

กลไกการระงับข้อพิพาทในสัญญาร่วมลงทุนระหว่างรัฐและเอกชน ในประเทศไทย: ความจำเป็นสำหรับการใช้วิธีการระงับข้อพิพาททางเลือก?

Dispute Resolution Mechanism for Public-Private Partnership Contracts in Thailand: The Need for Alternative Dispute Resolution?

ธนภัทร แยมกลีน (Thanapat Yaemklin)¹

ธัชชัย เหลืองภักธรวงศ์ (Tatchai Luangphatarawong)²

ปุณิกา เลหาไพโรจน์วัฒนา (Poonika Laohapirotwattana)³

วันที่รับบทความ 19 มีนาคม 2566, วันที่แก้ไขบทความ 11 กันยายน 2566, วันที่ตอบรับบทความ 18 กันยายน 2566

บทคัดย่อ

บทความฉบับนี้ได้พิจารณาถึงความเหมาะสมของการนำระบบการนำคดีขึ้นสู่ศาล (Litigation) มาใช้ในการระงับข้อพิพาทภายใต้สัญญาร่วมลงทุนระหว่างรัฐและเอกชนในประเทศไทย โดยได้พบว่าระบบการนำคดีขึ้นสู่ศาลนั้นยังมีข้อจำกัดประการสำคัญหลายประการในการระงับข้อพิพาทภายใต้สัญญาร่วมลงทุนระหว่างรัฐและเอกชน ไม่ว่าจะเป็นความเสี่ยงที่จะเกิดการดำเนินกระบวนการระงับข้อพิพาทในลักษณะคู่ขนานในโครงการร่วมลงทุน (Parallel Dispute Proceedings) ความยืดหยุ่นของกระบวนการ การที่ทำให้คู่กรณีสูญเสียความสามารถในการควบคุมข้อพิพาท หรือข้อจำกัดเกี่ยวกับการรักษาความลับในกระบวนการระงับข้อพิพาท ด้วยเหตุนี้ บทความนี้จึงเสนอให้มีการนำกลไกการระงับข้อพิพาททางเลือก (Alternative Dispute Resolution) มาใช้เพื่อเป็นการแก้ไขข้อจำกัดดังกล่าวของระบบการนำคดีขึ้นสู่ศาล ทั้งนี้ บทความนี้พบว่า การนำกลไกการระงับข้อพิพาททางเลือกมาใช้เพื่อระงับข้อพิพาทภายใต้สัญญาร่วมลงทุนระหว่างรัฐและเอกชนนั้นอาจยังมีปัญหาและข้อจำกัดต่าง ๆ ซึ่งเกิดจากระบบกฎหมายและนโยบายภาครัฐในประเทศไทยในปัจจุบัน

คำสำคัญ: การร่วมลงทุนระหว่างรัฐและเอกชน การระงับข้อพิพาททางเลือก

¹ Thanapat Yaemklin (Master of Construction Law, Melbourne Law School, University of Melbourne; LLB in Business Law (International Program) (First Class Honours), 2017; Email: thanapat.yaemklin@gmail.com (main author)). An earlier draft of this article was submitted by the main author as part of coursework undertaken for the Master of Construction Law Programme at Melbourne Law School, University of Melbourne. The main author sincerely thanks Mr Owen Hayford of the University of Melbourne for his feedback on the original version of this article.

² Tatchai Luangphatarawong (LLB in Business Law (International Program), Faculty of Law, Thammasat University, 2019; Email: ltatchai@hotmail.com), currently an associate at Chandler MHM Limited.

³ Poonika Laohapirotwattana (LLB in Business Law (International Program) (First Class Honours), Faculty of Law, Thammasat University, 2019; Email: eve.poonika@gmail.com), currently an associate at Weerawong, Chinnavat & Partners Ltd.

