of the Court of Justice Cases B.E. 2562, p.95 (2019) <http://online.flipbuilder.com/rtpv/jgco/index.html>.

[41] Office of the Judiciary, Statistics Report of the Court of Justice Cases B.E. 2563, p.528 (2020) <https://online.flipbuilder.com/rtpv/xzbl/>.

C. Thai Mediation Laws and Regulations

1. Mediation in local communities.

The concept of "community justice" by ADR means has been implemented in the Local Administration Act B.E.2457 (1914) and the Public Administration Act B.E. 2534 (1991). Under Section 28 Ter of the Local Administration Act, there is to be a village committee in each village (หมู่บ้าน, Mu Ban).[42] The village committee has general duties to "assist, recommend, and advise" the village chief (ผู้ใหญ่บ้าน, Phu Yai Ban). In 1987, the Interior Minister issued the Regulation of the Ministry of Interior on Mediation Conducted by the Village Committee B.E. 2530 (1987), which sanctifies the village committee's power to mediate disputes between citizens living in such village. Article 4 sets out the conditions under which mediation can be done: 1) the dispute concerns civil matters or compoundable criminal offences; 2) both disputing parties agree to the mediation; and 3) the dispute happens in the village or either party resides in the village. Overall, the Regulations simply mentioned that the village committee has the power to mediate and specified some mediation guidelines that the committee has to follow. Other matters, such as the validity and effect of the settlement agreement, shall be governed by normal legislation, i.e., Sections 850–852 of the CCC.

Another local organ that is legally entitled to mediate disputes is the district (อำเภอ, Amphoe) in accordance with the Public Administration Act B.E. 2534 (1991). A significant amendment was made in 2013 to the Act and the new provisions that concern mediation are Sections 61/1 to 61/3. Section 61/1(4) explicitly provides that the district has power to mediate disputes in accordance with Sections 61/2 and 61/3. Sections 61/2 concerns mediation of civil disputes, whereas Sections 61/3 concerns that of criminal disputes. Under Section 61/2, each district shall have a list of qualified mediators to mediate civil disputes of which its resident is a party. The kinds of disputes that can be mediated are restricted to those concerning land, inheritance, and pecuniary conflict worth not more than 200,000 baht.[43]

Once a dispute arises, and both parties agree to mediate, each party shall select a mediator from a list. In addition, either the district chief (นายอำเภอ, Nai Amphoe), a district prosecutor, or a deputy district chief (ปลัดอำเภอ, Palad Amphoe) shall act as the presiding mediator. When the mediators receive the dispute, legal prescription shall be paused. Should the dispute be settled, the mediators shall prepare a settlement agreement, which shall be binding between parties and treated as if it were an arbitral award. In case a party fails to comply with the settlement agreement, the other party may request that a prosecutor submit an enforcement

[42] Village (หมู่บ้าน, Mu Ban) is the smallest administrative organ of local administration. Villages then constitute sub-districts (ตำบล, Tambon), districts (อำเภอ, Amphoe), and provinces (จังหวัด, Changwat) respectively.

[43] At the time of this writing, approximately 36 baht equals 1 USD.

request to the court, which shall then apply the Arbitration Act B.E. 2545 (2002) *mutatis mutandis*. More details on the making of the list of mediators, the mediation procedure, the making of the settlement agreement, and the mediators' fees can be found in the Ministerial Regulations on Civil Mediation B.E. 2553 (2010).

These two Acts clearly evince Thailand's belief in amicable resolution of disputes among members of local communities. Whereas both acts create public mechanisms that facilitate the use of mediation to resolve conflicts, the Public Administration Act goes one step further by creating its own legal framework to govern the dispute settlement agreement arising out of the mediation process conducted under its umbrella, i.e., treating the settlement agreement as if it were an arbitral award. This is a remarkable move with the aim of simplifying the enforcement of the settlement agreement.[44] Since Thailand's Arbitration Act B.E. 2545 (2002) is fundamentally based on the UNCITRAL Model Law on International Commercial Arbitration (1985), there are very few exceptions upon which the enforcement of award, or in this respect settlement agreement, can be refused. Nonetheless, given the characteristic differences between arbitration and mediation, one may question if those grounds of setting aside[45] or refusal of enforcement of arbitral awards,[46] should be seamlessly applied to the settlement agreement *mutatis mutandis*.[47]

