



Dispute Mediation Abroad: An Alternative Conflict Resolution

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Abstract

This article aims to study the patterns or methods of dispute mediation abroad leading to an introduction of a dispute mediation model in Thailand. The literature review has been used to reflect patterns and processes of mediation in other countries which may serve as an example of mediating disputes in Thailand. A review of relevant literature shows that mediation has been a popular approach chosen to settle conflicts in many countries around the world. The key to mediating disputes is to empower people to resolve conflicts themselves. The dominant feature of this alternative conflict resolution is that it is more cost and time efficient than court proceedings. A crucial factor to a successful mediation is the mediator, the person responsible for facilitating negotiation between the disputed parties. It is found that the efficiency of operating mediation has contributed to a huge reduction of cases going into court each year. Moreover, mediation is also a form of conflict resolutions that has helped to maintain the relationship between disputants.

Keywords

Dispute mediation, Alternative conflict resolution

Introduction

Mediation is an alternative conflict resolution which focuses on empowering people to make decisions or create choices by themselves rather than having a third party decide or choose for them. Not only would a legal perspective be examined in the mediating process, but importance would also be given to explaining emotions, reasons, opinions, environment, and experiences happening in an incident. These would be used to find a solution which would satisfy the needs of all parties as well as maintaining a good relationship. Some of the advantages of mediation are allowing the use of feelings, having different ways to solve conflicts, being accessible to everyone, having flexible structures, allowing disputed parties to jointly make decisions, and giving more benefits while costing less than prosecution. It is also a way to strengthen and create peace in the community. (McCorkle and Reese, 2015)

In certain countries, namely Singapore, India, and the Philippines, mediation is a method of conflict resolution indigenous to their cultures. These traditional forms of mediation share the same objectives as the modern one, despite having different forms and processes. In the old form of mediation, each community would have different cultures, rules, manners, and mediating venues, with the role of a mediator played by the community leader who would help the disputants to discuss their solutions. Mediation would take place informally and was carried out under the criteria of each community, often under the aegis of a traditional doctrine or religious faith. (Hwee Hwee, 2012; Chodosh, 2003).

However, modern mediation is a revival and an expansion of traditional conflict resolution integrated into the legal system to ensure justice. Dispute mediation in modern society was born from an effort to find an effective solution to problems in order to increase choices for people and reduce the number of cases going into court proceedings (Hedeem, 2004). Together with urbanization, attention has been increasingly given to formal negotiation and expected to receive justice through the court process. This brings about a form of mediation in modern society where solution is based on the scope of law.

Nevertheless, mediation in modern society may vary from culture to culture depending on changes in the mediation model in accordance with the social context of each culture. For example, in some cultures, mediation would be performed by an outsider who neither knows nor has any relationship with any of the disputants, while some may require a mediator living in the same community to understand the values and culture of such community. Apart from the law, some cultures also have community rules that have been used to uphold or settle disputes (McCorkle and Reese, 2015).

Although mediation might be carried out differently in each culture, every country maintains the essence of mediation. That is, mediation is an alternative way to solve problems voluntarily. Disputants could participate and have the power to find a solution together; settlement would be based on the satisfaction and consent of the disputants under

the scope of law, and the solution would aid in maintaining relationships of all parties with a third party or a mediator to facilitate the negotiation and communication. These mediators, however, would not be involved in making decisions or inducing conflict resolution. Moreover, the advantages of mediation namely being flexible, cost efficient, and faster when compared to court proceedings, should also be nurtured.

From the above mentioned, we can see that dispute mediation has been used as an alternative for people to solve conflicts in many countries, and it has proven effective in mediating conflicts in the society and community levels. This notion brings about the current study which aims at examining successful dispute mediation cases in many countries in order to study their mediating patterns and methods and then use them to create a dispute mediation model for Thailand.