ABSTRACT

This article explores the suitability of using litigation as a method of resolving disputes under public-private partnership contracts in Thailand. It concludes that court litigation has a number of key limitations for resolving disputes under PPP contracts such as the risk of having parallel dispute proceedings in PPP projects, the lengthy process of dispute resolution, parties' loss of control over the dispute, as well as privacy and confidentiality issues. As an alternative, the article suggests using alternative dispute resolution to overcome these limitations. However, alternative dispute resolution still has its own set of challenges in resolving disputes under public-private partnership contracts given the current legal framework and government policies in Thailand.

Keywords : Public-private Partnership, PPP, Alternative Dispute Resolution, ADR

1. INTRODUCTION

This article addresses the need for using alternative dispute resolutions (ADRs) in resolving disputes arising under public-private partnership (PPP) contracts in Thailand. Part 2 begins with an overview of the dispute-resolution regime under the Thai PPP legal framework. Part 3 delves into the nature of disputes that normally arise under or in connection with PPP contracts. Part 4 examines the limitations of court litigation as a means of resolving disputes under PPP contracts. Part 5 explores the benefits and challenges associated with the use of ADRs, particularly arbitration and mediation, for resolving disputes under PPP contracts. Part 6 gives concluding remarks. Overall, this article argues that court litigation has a range of limitations as a means of resolving disputes under PPP contracts in Thailand, and that ADRs may be used as a way to overcome those limitations.

2. OVERVIEW OF DISPUTE-RESOLUTION REGIME UNDER THAI PPP LEGAL FRAMEWORK

In Thailand, PPPs are primarily governed by the Public-Private Partnerships Act B.E. 2562 (2019)⁴ (PPP Act). The PPP Act does not mandatorily require a procurement government authority to use any standard form of PPP contract when undertaking a PPP project. Nonetheless, the State Enterprise Policy Office (SEPO) has developed a standard-form PPP contract that government authorities are encouraged to use with the purpose of promoting consistency across PPP projects in the country.⁵ Under Section 35

⁴ พระราชบัญญัติการร่วมลงทุนระหว่างรัฐและเอกชน [Public Private Partnership Act] (Thailand) 10 March 2019.

⁵ United Nations Economic and Social Commission for Asia and the Pacific, 'PPP Policy, Legal and Institutional Frameworks in Asia and the Pacific' (Conference Paper, High-Level Dialogue on Financing for Development in Asia and the Pacific, April 2017) 16.

of the PPP Act, a procuring authority is responsible for preparing a draft PPP contract.⁶ Once the preparation is completed, the draft PPP contract will be submitted to the selection committee for approval.⁷ In any case, the draft PPP contract must, at a minimum, contain the terms and conditions which the Public-Private Partnership Policy Committee prescribe.⁸ In this regard, Clause 5(20) of the Notification of the Public-Private Partnership Policy Committee RE: Details of Invitation for Bids, Documents for Selection of Private Parties, and Material Terms of Public-Private Partnership Contract BE 2563 (2020)⁹ (Notification on Draft PPP Contract) provides as follows:

The draft public-private partnership contract must at least contain the following material terms: ... (20) dispute resolution clause, in which the procuring government authority shall not be bound to resolve disputes through arbitration unless the procuring government authority can demonstrate valid reasoning and the necessity that doing so is required by the general practice applicable to that type of public-private partnership contract or any other unavoidable causes¹⁰.

It is worth mentioning that Clause 5(20) of the Notification on Draft PPP Contract is in line with the Cabinet Resolution dated 14 July 2015¹¹, which also limits the use of arbitration as a dispute resolution mechanism for PPP contracts and government concession contracts in Thailand¹². According to this Cabinet Resolution, Thai government authorities are prohibited from using arbitration as a means for resolving disputes under PPP contracts and concession contracts in Thailand¹³. However, this Cabinet Resolution still provides relaxation on such proposition that the government authorities may still request permission

⁶ PPP Act (n4) s 35.

⁷ Ibid.

⁸ Ibid.