Another advantage of treating the settlement agreement as an arbitral award concerns the court fees, should a court enforcement be sought. According to Table I (Court Fees) of the CPC, filing a claim to enforce a settlement agreement shall require the claimant to pay court fees of 2% of the disputed amount of the first 50 million baht, which shall be capped at 200,000 baht, and 0.1% of the amount that exceeds such 50 million baht.[48] On the other hand, a petition requesting an enforcement or setting aside of a domestic award shall require the petitioner to pay court fees of 0.5% of the disputed amount of the first 50 million baht, which shall be capped at 50,000 baht, and 0.1% of any exceeding amount.[49] In case of a foreign award, court fees shall be tantamount to 1% of the disputed amount of the first 50million baht, which shall be capped at 100,000 baht, and 0.1% of any exceeding amount.[50]

With that being said, there is a peculiar inconsistency between the two regimes in terms of the limitation to use mediation. In particular, whereas the Local

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[44] On the problems with enforcement of settlement agreement, see Udom Ngammuangsakul and Wimonrekha Sirichairawan, "Laws on Public-Engaging Mediation" (2020) 49 Thammasat Law Journal 297, 302–3; Sawaporn Nussti, "Legal Measures Relating to Legal Executions in Accordance with the Contract of Compromise by Office of the Attorney General" (2018) 28 Payap University Journal 121, 128–29.

[45] Arbitration Act B.E. 2545, s 40.

[46] ibid ss 43–44.

[47] This point is well noted in the negotiation of the Singapore Convention on Mediation when the negotiating parties discussed "grounds for refusing to grant relief" under Article V of the Convention.

[48] Civil Procedure Code, Table I, s 1(a).

[49] ibid s 1(b).

[50] ibid.

Administration Act (with the relevant regulation) allows the village committee to mediate any civil disputes, regardless of the amount in dispute, the Public Administration Act merely allows the mediation of certain civil disputes, i.e., disputes concerning land and inheritance, and disputes valued not more than 200,000 baht. This is the case despite the fact that the village, which is the responsible organ under the Local Administration Act, is inferior to the district, which is the responsible organ under the Public Administration Act. One possible explanation may be that, as mentioned in the preceding paragraph, the settlement agreement under Section 61/2 of the Public Administration shall be treated in a different manner.

2. Mediation under specific legal regimes.

Having realized the benefits of mediation, the Parliament and some professional institutes have adopted and promoted its use in resolving disputes. One prime example is the resolution of consumer disputes. Section 10(1/1) of the Consumer Protection Act B.E. 2522 (1979), as amended in 2013, authorizes the Consumer Protection Board to mediate consumer disputes. Three years later, the Board issued the Regulation of the Consumer Protection Board on Mediation of Disputes Concerning the Infringement of Consumer's Rights B.E. 2559 (2016), specifying how the mediation shall be conducted. Additionally, the Board has recently established its online mediation system, which is easily accessible.[51] The use of mediation is also promoted in consumer cases. Under the Consumer Case Procedure Act B.E. 2551 (2008), after the statement of claim has been filed, the court shall promptly schedule a first meeting in which a court official or a court-designated mediator shall mediate the dispute in accordance with the Regulation of the President of the Supreme Court on the Proceedings and the Discharge of Duty of Case Affairs Officer in Consumer Cases B.E. 2551 (2008).[52]

The Telecommunication industry is another example. The Act of Organization to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunications Services B.E. 2553 (2010) established the National Broadcasting and Telecommunications Commission (NBTC), which shall have power to, *inter alia*, "protect right and liberty of the people from being exploited by the operators" under Section 27(13). In 2012, the NBTC issued the Regulation of the National Broadcasting and Telecommunications Commission on Mediation between Telecommunications Operator and Claim Petitioner B.E. 2555. There are 46 articles in total covering several issues relating to the mediator (e.g., qualification, objection, and code of conduct) and procedure (e.g., commencement, method, termination, and confidentiality).

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[51] Office of the Consumer Protection Board, "OCPB Mediate" <https://ocpbmediate.ocpb.go.th/>.

[52] Consumer Case Procedure Act B.E. 2551, ss 24–25; Regulation of the President of the Supreme Court on Regulation of the President of the Supreme Court on the Proceedings and the Discharge of Duty of Case Affairs Officer in Consumer Cases B.E. 2551, ss 14–16.

