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# Let's agree to disagree – Thailand passes Dispute Mediation Act

*by*

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*Introduction:* All family disputes in the Family Court, and all employment disputes in the Labour Court are subject to compulsory mediation when the action is filed, With consent of the parties other civil cases may be referred to mediation. In certain circumstances, criminal cases can be referred to mediation. In May 2019, Thailand passed a Dispute Mediation Act, which provides for a system of private mediators to be set up, subject to training and certification. In this article we consider the main points of the new Act.

*Coming into force:* Many of the sections of the Act are in force, some will only come into force In November 2019.

*Definitions:*

“**dispute mediation**” means any proceeding which allows the parties to negotiate and settle civil and criminal disputes but excluding mediation in court or during enforcement of a judgment.

“**mediator**” means a person who is registered and appointed to perform the duties of dispute mediation.

“**dispute settlement agreement**” means an agreement for settlement of a dispute or any claim, and each party shall have the rights, duties, or liabilities as specified in such agreement.

“**dispute mediation agency**” means a government agency that proceeds with dispute settlement by means of mediation.

“**government agency**” means the central administration agency, a provincial administration agency, the Office of the Judiciary, the Office of Attorney General, or other agencies of the state as prescribed by the Minister of Justice in regulations. The Act does not apply to mediation under the authority of such an agency.

*Limitation period:* Where mediation has been unsuccessful, if it appears that the prescription period has lapsed during the mediation proceedings, or it will lapse within 60 days from the date the mediation has come to an end, the prescription period shall be extended for another 60 days from the date the dispute mediation has ended.

Where the court orders that there shall be no enforcement under a dispute settlement agreement, the provisions above shall also apply.

*Cases in the Family and Juvenile court* The Act shall not apply to criminal cases under the Family and Juvenile Court.

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*Mediators:* Mediators must be registered as such with the regulatory authority under the Act.

Mediators:

- (1) Must have attended approved mediation training courses.
- (2) Must have experiences in fields which are beneficial to dispute mediation.

A mediator has the following duties and powers:

- (1) To fix guidelines and arrange for mediation.
- (2) To provide assistance and make proposals to the parties in order to seek proposals for settlement of dispute.
- (3) Conduct a dispute mediation with impartiality.
- (4) Prepare a dispute settlement agreement according to the result of mediation.

Provided a mediator performs his/her duties in good faith, he/she shall be protected from civil and criminal liability.

*Mediators' duties:* A mediator must:

- (1) Perform his/her duties with impartiality, independence, impartiality, and without discrimination.
- (2) Participate in all dispute mediation meetings.
- (3) Perform his/her duties expeditiously and must not cause mediation to be delayed inappropriately.
- (4) Perform his/her duties honestly and not demand or accept property or any other benefit from the parties or others related to the dispute.
- (5) Conduct the mediation with politeness.
- (6) Maintain confidentiality relating to mediation.
- (7) Must not pre-decide the dispute or force a party to sign a settlement agreement.

*Mediators' disclosing of an interest in the dispute:* A mediator must disclose to the parties facts which may cause suspicion of his/her impartiality and independence in performing his/her duties, especially those related to either party, as follows:

- (1) Being a fiancé or a spouse of a party.
- (2) Being a parent, descendant, brother/sister or a cousin of up to three levels, or a relative through marriage up to two levels of a party.

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- (3) Being or formerly being a representative, guardian, representative or agent of a party.
  - (4) Being a creditor or debtor, or employer or employee of a party.

A mediator may be objected by either party that his/her performance may not be neutral or independent. In such a case, the mediator may be removed.

Where a party comprises several persons, such objection must obtain consent from all persons of such party.

*Removal of a mediator:* A mediator may be removed in the following causes:

- (1) Having committed a fraudulent act or threatened a party or other persons concerned with the dispute.
- (2) Having failed to perform his duties more than twice without reasonable grounds
- (3) Lacked prescribed ethical qualities.
- (4) Having been successfully objected to.

No mediator may act or arrange for an act that is compulsion, a threat, a deception, or any illegitimate act, so that the parties may enter into a settlement agreement.