⁹ ประกาศคณะกรรมการนโยบายการร่วมลงทุนระหว่างรัฐและเอกชน เรื่อง รายละเอียดของร่างประกาศเชิญชวน ร่างเอกสารสำหรับการคัดเลือกเอกชน และสาระสำคัญของร่างสัญญาร่วมลงทุน พ.ศ. 2563 [Notification of the Public-Private Partnership Policy Committee RE: Details of Invitation for Bids, Documents for Selection of Private Parties, and Material Terms of Public-Private Partnership Contract BE 2563] (Thailand).

¹⁰ Ibid cl 6(20).

¹¹ See Secretariat of Cabinet of Thailand, ขอแก้ไขมติคณะรัฐมนตรีวันที่ 28 กรกฎาคม 2552 (เรื่อง การเข้าทำสัญญาระหว่างหน่วยงานของรัฐกับเอกชน) [Request for Approval to Amend the Cabinet Resolution dated 28 July 2009 (RE: Entering into of Contracts between Government Authorities and Private Parties)] (NorRor0503/Wor228, 17 July 2015) ('Cabinet Resolution Dated 14 July 2015').

¹² See Panita Paoanphongkul, 'Legal Problems Relating to the Dispute Resolution by an Arbitration under a Contract for the Private Participation in State Understanding Under the Private Participation in State Understanding, B.E. 2556' (LLM Thesis, Dhurakij Pundit University, 2016) 110-9.; Danuphat Visuthpakdee, ปัญหาทางกฎหมายในการรับข้อพิพาทในสัญญาร่วมลงทุนระหว่างรัฐและเอกชนตามพระราชบัญญัติการร่วมลงทุนระหว่างรัฐและเอกชน พ.ศ. 2562 [Legal Problems on Settlement of Disputes under Public-private Partnership Contracts under the Public Private Partnership Act B.E. 2562] (Article, 2019) <<http://www.lawgrad.ru.ac.th/Abstracts/436>>.

¹³ Cabinet Resolution Dated 14 July 2015 (n11). Note that the Cabinet Resolution dated 14 July 2015 does not provide a specific reason for prohibiting the use of arbitration for PPP contracts and concession contracts in Thailand. However, perhaps, this was due to the fact that Thai government authorities have often lost cases in arbitration in which they were ordered to pay significant damages to private parties. Additionally, PPP contracts and concession contracts typically involve much larger sums of money than other types of contracts, making the potential risks and costs of arbitration more significant. See Secretariat of Cabinet of Thailand, การทำสัญญาระหว่างหน่วยงานของรัฐกับเอกชน [Entering into of Contracts between Government Authorities and Private Parties] (NorRor0506/Wor155, 7 August 2009).

to use arbitration as a method of dispute resolution from the Cabinet on a case-by-case basis if there is a valid reason, necessity, or an unavoidable demand by the other contracting party for the use of arbitration as a dispute resolution mechanism.

With that said, given the Thai government's policies against the use of arbitration as a dispute resolution mechanism for PPP contracts, disputes under PPP contracts in Thailand are normally resolved through court litigation. As a result, dispute resolution clauses in most of the PPP contracts are relatively short and simple. These clauses typically provide for negotiation as the beginning of the dispute resolution process, followed by court litigation as the final tier of dispute resolution.¹⁴

3. NATURE OF PPP DISPUTES

A PPP contract is the legal instrument for delivery of the PPP project, setting out the rights and obligations of the parties and allocating risks and responsibilities between them.¹⁵ Given the nature of PPP project as a long-term arrangement and with the public interest involved, disputes arising from the PPP contract may have several features which distinguish them from other types of contracts.¹⁶

Specifically, disputes under the PPP contract often arise with regard to the issues of risk allocation between the parties,¹⁷ namely, the government and its private investor, each bearing particular risks and its effects. Indeed, most of the risks may have already been allocated between them by the provisions of the PPP contract. However, the fact that the contract provides a clear risk allocation for any matter does not necessarily mean that there will be no dispute arising in relation to that matter. Typically, disputes that may arise usually involve matters in project construction such as claims by the private investor for an extension of time for construction or additional payment in relation to events such as changes in scope or specifications of work, unexpected site conditions, or force majeure, and the government does not agree that the private investor is entitled to the relief sought.