A comparable legal framework can be found in the insurance industry. Under the Life Insurance Act B.E. 2535 (1992), as amended in 2008, and the Non-Life Insurance Act B.E. 2535 (1992), as amended in 2008, once a claim has been filed by an insured against an insurer, the Secretary General of the Office of Insurance Commission (OIC), or his representative, may determine the claim and commence mediation.[53] In 2009, the Regulation of the Office of Insurance Commission on Determination and Mediation of Insurance Claim B.E. 2552 was enacted. Article 14 provides that the OIC officer shall notify in writing that the parties meet to find a settlement. Should a settlement be reached, a settlement agreement shall be concluded in accordance with Sections 850–852 of the CCC. In case the parties fail to settle, the officer shall issue an opinion based on the evidence proven in the mediation. In 2013, the OIC issued the Regulation of the Office of Insurance Commission on Mediation of Insurance Disputes B.E. 2559. This new regulation has greatly improved and formalised the OIC's mediation practice. The provisions mostly resemble those found in the Regulation of the National Broadcasting and Telecommunications Commission on Mediation between Telecommunications Operator and Claim Petitioner B.E. 2555, mentioned in the preceding paragraph.

The use of mediation is also implemented in other Acts. For instance, Section 22 of the Labor Relations Act B.E. 2518 (1975) provides that, in case that a labor dispute between a labor union and employer arises, the labor mediator appointed by the Minister of Labor shall commence mediation proceedings. In this regard, mediation is compulsory; it must be attempted before the employee can call a strike or the employer can temporarily shut down its operation.[54] Also, pursuant to Section 38 of the Act on the Establishment of and Procedure for Labor Court Act B.E. 2522 (1979), the labor court shall mediate the dispute in the first meeting. Mediation is also available in resolving intellectual property (IP) disputes. This initiative can be found in the Regulation of the Ministry of Commerce on Mediation of Dispute Concerning Intellectual Property B.E. 2546 (2003).

This observation shows that mediation is seen as an appropriate and beneficial dispute settlement mechanism for businesses that it was institutionalized under various legal frameworks, especially for those involving dealings between business operators and consumers or users. To facilitate mediation, each regulator tends to offer its own mediation service to disputing parties. Thus, these mediation services are individualized and specifically designed to serve the needs of each institution. This is rightly so, given the specific nature of disputes under the administration of different institutions. Nonetheless, there remains some commonalities. That is, the general legal framework of settlement agreement under Sections 850-852 of the CCC is applicable to any settlement agreement resulting from mediation. In addition, the cornerstone principle of mediation remains intact: the parties' consent or willingness to participate in mediation is required. In any case, the regulator may nudge the parties to mediate by, for instance, mentioning the

[53] Life Insurance Act B.E. 2535, s 37/1; Non-Life Insurance Act B.E. 2535, s 36/1.

[54] Labor Relations Act B.E. 2518, s 22.

availability of mediation during its meeting with the parties and encouraging them to seriously consider using the service.

3. Dispute Mediation Act B.E. 2562 (2019).

As mentioned earlier, the development of mediation in Thailand had generally been sporadic. Though there are some leading organizations in the field, e.g., the Office of the Judiciary and other regulatory state entities, and some informal cooperation through conferences and joint training programs, the practice has been essentially decentralized. A shared common legal framework was lacking. Acknowledging this shortcoming, the Legislative Assembly passed the Dispute Mediation Act B.E. 2562 (2019).[55] The Act is divided into six Chapters: 1) Mediators; 2) Civil Dispute Mediation; 3) Criminal Dispute Mediation; 4) Criminal Dispute Mediation at the Inquiry Stage; 5) Civic Mediation;[56] and 6) Penalties. As noted in the preamble, the most important objective of the Act is to *systematize* and *standardize* the practice of mediation of small civil disputes and certain kinds of criminal disputes.

A few points should be made about the scope of application of the Act. Despite its general character, the Act only applies to mediation administered by state agencies.[57] Some commentators have raised the criticism that, by so doing, Thailand has missed an opportunity to support the mediation services conducted by private organizations.[58] In any case, concerning state-affiliated mediation, the Act does not prejudice mediation by state agencies carried out under its specific legal framework.[59] Should a state agency prefer to make use of this Act, it would have to notify the Ministry of Justice of such intention.[60] In addition, apart from the central administration, the provincial administration, the Office of the Judiciary, and the Office of the Attorney-General, the Act only applies to state agencies listed in the ministerial regulation. Moreover, there are certain restrictions on the kind of civil disputes that can be mediated under Section 20. The provision provides that mediation is impermissible for a civil dispute that "relates to a right as regards personality, a family right or ownership in immovable property." In other words, mediation is only permissible in the following cases: 1) a dispute concerning land but

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[55] An unofficial translation prepared by the Office of the State Counselor can be found at <http://web.krisdika.go.th/data/document/ext856/856807_0001.pdf >.