Format of mediation

There are many processes and cases of mediation in other countries. Specialized agencies would oversee and support mediation in all aspects including structural, personnel, and budget management. The administrative structure of each country would determine which organization would supervise mediation. However, mediation process would be independent of the court process, and have the power to operate itself. For example, there are 3 forms of mediation in Singapore: 1. Mediation by court done by the Court of Justice, 2. Mediation by Singapore Mediation Centre (SMC) established to mediate disputes in civil and criminal cases, and 3. Mediation by Community Mediation Centres (CMC) established by the Ministry of Justice. Both SMC and CMC mediations would be a collaboration between the Court of Justice, government, specialists, and people involved in the mediation. This is similar to that of the Philippines where there are also 3 types of mediation: 1. Mediation associated with the court namely Court-Annexed Mediation (CAM), Appellate Court Mediation (ACM), and Judicial Dispute Resolution (JDR), 2. Mediation by Philippines Mediation Centre (PMC), and 3. Community mediation (Barangay) with an oversight by the Supreme Court under the Alternative Dispute Resolution (ADR) laws (Hwee Hwee, 2012; Prodigalidad, 2012).

Originally, mediation was used in civil cases to help disputants settle and solve their conflicts quickly. After that, it was extended to non-serious criminal offenses and cases. With the effectiveness and success of mediation, it is now being used to solve many types of cases including family cases, divorce, tax management, environment, property, as well as quarrels among neighbors. To illustrate, the Family Law Dispute Resolution in the United States which began in 1984, established a standard format for family law and divorce settlement whereby an expert lawyer would be responsible for providing assistance as a mediator under the Code of Conduct. Later in 1996, the Family Court of American Bar Association extended the mediation model of family disputes from that of the 1984 mediation model. The new standard requires a collaboration between personnel in relevant organizations, and the mediator does not have to

be a lawyer. Additionally, a clear standard has been set to guide mediators in family disputes. The mediators need to have the knowledge of family law, impact of family conflict, knowledge of child development, and violence in families and children (The ABA House, 2001).

Community mediation focuses on solving problems to bring peace to the community. Most cases needing mediation deal with conflicts among neighbors and non-heinous crimes. Community mediation as a non-profit organization that is under supervision of the government who provides resources and financial support. The objective of community mediation is not only to reduce the number of cases entering court proceedings, it is also a way to strengthen and harmonize the community under the concept of "Community Dispute Resolution" is a solution to public conflict by the people for the people. An example of this is the National Association for Community Mediation (NAFCM) in the United States. The center would oversee community dispute mediation in the US. Each state would set up a center for consultation and mediation services. Moreover, the center would work to develop strength and leadership of the community through volunteer training (Hedeem, 2004). Nevertheless, mediation in each area may differ in format and operational details depending on the cultures in that community. Although it is operating and is under state supervision, there may be laws that apply to each particular mediation such as the Islamic law.

The decision to enter mediation process is voluntary. The disputants can contact the center to enter the mediation process by themselves. However, if the disputed parties bring the matter into court, the court will then send that matter into a mediation process to have all parties negotiate and decide on the legal action. If the disputants could reach an agreement, it shall terminate the litigation. It should also be noted that mediators are the key contributor to creating confidence and success in the mediation process. Furthermore, the popularity of mediation arises from word-of-mouth recommendations, as well as publicity through various channels such as advertising and leaflet distribution. (Hedeem, 2004).

From the aforementioned, it can be seen that each country has similar structures and give similar importance to the mediation process. Though the operational structure of mediation has been designed and developed under the oversight and support from the court and government, mediation is still independent from the court process. It can mediate and function differently from resolving dispute through courts which focus on finding the right or wrong doers as well as relying on law as a primary tool in sentencing and punishing offenders. In contrast, dispute mediation focuses on compromising and reaching an agreement which would benefit all parties. It does not clearly brand or judge if someone is right or wrong in order to maintain the social relationship between disputants. It is also a way to solve conflict which allows disputed parties to make decision and find a solution themselves to satisfy everyone. Because of this, dispute mediation is a conflict resolution that has been gaining in popularity.