¹⁴ By way of example, in the Pink Line electric rail project (Khao Rai – Minburi Section), Clause 30 of the PPP contract between the Mass Rapid Transit Authority of Thailand (MRT) and Northern Bangkok Monorail Company Limited ('Pink Line PPP Contract') provides as follows:

Unless otherwise provided in this Agreement, in the event that there is any Dispute, conflict, or claims arising from or in connection with this Agreement between MRT and the Concessionaire, the Parties may negotiate to settle the Disputes amicably (amicable settlement of disputes) in order to ensure whether the parties can reach amicable settlement.

In the case of being unable to resolve the said Disputes, conflicts or claims within sixty (60) days or any other period as agreed by the Parties, either Party may submit the Disputes, conflicts or claims to the competent court. . . .

¹⁵ See generally Donald Charrett, 'Lex Constructionis – Or My Country's Rules?' (2021) International Construction Law Review 61.

¹⁶ United Nations Commission on International Trade Law, Legislative Guide on Privately Financed Infrastructure Project, 33rd Sess., UN Doc A/CN.9/SER.B/4 (2001) 174-5.

¹⁷ See Mark Moseley, 'Restoring Confidence in Public-Private Partnerships: Reforming Risk Allocation and Creating More Collaborative PPPs' (2020) 41 Governance Brief 1, 5.

Indeed, those disputes may also arise even when the government uses traditional procurement models instead of PPPs. However, what makes disputes in PPP projects unique is the involvement of several participants in the project and the interactions between them.¹⁸ The key participants in a PPP project typically include a government contracting authority, a special purpose vehicle (SPV), SPV's shareholders (equity investors), SPV's debt financiers, a design and construct (D&C) contractor, and an operation and maintenance (O&M) contractor.¹⁹ Figure 1 below shows a typical contractual structure of participants in PPP projects.

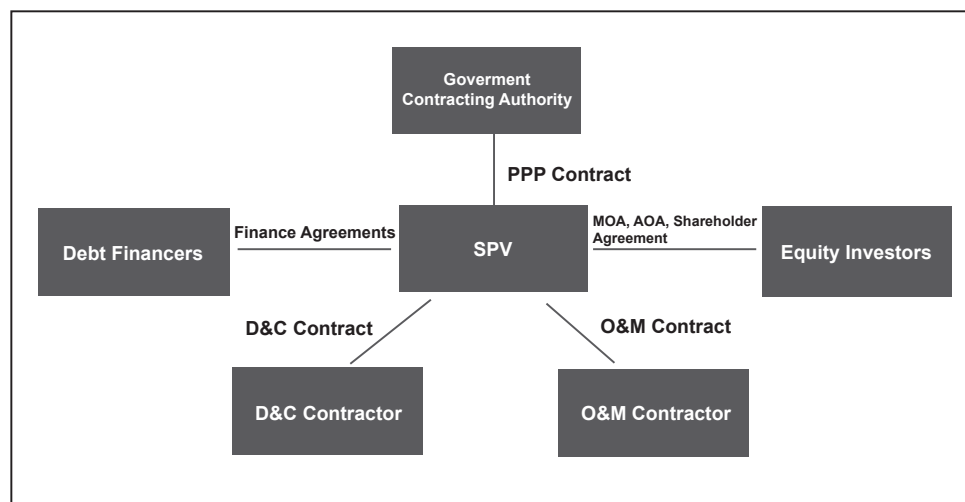


Figure 1: typical contractual structure of key participants in PPP projects

As seen from Figure 1, the SPV is situated at the centre of the contractual structure, being the link between the government and all other key participants. As such, it is not uncommon for disputes under the PPP contract to give rise to disputes under the surrounding contracts and vice versa.²⁰ This is particularly relevant when considering the interplay between the PPP contract, on one hand, and the D&C contract and/or the O&M contract, on the other hand. In most cases, under the D&C contract and the O&M contract the SPV would pass down its relevant obligations of the SPV under the PPP contract to the D&C contractor and/or the O&M contractor in each respective contract on a back-to-back basis.²¹ This structure of risk allocation, which is designed to enhance the bankability of the PPP project,²² is often required by debt financiers in the relevant finance agreements.