[56] The term for Civic Mediation in Thai is "การไกล่เกลี่ยภาคประชาชน". Some commentators have translated it into English as "public-engaging mediation" or "public sector mediation." However, the authors opine that "civic mediation" is a more appropriate term in this context.

[57] Dispute Mediation Act B.E. 2562, s 3. Under this Section, State Agency is defined as "the central administration, the provincial administration, the Office of the Judiciary, the Office of the Attorney–General or any other agency of the State as prescribed by the Minister of Justice in the Ministerial Regulation."

[58] Pattrawn Kettuluk and Thanee Vorapatr, "The Conciliation Dispute of Private Organization: Case Study on the Dispute Resolution Act 2019" (2022) 6 The Journal of Law, Public Administration and Social Science, School of Law Chiang Rai Rajabhat University 225, 235–36.

[59] Dispute Mediation Act B.E. 2562, s 4.

[60] ibid s 5.

does not relate to ownership; 2) a dispute concerning inheritance; 3) a dispute of which the amount of claim does not exceed five million baht; and 4) other disputes prescribed in the royal decree.[61]

Mediators performing their function under this Act must be registered with the relevant state agency. The Act prescribes, amongst others, the registration procedure,[62] the mediators' qualifications and prohibitions,[63] duties and powers,[64] ethics,[65] duty to disclose information relating to impartiality and independence,[66] and the challenges and removals of mediators.[67]

As for the civil dispute mediation, it is fundamentally based on the parties' consent.[68] The Act also specifies some fundamental principles upon which a mediation shall be conducted. For instance, it provides that mediation shall be conducted continuously and completed expeditiously,[69] and in the presence of both parties, with some exceptions.[70] It also affirms the party's right to withdraw from the proceedings at its own discretion.[71] Moreover, certain kinds of evidence presented in the mediation shall not be admissible in any subsequent adjudicatory proceedings.[72] Concerning the issue of prescription, Section 8 provides that, in case of an unsuccessful mediation, "if it appears that a period of prescription has expired [. . .] or is due to expire within sixty days as from the date on which the dispute mediation terminates, the period of prescription shall be extended for another sixty days" from the date of termination.

Another interesting development under the Act concerns the enforcement of settlement agreements prescribed under Sections 32 to 34. Section 32 prescribes the time limitation to enforce the settlement agreement, which shall be three years from the date on which the agreement is enforceable. This is different from the prescription for a normal settlement agreement under Section 193/32 of the CCC, which is 10 years. Section 33 enhances the court enforcement of the settlement agreement by stating that the agreement is generally applicable, except for four exhaustive circumstances to be proved by the party against whom the enforcement is invoked. These exceptions concern: 1) the parties' deficient capability to conclude the agreement; 2) the unlawfulness of the agreement; 3) the voidability of the agreement due to fraud, coercion, or other unlawful acts; and 4) the mediator's failure to disclose information relating to his or her impartiality and independence, which "materially affects" the preparation of the agreement. The right to appeal the court's

[61] ibid s 20.
[62] ibid s 9.
[63] ibid s 10.
[64] ibid s 11.
[65] ibid s 12.
[66] ibid s 13.
[67] ibid ss 14–15, 23.
[68] ibid s 21.
[69] ibid s 25.
[70] ibid s 26.
[71] ibid s 27.
[72] ibid s 29.

judgment is limited to a few exceptional circumstances. In any case, the decision of the appellate court shall be final; no appeal can be filed with the Supreme Court. Lastly, Section 34 stipulates that more details on the enforcement proceedings can be prescribed by the President of the Supreme Court, with the approval of a general assembly of the Supreme Court. On other matters on which this Act is silent, the CPC shall apply.

Civic mediation is another mediation method endorsed by this Act. It evinces the state's effort to encourage public participation in the communal dispute resolution process. To achieve this goal, the Rights and Liberties Protection Department of the Ministry of Justice is tasked to encourage citizens to congregate and run civic mediation centers (ศูนย์ไกล่เกลี่ยข้อพิพาทภาคประชาชน) under the Department's supervision.[73] The power of each center to mediate is relatively restricted, nonetheless; it is permitted to mediate a civil dispute of which the amount of claim does not exceed 500,000 baht. Commentators have pointed out an overlap between this civic mediation effort and the pre-existing village committee mediation framework under the Local Administration Act B.E. 2530. Given the differences between these two legal frameworks, especially in terms of the scope of permissible mediation cases, it may be appropriate to amend the laws to avoid redundancy and inconsistency and alleviate people's confusion.[74]