*Removal and replacement:* Where a mediator is removed or the mediatorship terminates during mediation proceedings, the parties may appoint a new mediator to continue the dispute mediation, and the documents already considered may be used as deemed suitable by the parties and the new mediator.

*Remuneration:* A mediator may receive remunerations and expenses according to regulations issued.

*Mediation in civil cases:* If a civil dispute mediation concerns personal status, family rights, or ownership in immovable property, such shall be prohibited.

A civil dispute in the following cases may be mediated:

- (1) Disputes concerning land but not disputes involving ownership.
- (2) Dispute between heirs relating to a legacy.
- (3) Other disputes prescribed in regulations.
- (4) Disputes other than (1), (2) and (3) involving an amount not exceeding Baht 5 million.

*Application for mediation:* If either party wishes to arrange for mediation, an application shall be filed with the dispute mediation agency.

The agency shall ask whether the other party will participate in mediation.

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If the other party is unwilling to participate in mediation, the dispute mediation agency shall dispose of the application for dispute mediation and shall also notify the party applying for mediation.

In the event there are more than two parties in a case, and any party is not willing to participate in mediation, mediation may be conducted between the parties who are willing to mediate.

An application for mediation, the details of the application, and the period of time for consideration of any application for mediation, shall be according to regulations issued by the dispute mediation agency.

*Selection of mediators:* The parties shall appoint one or more mediators from the list of mediators provided by the dispute mediation agency. If the parties cannot agree on the appointment of a mediator, they may request the dispute mediation agency to appoint a mediator from the said list.

*Challenging a mediator:* When there exists any fact that may cause suspicion of the impartiality or independence of a mediator, and either party objects or the mediator himself/herself raises such a matter, the mediator shall cease mediation and shall notify the dispute mediation agency of this so that it can be investigated.

*Non-disclosure by mediator:* If it appears that the mediator did not disclose facts that may cause suspicion of his/her impartiality or independence, or the appointment of the mediator was unlawful, the agreement to mediate shall not be avoided, but a party may apply to the court for an order that said agreement may not be enforced.

*Procedure:* Mediation shall be proceeded with continuously and expeditiously. The mediator may make an agreement with the parties to set a timeframe and a mediation plan.

When the mediator inquires about the facts, the wishes of the parties to settle the dispute, and other facts concerning the mediation, the mediator shall ensure that the parties understand each other or understand each other so that this may lead to a dispute settlement.

The mediator must proceed openly in the presence of the parties, except where the mediator may proceed in the absence of either party, provided the mediator notifies the parties of the proceedings.

The mediator may permit a lawyer, an adviser of the parties or any person to take part in the mediation.

During mediation, either party may withdraw from mediation by notifying the mediator of such in writing.

The parties may negotiate in order to reach an agreement independently. Provided such an agreement must not be prohibited by law, be impossible, or must not be against the peace and order or the good morality of the public.

It is prohibited to admit facts arising from the following mediation proceedings as evidence in a trial, an arbitration, or any other proceedings, except for enforcement according to the settlement agreement.

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- (1) A desire or the voluntariness of the parties in participating in mediation.
  - (2) An opinion or suggestion concerning guidelines or the method of mediation.
  - (3) Acceptance or a statement made by a party in the mediation.
  - (4) Any proposal proposed by the mediator.
  - (5) A fact showing willingness to accept a proposal in the mediation.
  - (6) A document prepared and intended to be used or used in the mediation.

Any evidence or facts that already exist and can be given as evidence in court proceedings, an arbitration, or any other proceeding, are not prohibited under paragraph one for the reason that either party has used them in the mediation.

*Agreement after mediation:* When the parties have made an agreement, the mediator shall prepare a memorandum of mediation agreement or arrange for a preparation of memorandum of dispute settlement agreement in writing which must be signed by the parties and the mediator. The memorandum contain the following details:

- (1) Names and addresses of the parties.
- (2) the nature of the dispute.
- (3) Willingness to participate in the mediation.
- (4) Essentials of the agreement which is a result of the mediation, such as, damages, conditions that must be complied with, or acts that must not be performed, the period of the proceedings, or agreement to apply if the damages are not paid.