¹⁸ See Dough Jones and Janet Walker, 'Resolving Infrastructure Disputes: the Interplay between International Commercial Courts and International Arbitration' (2022) *International Construction Law Review* 122, 123.

¹⁹ See Owen Hayford, 'Improving the Outcomes of Public Private Partnerships – Lessons from Australia' (2013) *International Construction Law Review* 457, 463-4.

²⁰ Owen Hayford and Dominic Mueller, 'Better Dispute Resolution for PPPs', *Infralegal* (Article, 5 December 2021) 2 <<https://www.infralegal.com.au/dispute-avoidance-and-resolution/better-dispute-resolution-for-ppps>>.

²¹ See E.R. Yescombe and Edward Farquharson, *Public-Private Partnerships for Infrastructure* (Butterworth-Heinemann, 2nd ed, 2018) 143; Tim M Burbury and Khaled Dahlawi, 'Back-to-back – the pass-through of construction risk from project agreement through to subcontracts under public private partnerships (PPPs) and energy infrastructure projects', *Lexology* (Web Page, 1 February 2013) <<https://www.lexology.com/library/detail.aspx?g=f38fd554-bbc2-4b37-a90c-fc78eb7d68af>>.

²² International Bank for Reconstruction and Development, *Guidance on PPP Contractual Provision* (2019).

By way of example, if the SPV fails to complete the construction of the facility within the agreed-upon timeframe, the PPP contract may require the SPV to pay liquidated damages to the government at a rate specified in the contract.²³ In such cases, under the D&C Contract, the SPV would typically also be entitled to impose liquidated damages on the D&C contractor for the same amount it is required to pay to the government. This structure, therefore, enables the SPV to, in most cases, fully discharge its liability towards the government by using the liquidated damages received from the D&C contractor to pay the government.

Likewise, when a claim is brought by the D&C contractor or the O&M contractor against the SPV under its respective contract, the SPV would typically bring a corresponding claim against the government if it believes that it is entitled to the same relief under the PPP contract. For instance, during the construction phase, if the progress of the work is delayed due to a force majeure event, the D&C contractor may submit a claim for an extension of time and/or extra payment to the SPV under the D&C contract. In turn, the SPV would file a corresponding claim with the government under the PPP contract to ensure its profitability in the project.

Given the interconnected nature of the PPP contract and the D&C contract and/or the O&M contract, it is highly likely that disputes arising under these different contracts will occur simultaneously but will be heard before different tribunals or courts, even though they may closely share the same or similar questions of fact or law. These parallel proceedings can lead to different outcomes, which can negatively impact the financial stability of the SPV and its ability to repay investments or debt to financier. For instance, if the SPV is held liable to provide additional compensation to the D&C contractor in a downstream dispute, but the upstream dispute with the government denies any relief for the same issue, the SPV will be left to bear the full responsibility and losses of the so-called ‘liability gap’.²⁴

Apparently, the insolvency of the SPV cannot be said to be irrelevant to the government. Generally, if the SPV goes insolvent, the SPV will be in breach of PPP contract and the government will be entitled to terminate the PPP contract, potentially resulting in significant delays and increased costs for the infrastructure project. However, as a protective mechanism to ensure the continuity of the PPP project, the PPP contract usually allows the debt financiers to exercise a right to step-in to remedy the breach by SPV before the government may terminate the PPP contract.²⁵

²³ See, for example, Clause 8.4 of Pink Line PPP Contract.

²⁴ Hayford and Mueller (n20) 4.

²⁵ See Prachaya Apibansri, ‘Lender’s Direct Agreement in Public-Private Partnership Projects’ (2020) 38(2) Chulalongkorn Law Journal 161, 167.