IV. THE SINGAPORE EXPERIENCE

A. A Brief Account of Mediation in Singapore

Mediation has always been practiced within the communities of the Asian cultures and Singapore throughout history, but had been overtaken by the modern legal framework of the court systems as the need to organize the State grew.[75]

The modern practice of mediation as a form of dispute resolution is a result of the purposeful application of mediation to key areas of disputes as well as support from the enactment of key laws. Mediation as a form of dispute resolution began to take shape in Singapore during the 1990s as a result of several developments.[76] The Singapore Judiciary introduced court-based mediation. The Community Mediation Centres were established to focus on community disputes. The Singapore Mediation Centre was established to develop commercial mediation.

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[73] ibid s 69.

[74] Suchada Srimai and Tossaporn Jindawan, "Mediation: A Comparative Study of People Sector and Village Committee" (2021) 5 Law and Local Society Journal 145, 164–69.

[75] "A Historical Perspective of Dispute Resolution in the Region – What Lessons Can We Draw for Today?" (Singapore Mediation Lecture 2022).

[76] See Joel Lee and Teh Hwee Hwee (eds), *Asian Perspective on Mediation* (Singapore Academy Publishing, 2009) 6–13.

Mediation proved to be effective. For example, since its inception and as of 1 October 2023, over 6,400 matters with an aggregate value of over SGD 15 billion have been mediated at the Singapore Mediation Centre, with 67% of the matters settled. Ninety percent of these cases were resolved within one day.[77]

Mediation was applied to other areas, such as intellectual property disputes,[78] employment disputes,[79] and financial services.[80]

As part of Singapore's push to establish itself as a dispute resolution hub, mediation was identified as a key offering, alongside litigation and arbitration.[81] To spearhead this development, the Singapore International Mediation Centre (SIMC) was established (to focus on international commercial mediation), together with the Singapore International Dispute Resolution Academy (a research institute of the Singapore Management University (SMU) with a focus on applied research in dispute resolution), and the Singapore International Mediation Institute (SIMI) (a professional self-regulatory body of mediation in Singapore).[82]

Relevant laws were enacted to support the development of mediation of commercial mediation in Singapore. These include the Mediation Act 2017, the Singapore Convention on Mediation Act 2020, and the Rules of Court 2021. We shall briefly look at each of these in turn.

B. Singaporean Mediation Laws and Regulations

1. Mediation Act 2017 ("MA").[83]

As Professor Joel Lee noted in November 2013, the Ministry of Law Working Group on International Commercial Mediation delivered its report on developing international commercial mediation in Singapore. Amongst the key recommendations in this report were the creation of a mediation service provider for international matters (SIMC), the creation of a mediation accreditation body (SIMI), and the establishment of the Mediation Act.[84]

The MA came into force on 1 November 2017. It is described as "An Act to promote, encourage and facilitate the resolution of disputes by mediation." Section 3 of the MA provides a working definition of mediation, while Section 4 sets out the

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[77] Statistics from <https://www.mediation.com.sg/>.

[78] Intellectual Property Office of Singapore, "Mediation" <https://www.ipos.gov.sg/manage-ip/resolve-ip-disputes/mediation>.

[79] Tripartite Alliance for Dispute Management, "About Us" <https://www.tal.sg/tadm/about>.

[80] Financial Industry Disputes Resolution Centre <https://www.fidrec.com.sg/>.

[81] Gloria Lim, "International Commercial Mediation, The Singapore Model" (2019) 31 Singapore Academy Law Journal 377, 383–86.

[82] ibid 393–96.

[83] Mediation Act 2017 (2020 Revised Edition) <https://sso.agc.gov.sg/Act/MA2017>.

[84] Joel Lee, "Singapore Developments – The Mediation Act 2016" *Kluwer Mediation Blog* (2017) <http://mediationblog.kluwerarbitration.com/2017/03/12/singapore-developments-the-mediation-act-2016/>.

meaning of the term "mediation agreement." Section 5 of the MA states that it binds the Government. Section 6(1) provides that the MA applies "where the mediation is wholly or partly conducted in Singapore or where the agreement provides that this Act or the law of Singapore is to apply to the mediation." In other words, since mediation is consensual, parties can agree to conduct their mediation under the MA and so avail themselves of the benefits.