Steps of dispute mediation and roles of mediator

The process of entering into dispute mediation is based on the disputants' willingness to accept mediation. It is the first thing that the mediator should realize before starting mediation. The process of mediation is merely a practical guideline. The mediator may adjust it to a particular mediating situation. As the mediator is the key factor to a successful mediation, it is necessary for the mediator to be trained and skilled under the assigned duties and responsibilities. (McCorkle and Reese, 2015)

Dispute mediation process

The key elements of mediation are as follows. First is *mutual recognition* where the mediator must have appropriate role and gain acceptance from the disputed parties. Next is the need for neutrality which requires that the mediator does not have close relations with any of the disputed parties, and have no stake in the outcome of the mediation. The *interest of the disputed parties* involves the mediator helping the disputants to explain or identify what each party wants and needs. *Communicating process* is also needed for the mediator to facilitate in the discussion to help the disputants understand each other and find a solution that comes from their own desires. The last is *creating agreement* where the mediator is not the one who decides, chooses, or induces the results. The agreement must come from the disputed parties. The mediator only serves as an intermediary to determine whether the agreement is practical and appropriate.

Mediation in other countries follows a clear process. Once a dispute arises, the disputed parties can contact the center themselves to receive mediating services without entering court process. This includes when the case gets into court, the court will send the matter to the community mediation process to determine whether such dispute can be resolved at this stage. Therefore, the community mediation is the first choice when a dispute arises in the society. The mediation process is divided into 3 following steps.

There are 3 objectives to mediation: 1. Ensuring that all parties decide and are willing to participate in the mediation, 2. To conduct a primary study of the disputed issues during the pre-mediation period, as well as deciding which actors should be involved. 3. The pre-mediation period also provides an opportunity for the mediator to study and be acquainted with the disputed parties, in order to prepare and build confidence and trust through initial conversation with the disputants.

The process of mediation begins with an opening speech by the mediator. He will begin by introducing himself and each disputed party, giving information on the credentials of the mediator, stating the rights of the disputants, and explaining the characteristics and scopes of the mediation as well as the roles of mediator, confidentiality, and the rules of communication. Then it is time for a background information about the dispute in order to

urge all parties to discuss the situation from their own perspectives and to state their needs. During this, the mediator will be responsible for lessening the emotional obstacles and managing the atmosphere for discussion.

While the disputants are sharing their stories, the mediator needs to listen attentively to details to gather and connect the facts as well as record the issues in the negotiation. This is to build rapport and encourage all parties to jointly find a solution to the problem. After having discussed and reached a common understanding of the situation, the mediator will conclude the agenda by identifying problems needed to be solved, so that each party can discuss potential solutions together until a mutually satisfying agreement can be reached. Upon reaching an agreement, the mediator will draft an agreement contract and inform the disputed parties of the details in each agreement, then determine the practicality and appropriateness of each agreed terms to clearly create a mutual understanding of all details and definitions. Once there is a clear conclusion and consent of all parties, everyone will sign on the contract. The mediator will make copies of the contract for each party and notify them after the mediation process.

After completing the mediation, the mediator must follow the results of satisfaction assessment from the disputed parties, complete the agreement contract, destroy records of the conversation, and report the results of the mediation to the agency or supervisor.

Qualifications and roles of the mediator

A mediator is a willing participant or a volunteer who wishes to be part of the mediation. It is not required that they should have legal knowledge, but would need to be trained and skilled in mediation as well as passing an assessment or having a license to be a mediator from mediation organizations or court in that country. For example, Singapore requires the mediator to have legal knowledge and competency as well as to have work experience of at least 3 years in the related field.