4. LIMITATIONS OF COURT LITIGATION

Given the nature of disputes under the PPP contract as discussed above, it is submitted that court litigation may pose significant limitations in efficiently resolving disputes under the PPP contract. These limitations can be broken down into four distinct aspects, which will be further discussed below.

4.1 Parallel Proceedings and Different Outcomes

Litigation may be a preferred choice of dispute resolution when several disputes arise from different contracts between different parties given that sometimes it enables multiple disputes to be heard or decided at once without the consent of all the parties involved. Nonetheless, when it comes to disputes in PPP projects in Thailand, this benefit of litigation may not be certain.

Under Thai law, as PPP contract is characterised as an ‘administrative contract’, disputes arising thereunder would typically fall under the jurisdiction of the Administrative Court pursuant to Section 9(4) of the *Act on the Establishment of Administrative Courts and the Administrative Court Procedure B.E. 2542 (1999)* (‘Administrative Court Act’).²⁶ However, based on the definition of ‘administrative contract’ under the *Administrative Court Act*,²⁷ it is unclear whether this definition also concurrently applies to the D&C contract or the O&M contract as the definition requires that at least one party to the administrative contract must be an ‘administrative agency’ or a ‘person acting on behalf of the State’. While there is no publicly available court decision specifically addressing this legal issue, the answer may be implied by the *Ruling of the Committee on Jurisdiction of Courts no. 16/2553 (2010)*. In that case, it was held that, a subcontract between a private contractor and its subcontractor, while connected to a head construction contract between the government and the contractor, was not an administrative contract but rather merely a contract between private parties, and thus the disputes under the subcontract was under the jurisdiction of the Court of Justice rather than the Administrative Court.²⁸ Therefore, by analogy, it is possible that a dispute under the D&C contract and the O&M contract may fall under the jurisdiction of the Court of Justice for the same reason, as opposed to the PPP contract which is subject to the jurisdiction of the Administrative Court.

If this proposition is true, it is likely that there would be parallel dispute proceedings for a dispute under the PPP contract and a dispute under the D&C contract and/or the O&M contract, even if both disputes deal with the same or similar questions of fact or law. In such case, the SPV may be restricted from requesting

²⁶ พระราชบัญญัติจัดตั้งศาลปกครองและวิธีพิจารณาคดีปกครอง [Act on Establishment of Administrative Courts and Administrative Court Procedure] (Thailand) 10 October 1999, s 3, 9(4). See also Niratchara Pong-ajarn, ‘The Direction Towards Administrative Contracts in According with Thai Legal System’ (2019) *Journal of Ombudsman* 113, 122-3 <http://ombstudies.ombudsman.go.th/ewt_news.php?nid=893>.

²⁷ Administrative Court Act (n26) s 3.

²⁸ Ruling of the Committee on Jurisdiction of Courts no. 16/2553 (2010). But see the Supreme Administrative Court Decision No. 58/2558 (2015).

the Court to consolidate these multiple dispute proceedings or to call upon the D&C contractor or the O&M contractor into the legal proceeding between the SPV and the government because the dispute between the SPV and the D&C contractor or the O&M contractor may be subject to different court jurisdiction.²⁹ Additionally, under Thai law, disputes arising under administrative contracts and commercial contracts are not always governed by the same principles of law. As per the *Decision of the Supreme Administrative Court no. Aor 676/2554 (2001)*, disputes related to administrative contracts cannot be solely decided based on general contract law but must also be decided in accordance with the principles of administrative law.³⁰ Therefore, arguably, there may be a greater risk in the Thai legal system that the parallel dispute processes in PPP projects may lead to materially different decisions.

It is important to note that, even if the D&C contracts and the O&M contract could be characterised as administrative contracts, this might not entirely resolve the issue of parallel proceedings and differing outcomes in the PPP project. In the case where any of the subcontracts of the D&C contractor or the O&M contractor (tier 2 subcontracts) are not administrative contracts, the D&C contractor or the O&M contractor will still be at risk of parallel proceedings and different outcomes for the same reasons previously discussed. If the D&C contractor or the O&M contractor becomes insolvent, the SPV will assume full responsibilities and liabilities under the PPP contract. This cascading effect applies to tier 2 subcontractors in relation to their subcontracts (tier 3 subcontracts) and so on.