To ensure standards, Section 7 provides that only designated mediation service providers and credentialing schemes are approved under the MA. At present, only the Singapore Mediation Centre, the Singapore International Mediation Centre, the World Intellectual Property Organization Arbitration, and the Mediation Centre are designated mediation service providers, and the Singapore International Mediation Institute Credentialling Scheme is the only approved certification scheme under the MA.

Section 8 of the MA provides that a party to a mediation agreement can apply to court to stay the proceedings. The court in granting a stay "may make such interim or supplementary orders as the court thinks fit for the purpose of preserving the rights of the parties."

Section 12 of the MA provides that a party may apply to have a mediated settlement agreement recorded as an order of court where certain conditions are met. The effect of having the resulting settlement recorded as a Singapore court judgment is that it can be enforced under the prevailing rules of the court and also enforced all over the world wherever a Singapore court judgment is enforceable. Currently, Singapore court judgments are enforceable by registration in at least 38 countries: 28 countries under the 2005 Hague Convention, and 11 commonwealth countries referred to under the Reciprocal Enforcement of Commonwealth Judgments Act.[85]

It is noteworthy that Section 12 of the MA covers the situation where parties have reached a settlement in "a mediation in relation to a dispute for which no proceedings have been commenced in a court." The court may refuse to record a mediated settlement agreement as an order of court if there are grounds, such as the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake, or any other ground for invalidating a contract or is contrary to public policy.

2. Singapore Convention on Mediation Act 2020 ("SCMA").[86]

The SCMA came into force on 12 September 2020. It is described as "An Act to give effect to the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation,

[85] Christine Sim, "The International Reach of the Singapore Mediation Act" *Kluwer Mediation Blog* (2017) <http://mediationblog.kluwerarbitration.com/2017/12/17/international-reach-singapore-mediation-act/>.

[86] Singapore Convention on Mediation Act 2020 <https://sso.agc.gov.sg/Act/SCMA2020>.

opened for signature on 7 August 2019 in Singapore." The SCMA adopts the wide meaning of mediation used by UNCITRAL in Section 2. Section 3(1) provides that the Act applies to international settlement agreements, and Section 3(4) provides that the Government is bound by the SCMA.

The SCMA allows parties to an international settlement agreement to apply to the High Court of Singapore to record the agreement as an order of court. The court has the discretion to refuse to grant the application on the grounds set out in Section 7, which include breach of mediator standards.

3. Rules of Court 2021 ("ROC 2021").[87]

The ROC 2021 came into force on 1 April 2022 and has transformed the way that litigation is conducted in Singapore. Order 5 of the ROC 2021 provides that there is now a duty imposed on parties to consider "amicable resolution of the party's dispute." The duty falls on the parties even before they commence the action in court. It persists throughout the course of the action and even upon appeal. A party is to make an offer of amicable resolution unless the party has reasonable grounds not to do so. An offer of amicable resolution means making an offer to settle the action or appeal, or making an offer to resolve the dispute other than by litigation, whether in whole or in part. The offer must not be rejected by a party receiving it unless that party has reasonable grounds to do so.

The court has the power to make an adverse order of costs against a recalcitrant party. Order 21 r2(2)(a) of the ROC 2021 specifically provides that the "efforts made by parties at amicable settlement" is a factor the court can consider when exercising its power to fix or assess costs. Order 21 r4 of the ROC 2021 further provides that a successful litigant can face reduced costs or have costs disallowed if the court finds that the "party has not discharged that party's duty to consider amicable resolution of the dispute or to make an offer of amicable resolution in accordance with Order 5." Under Order 21 r6(1) of the ROC 2021, the court can also make adverse costs orders against the lawyer personally if "the solicitor is responsible, either personally or through an employee or agent, for incurring costs unreasonably in the proceedings."

While the ROC 2021 did not specifically mention mediation, the effect is that mediation has now become the alternative dispute resolution process of choice for parties to attempt to amicably resolve the dispute other than by litigation.

The Singapore Courts have consistently showed support for mediation. In the case of *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*,[88] the Singapore High Court found that the parties were under a legal obligation to refer their dispute to mediation and that, pursuant to this obligation, Maxx should be granted an order for specific performance to compel PQ to refer the dispute to mediation.

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[87] Supreme Court of Judicature Act, Rules of Court 2021 <https://sso.agc.gov.sg/SL-Supp/S914-2021/Published/20211201>.

[88] [2023] SGHC 7.

C. Enforceability of Mediated Settlement Agreements

It was noted above that if the parties had worked together to work out an amicable resolution of their dispute, there would be greater "buy-in" to the outcome and less likelihood of a default.[89] However, defaults do occur, whether due to changed circumstances, factors beyond the control of the parties, or a change of heart.