In cases which require specialized expertise namely family cases and divorce, the US states that the mediator of family disputes and divorce cases must be trained, be interned, and have work experience in family relation and also have knowledge of family law, impact of family conflicts, knowledge of child development and violence in families. This is because mediating family conflicts is a sensitive issue with great consequences such as an impact on children. For an example of cases on tax management, the Netherlands indicates that the mediator needs to be knowledgeable in tax law and practice, and be certified by the Netherlands Mediations Federation (NMF) to understand the tax system and its problems. For this reason, the mediation process requires co-operation from a variety of occupations as part of the mediation process to protect the interests of all parties (Roo and Jagtenbergw, 2003; Roelof Vos, 2014; The ABA House, 2001).

The important skills of a mediator are communication and negotiation skills. The key to mediation is to focus on the interests of the disputed parties as much as possible. The mediator is responsible for giving advice in the mediation process, creating an atmosphere conducive to a meaningful conversation between disputants that would lead to identifying the cause of dispute, their interests, and an agreement. If the parties do not cooperate, the mediator needs to find a way to discuss and negotiate. External resources may also be used. For example, in the case of financial controversy and debt, it may be necessary to request for assistance from banking professionals.

Communication is one of the important tools in facilitating a meeting between the disputed parties so that conflicts can be reduced before they escalate. The mediator serves as an intermediary, creates a conversational atmosphere among the disputants to moderate any potential friction between parties. The mediator must make this communication private by bringing all parties together to share their perspectives, leading to a conflict resolution and a mutual agreement. The mediator must use both friendly non-verbal language and tone of voice. They should demonstrate confidence, decisiveness, and good manner to create a favourable atmosphere for communication and confidence-building for the disputants.

In addition, a good mediator should listen; a vital skill for gaining a complete and clear information needed for developing a refined understanding, leading to effective mediation. The mediator needs to listen carefully to form a clear analysis to understand the problem and needs of the disputants. It not only creates understanding, but also brings about acceptance which is a key element to end the conflict cycles.

In every country that uses dispute mediation to solve social conflicts, the roles and responsibilities of the mediator have been similarly set. That is, the mediator is a third party without any relationship or interest with the disputants or the disputed matter that he/she is supervising. This is to ensure the neutrality of the mediator and to make sure that the mediation will be fair to all parties. The mediator utilizes assistance from all parties to find appropriate and satisfying solutions under the scope of law; creates a welcoming conversation, gives a chance to all parties to communicate and exchange ideas to come up with a solution which will benefit everyone. The mediator also manages emotions during negotiation and summarizes the main points together with helping to find a solution which satisfies needs and complies by the law. However, the mediator does not have the right to manage or force the disputants to accept the agreement.

As for the selection criteria used to assign mediator to a case, the mediation center or the court would choose a mediator from a list. The chosen mediator will be the one with expertise and experience appropriate for that case. This is to ensure the benefits of the disputants and the highest possible success rate. An example can be found in Singapore where the Singapore Mediation Centre would match a case with a mediator with relevant

experience which includes mediator's language competency in order to avoid using interpreting services which may delay the work process.

Ethics of mediator

A mediator needs to always consider ethics in mediation. It acts as a guideline and fosters confidence and trust in the mediator as well as in the disputants. It also lends credibility to the mediation process itself. The mediator must be trained in mediation skills and ethics as well as be certified by a mediation facility before being allowed to mediate (Noone and Ojelabi, 2014; McCorkle and Reese, 2015).

Fairness

The mediator must proceed with efficiency, fairness, and expertise during mediation. They must be impartial and avoid exercising any verbal and non-verbal bias towards the disputants themselves. The mediator must not use such feeling to mediate in order to ensure all parties can equally participate in the mediation. Also, the mediator must not receive any gift or item offered by the disputants in the mediation proceeding. This is because the mediator is responsible for being neutral and helping all parties to find a compromise that leads to a mutual agreement. If the mediator appears prejudiced, the disputants can terminate the mediation or change the mediator.