*Termination of mediation:* Mediation is terminated in the following cases:

- (1) The parties have reached an agreement to settle the dispute.
- (2) Either party withdraws from mediation.
- (3) The mediator is of opinion that the mediation is no longer beneficial and that the mediation be terminated.

*Enforcement of terms of mediation:* When either party demands that the other party complies with the settlement agreement but the other party fails to comply, the demanding party may apply to the court for enforcement according to the settlement agreement.

An application to enforce must be made within three years from the date it may be enforced under settlement agreement. If enforcement is not applied for within that period, the right to enforce is lost.

*Avoiding enforcement:* The court shall order enforcement, except where it appears to the court or the party who is subject to enforcement that:

- (1) Either party lacked the capacity for entering into the settlement agreement.

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(2) The grounds of the dispute or the settlement agreement is prohibited by law, must be avoided, or it is against peace and order or the good morality of the public.

(3) The settlement agreement originated from a fraudulent act, by means of duress, threats, or any unlawful act.

(4) There appear to be grounds concerning the appointment of the mediator which significantly affect the making of the agreement.

*No right of appeal:* There is no right of appeal against a court order under the above section, except where:

(1) the court has ordered that there shall be no enforcement under the settlement agreement;

(2) the court has made an order which is not in accordance with the settlement agreement;

(3) the court has made an order for enforcement which is in violation of paragraph one.

A judgment of the Court of Appeals shall be final.

*Mediation in criminal cases* The Act also contains provisions as to mediation of criminal cases in relation to compoundable offences or petty offences under certain sections of the Criminal Code, and other petty offences which have no impact on the general public, as prescribed in regulations. .

Where the parties enter into a mediation agreement in a criminal case, it shall be deemed that the right to file a criminal charge is abandoned.

In criminal mediation, if the case is under an inquiry or consideration by an official, a public prosecutor, or a court, the dispute mediation agency, shall notify the inquiry official, the public prosecutor, or the court. The inquiry official, the public prosecutor, or the court may wait for the inquiry, the prosecution order or non-prosecution order, the trial or the adjudication, until the result of such dispute mediation is known.

Where a criminal mediation is not successful, the inquiry official, the public prosecutor, or the court shall carry out the inquiry, issue a prosecution order or non-prosecution order, or proceed with the adjudication accordingly.

If the parties have made a criminal dispute settlement agreement so that either party may file a civil action in connection with the criminal case, the said right shall be extinct when the parties have complied with the civil settlement agreement. In the event either party fails to comply with the civil settlement agreement, the other party may proceed to enforcement according to the dispute settlement agreement.

In the event that either party is entitled to the benefit of a time condition in complying with the agreement, the provisions above shall apply in the case where the said party fails to comply with the agreement.

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There are also detailed provisions that apply to mediation during the inquiry stage of a criminal case, and special rules applying to mediators in criminal mediations.

*Public dispute mediation for small claims:* The Rights and Liberties Protection Department, Ministry of Justice, shall promote and support the public in setting up a public dispute mediation centre to proceed with public dispute mediation.

A mediator of the public dispute mediation centre must possess the qualifications and must not have the prohibited characteristics above.

*Jurisdiction:* A dispute mediation by the public dispute mediation centre may be conducted in the following cases:

- (1) A civil dispute involving an amount not exceeding Baht five hundred thousand or such other amount fixed in regulations.
- (2) Civil disputes other than (1) as prescribed in regulations.
- (3) Criminal dispute in accordance with this Act.

In the event the Rights and Liberties Protection Department is of opinion that a dispute mediation of the public dispute mediation centre in any case has been conducted under this Act and a certificate therefor has duly been issued, the said dispute settlement agreement shall be enforceable or the right to file a criminal case shall become extinct under this Act.

*Offences:* The Act contains a list of offences that may be committed by a mediator or a party to a mediation, or others.

*Comment:* Compulsory mediation applies to family disputes and employment disputes and other civil cases or criminal cases where the parties agree to mediation. This Act represents a new departure whereby private sector mediation is now to be encouraged by trained and certified mediators.

Lawyers drafting arbitration clauses in contracts should also consider whether they choose to make disputes under contracts also subject to mediation procedures under this Act.

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