Conventionally, a mediated settlement agreement ("MSA") is treated as a fresh contract between the parties. This means that an aggrieved party will have to sue on the MSA. This would involve bringing fresh legal proceedings, which will incur additional time and costs. The court would examine the facts, applying contractual principles to see if an agreement had in fact been reached.[90] Similarly, the court will consider whether any vitiating factors apply to invalidate the MSA.[91] So an aggrieved party may face a "double jeopardy" in event of a default of an MSA. This is because a party cannot return to sue on the original contract or cause of action. These are replaced by the compromise terms of the MSA, which is now in dispute.[92]

The MA and the SCMA have altered this landscape by allowing for MSA to be recorded as an order of court (where prescribed criteria are met).

As noted above, specific to the MA, Section 12 covers the situation where parties have reached a settlement in "a mediation in relation to a dispute for which no proceedings have been commenced in a court." Once the MSA has been recorded as an order of court, it can be enforced as such. Additionally, as observed by Lim,[93] such legislation supports cross-border mediated settlements (where applicable) in that once the MSA is recorded as an order of court, it can then be "enforced internationally as a court order under international instruments such as the Hague Convention on the Choice of Court Agreements."

Another way parties can enhance the effectiveness of the MSA is to have it recorded as arbitral award. One means of doing so is to use the Arb-Med-Arb procedures of the Singapore International Mediation Centre ("SIMC"),[94] which "is a flexible and efficient form of alternative dispute resolution, which combines the advantages of confidentiality and neutrality with enforceability and finality."

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[89] See nn 6–7.

[90] In the Court of Appeal decisions of *Gay Choon Ing v Loh Se Ti Terence Peter* [2009] 2 SLR 332 and Ng *Chee Weng v Lim Jit Ming Bryan* [2015] 3 SLR 92, the Court used contractual formation principles to determine whether there was a valid compromise agreement.

[91] In *Chan Gek Yong v Violet Netto* [2018] SGHC 208, the court had to determine whether the allegations of duress and incapacity were made out to invalidate a mediated settlement agreement.

[92] The Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] 2 SLR 12 noted that the settlement agreement may provide for its terms to be recorded as a consent judgment or order of court. The Court concluded that such a consent order is contractual in nature. It has the effect of superseding the original cause of action and it puts an end to the proceedings. Furthermore, the Court did not retain residual discretion to set aside a consent order arising from a settlement.

[93] Lim, "Singapore Model" (n 81) 389.

[94] Singapore International Mediation Centre, "Arb-Med-Arb" <https://simc.com.sg/dispute-resolution/arb-med-arb/>.

The Singapore Convention on Mediation ("SCM"), opened for signature on 7 August 2019, aims to be a game changer for commercial mediation internationally. The SCM[95] "is a uniform and efficient framework for international settlement agreements resulting from mediation. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute." It is hoped that the SCM "will facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders." It is, however, still in the early days. For the grand vision to be realised, more countries need to sign and more importantly ratify the SCM.[96] As Alexander observed,[97] "the mood is positive" and proceeds to set out a "mediation eco-system framework" to guide States "to be ready to embrace" the SCM.

With these developments taking place, it is hopeful that the perceived "lack of enforceability" of MSAs will be overcome, and more parties will use mediation as an effective dispute resolution process to resolve their cross-border commercial disputes.

V. CONCLUSIONS AND RECOMMENDATIONS

Having considered the mediation infrastructure and legal framework in Thailand and Singapore, the authors have the following observations.

To begin with, it is evident that both jurisdictions share a similar policy of advocating the practice of mediation. That said, while Thailand seems to focus principally on domestic mediation, Singapore also tends to position itself as a mediation hub for international disputes. As for the legal framework, both countries have witnessed the enactment of significant legislation and regulations that endorse, effectuate, and facilitate mediation. Despite some slight differences, their laws and regulations aim to uphold the principle of party autonomy, provide the necessary support, create a mediation-friendly climate, maintain the process integrity, and ensure the enforceability of valid mediated settlement agreements.

Nonetheless, Thailand should seriously consider whether it should become a contracting state to the Singapore Convention on Mediation. Acceding to this Convention would surely improve Thailand's image as a mediation-friendly jurisdiction. It would also indirectly force the country to re-evaluate and modernize its laws to ensure compatibility with the Convention. In this regard, one may find it pertinent to consider adopting the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from

[95] Singapore Convention on Mediation <https://www.singaporeconvention.org/>.