Maintaining confidentiality

The mediator must maintain privacy and confidentiality of all contributors. The mediator and the disputants must agree on confidentiality before commencing mediation. The mediator must explain the rules of non-disclosure of information, documents, and agreement that occur during the course of mediation to ensure all parties understand the rules of confidentiality and to guarantee the effectiveness of the mediation process. The mediator must maintain a credible third-party mediation process. It includes creating an atmosphere of trust as this will be the first thing the mediator must clearly establish before commencing mediation. The mediator will only be able to disclose information to the disputants or to the court in order to protect the interests of the parties. This may include noting in the consent document that information related to the mediation will be kept in a safe place and may be destroyed in 90 days after the mediation process have ended.

Honesty

The mediator must not force, direct, or invite the parties to agree or comply with the decision, but must ensure an understanding of the agreement from all parties. This can be done by providing convenience and necessary information to make a decision and establish an agreement between the parties. The mediator must always be aware that the power to make decision to solve problems is based on the mutual satisfaction between parties. Therefore, the mediator's purpose is to help the parties address their disputes and encourage communication leading to a decision which subsequently solves the problems. Mediators are

expected to help all parties to clearly understand the agreement and to have mutual understanding in each of the agreed terms.

Sincerity

Based on the ethical conduct, the mediator must inform the parties of his/ her experience and expertise in mediation. This includes any information on the expenses or fees of the mediating services to help the parties make decision. The mediator must disclose information about the scope of all mediation process so that the parties can decide whether they would enter the mediation process. It is to provide information and confirm the parties' rights in the mediation process, that all parties have the freedom to express their intentions and seek solutions. The mediator must make sure that all parties understand and agree to enter mediation. The roles of the mediator are to proceed and maintain the relationship between the mediator and the parties so the disputants can compare the results of the mediation with other methods.

Ethics in mediation is a dynamic that mediators must be conscious of. They will need to pass an assessment or be certified by a mediation institute or the court. For example, mediators in the US need to receive 30-50 hours of training, in order to maintain and develop their mediating skills. Although the mediators have been certified by mediation institutions or committees, they will still be required to attend mediation sessions which are held annually to improve their skills and to have the mediators assess themselves. This is because the mediator is vital to the success of mediation. Therefore, continuous training is provided to build expertise in the mediation of litigation.

Case studies: dispute mediation in other countries

Dispute mediation has been used to solve conflicts in many countries. For example, in a family conflict case where a divorced couple had children, the husband (Levi) and wife (Maria) (alias for confidentiality) wished to end their relationship because both did not have a happy marriage. However, the wife wanted sole custody of their children, and Maria's friend advised her to use mediation because this took shorter time than legal processes. When the couple expressed their wish to mediate, a mediator worked together with a family counsellor to discuss child custody and demands of both parties. The mediating process involved having the two disputants negotiate to come up with the best option for both parties and their children. The mediator had the disputants discuss the causes of their divorce and future plans for their kids in order to reach mutual agreements. Within a few hours, the mediation yielded an agreement on Levi and Maria's finance and how they would split their assets and savings earned while being married. They also agreed that both could meet and spend time with their two children without each other objection. This was to make sure that their kids could maintain a good relationship with both father and mother (National Family Mediation, 2018).

The next case is a conflict between the Field family and the neighbor (alias for confidentiality). Miss Field lived in a house with her 6-year-old son. Her house was attached to the neighbor's parking and garbage area (Mr. and Mrs. Snow, alias for confidentiality). When the Snow's son and his friends were playing football in the family parking space, the ball often hit the wall at Miss Field's and woke up her son. Miss Field consulted her brother about the situation, and he decided to come to Miss Field's house to intimidate the Snow family causing conflict between neighbors. Both disputants decided to enter the mediation process instead of going to court. The mediation gave both parties a chance to converse and made the Snow family understand the cause of this conflict. Both parties mutually agreed not to let the son play football in the parking area and there would not be any intimidation or disturbance in order to maintain a good relationship between neighbors. Moreover, there was another case between neighbors when the Smith family complained to the landlord that their neighbors were making loud noises and disturbance. The landlord mediated by asking all disputants to discuss the situation, and sent the case to a nearby mediating service center. When all parties arrived at the mediating center, the mediator created a relaxing atmosphere to aid an open discussion. All parties were given a chance to explain the situation and express their wishes so everyone would understand. The Smiths became aware that the loud noises were caused by their neighbour's unwell child. After an hour-long mediation, both disputants understood the cause of their conflict and worked to find a solution (Derek Finch Associates, 2012).

These mediated cases demonstrated the effectiveness of mediation in solving many types of conflicts and its popularity as a social problem-solving method. However, the key for successful mediation lies in giving all disputants a chance to understand the cause of actions which would subsequently lead to a satisfying solution for all parties. The mediating process in many cases demonstrated that the main role of the mediators was to explain the objective of mediation and to create an inviting atmosphere for the disputants to communicate, discuss, and consult about the conflicts.

Conclusion

Dispute mediation is an effective alternative conflict resolution which is popular in many countries. It can reduce the number of cases going into the court proceedings. Moreover, it is also a popular form of conflict-resolution in society. Mediation has many distinctive characteristics. It can solve conflicts by allowing people to participate in finding the solution themselves. The process is also flexible and time efficient. It normally takes an average of 1 day to complete. Therefore, it takes less time than the court proceedings while maintaining relationship between the parties.

Having people to participate in solving problems by themselves with the help of the mediator is a way to empower people and to yield results which satisfy the needs under the scope of law. Moreover, it can strengthen and harmonize the community. It can also create

job opportunities for people who do not have legal knowledge but are willing to participate and act as mediators to bring peace to the society.

The interest and success of mediation at present have led many countries to introduce curriculums specialized in mediation. Mediation expertise is also applicable to other purposes outside of mediation such as working and living with others, since mediation involves skills in communication, negotiation, and compromise. These skills can be applied to daily life.

Thailand has started to use mediation to solve communal and social conflicts. It has been used as an alternative justice to bring about social justice. Moreover, it gives an opportunity for all parties involved – be it institutions or individuals, to participate in solving problems and ending conflicts, and it also strengthens the community and society. To start a mediating process, it is necessary to establish a mediating center and to have specialized professionals well-versed in mediation, capable of advising when conflicts arise. This can be done through personnel training in various aspects to increase the efficiency of mediation.

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References

- Chodosh, H. E. (2003). Mediating Mediation in India. *Law Commission of India*. 1-26.
- de Roo, A. J. & Jagtenbergw, R. W. (2003). Encouraging Mediation in the Netherlands. *ADR Bulletin*. 6(3). p.1-4.
- Hedeen, T. (2004). The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress. *Conflict Resolution Quarterly*, 22. 101-121.
- Hwee, T. H. (2012). Mediation Practices in ASEAN: The Singapore Experience. 11th General Assembly (2012). *Asean Law Association*. 1-27
- McCorkle, S & Reese, M. J. (2015). *Mediation Theory and Practice* (second edition). London. Sage Publication.
- Noone, M. A. & Ojelabi, L. A. (2014). Ethical Challenges for Mediators around the Globe: An Australian Perspective. *Washington University Journal of Law & Policy*. 15. 145-193.
- Prodigalidad, P.T. (2012). Building an Asean Mediation Model: Philippine Perspective. 11th General Assembly (2012). *Asean Law Association*. 1-40.
- The ABA House. (2001). Model Standards of Practice for Family and Divorce Mediation. *The Symposium on Standards of Practice*. 1-13.
- Vos, R. (2014). Mediating Tax Disputes in the Netherlands. 18(3). p.1-7.