[96] At the time of writing, 56 countries have signed and 11 countries have ratified the SCM.

[97] Nadja Alexander, "The Singapore Convention: What Happens after The Ink Has Dried?" (2020) 30(2) American Review of International Arbitration.

Mediation 2018.[98] This move may prove promising, given Thailand's past positive experience with the comparable adoption of the UNCITRAL Model Law in International Commercial Arbitration as its Arbitration Act B.E. 2545. On a related note, should an amendment to Thailand's mediation law be desirable, the legislature should seriously consider applying the legal regime across the board, instead of applying it solely to state-affiliated mediation, as the Dispute Mediation Act B.E. 2562 currently does.

For mediation to thrive in any country, the most crucial factor may be the proper understanding of the end-user, namely the parties and the parties' legal counsel (both external and in-house lawyers) on how to properly use mediation to their advantage. Proper education on the advantages of mediation, and how to advance their interests in a non-adversarial way in a confidential setting to obtain a win-win amicable outcome will be key. This education needs to be carried out not just in the commercial space but also in universities.

Another vital ingredient is mediator quality and standards. Mediators need to be skilled at managing the mediation process as well as using conflict management techniques. One way to ensure that each mediator possesses the qualities needed to perform his or her function appropriately is to establish a proper accreditation system. Many institutions in Thailand, including the Office of the Judiciary,[99] THAC,[100] and the Department of Rights and Liberties Protection,[101] have created their rosters of registered mediators. In so doing, each institution stipulates its own registration requirements, which generally concern age, experience, and character.[102] Another frequently found criterion is that the candidate must have passed mediation training organized or approved by the institution. Nonetheless, one may reasonably argue that a central accreditation system is missing, which naturally results in a lack of standardization. One easy fix is for Thailand to adopt the SIMI accreditation system.[103] This has the advantage of ensuring that mediators in Thailand are benchmarked to international standards.

Another factor that could affect the quality of mediation is the mediator's remuneration. Having surveyed the schedule of the mediator's fees of several institutions in Thailand, one could not help but be left with the impression that the mediator's work is a kind of a *pro bono* service. For instance, a court-annexed

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[98] UNCITRAL, "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation>.

[99] Regulation of the President of the Supreme Court on Mediation B.E. 2554, Ch. 7.

[100] Thailand Arbitration Center Rules on Registration of Mediators B.E. 2557.

[101] Department of Rights and Liberties Protection Regulations on Dispute Mediation of Civic Mediation Center B.E. 2562, Ch. 4.

[102] See, e.g., Regulation of the President of the Supreme Court on Mediation B.E. 2554, Art. 51; Thailand Arbitration Center Rules on Registration of Mediators B.E. 2557, Art. 2; Department of Rights and Liberties Protection Regulations on Dispute Mediation of Civic Mediation Center B.E. 2562, Art. 23.

[103] Singapore International Mediation Institute, "About the SIMI Credentialing Scheme" <https://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme>.

mediator is typically entitled to a fee of 1,000 Baht per case, which may be increased to a maximum of 6,000 baht, considering the case complexity and length.[104] A mediator appointed under the NBTC's mediation scheme is entitled to a fee of 2,000 baht per mediation meeting, which shall not exceed 10,000 baht in total per case.[105] On the one hand, this low fee would assure everyone's accessibility to mediation. On the other hand, such a low fee would not be able to attract quality mediators, which would inevitably affect the quality of the mediation industry in general. In Singapore, mediators may charge commercial rates, especially in international commercial disputes. Even so, when these rates are compared against what a party could expect to incur in a litigation or arbitration of the same dispute, the cost advantage of mediation is still obvious.

There is still a lot to do to develop mediation in Thailand. However, it is clear that mediation has definite advantages that can help the client resolve disputes in a non-adversarial, time, and cost-efficient way. Adopting more widespread use of mediation as a means of dispute resolution especially in international commercial cases will make Thailand more attractive as an investment destination as well as a dispute resolution hub. For the practitioner who has to advise his client, the inescapable conclusion is that one cannot ignore mediation's rise. Mediation is here to stay, and it should be an integral part of every lawyer's dispute resolution strategy.

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[104] The Office of the Judiciary Announcement on Rules and Methods of Payment of Fees and Expenses of Mediators B.E. 2556

[105] Regulation of the National Broadcasting and Telecommunications Commission on Mediation between Telecommunications Operator and Claim Petitioner B.E. 2555, Art. 14.