4.2 Lengthy Process and Time Consumption

It is submitted that court litigation may not be an efficient dispute-resolution process for a PPP contract due to its time-consuming nature. The Administrative Court consists of two levels of court, namely the Administrative Court of First Instance and the Supreme Administrative Court.³¹ The average time spent on each level of the court was said to be around 1 to 3 years.³² As such, it can take up to 6 years, or even longer, for a dispute arising under a PPP contract to be finally resolved.

During the pendency of a court litigation dispute, it is likely that the parties will become entrenched in an adversarial or combative environment, which ‘oftentimes lead[s] to a complete breakdown of ... a partnership relationship between parties’.³³ Maintaining trust is a crucial factor for the success of a PPP

²⁹ See Wiriya Sachorfa, ‘Legal Problems on the Analogous Application of Interpleading in Civil Procedure Code to the Administrative Court procedure’ (LLM Thesis, Dhurakij Pundit University, 2016) 110-9.

³⁰ Supreme Administrative Court no. Aor 676/2554 (2001).

³¹ Administrative Court Act (n26) s 7.

³² Chaosaard, รายการศาลปกครองพบประชาชน [Administrative Court Meeting People] (YouTube, 13 March 2017) 00:24:35-00:25:00 <<https://www.youtube.com/watch?v=4BZ7IIE2ecA&t=835s>>.

³³ Moseley (n17) 5.

project.³⁴ Without trust, there is a risk that issues at hand will escalate into further disputes between the government and the SPV. Thus, it is important for disputes arising under the PPP contract to be resolved in a timely manner in order to minimise damage caused to the commercial relationship between the parties and the overall implementation of the PPP project.

It is also important to note that when the D&C contractor and/or the O&M contractor brings a claim against the SPV under their respective contracts, if the claim is related to a dispute under the PPP contract, it is unlikely that the SPV will agree to provide any form of relief, such as additional funds, to the relevant contractor before the dispute under the PPP contract is finally resolved. Therefore, having a speedy dispute resolution proceeding under the PPP contract is crucial for the downstream contractors. This is particularly important for the D&C contractor, as cashflow is the lifeblood of the construction industry.³⁵ Without proper cashflow, the D&C contractor or their subcontractors at the tier below may experience financial difficulties and may ultimately decide to suspend or abandon the construction work, potentially resulting in a massive delay to the implementation of the PPP project.

4.3 Loss of Control over Dispute

Court litigation is a dispute resolution mechanism where the parties to a dispute lose control over several aspects of the proceedings. Firstly, the parties cannot agree on the procedures to be followed given that the proceedings will always be conducted in accordance with the steps and rules set out under the *Administrative Court Act* and its subordinate regulations. Secondly, perhaps more importantly, the parties also cannot agree on the individuals who will make the final decision of the dispute, as judges are assigned to the case by the court. As previously noted, disputes in a PPP project can be very unique and can involve highly complicated matters.³⁶ Accordingly, it is perhaps in the best interest of the PPP project for the parties to ensure that the individual determining the dispute possess the required knowledge and understanding of the commercial objectives in relation to the PPP contract. As Sundaresh Menon, currently the Chief Justice of Singapore, noted:

Equally important to the commercial litigant is the second factor, which is judicial competence and efficiency. *A court user must have the sense that he is in the hands of a judge who is not only competent in the law, but also sufficiently sophisticated in business and industry practice and sensitive to the demands of commerce.*³⁷

³⁴ See Rianne Warsen et al, 'What makes public-private partnerships work? Survey Research into Outcomes and the Quality of Cooperation in PPPs' (2018) 20(8) Public Management Review 1165, 1167-9.

³⁵ Paula Gerber and Brenan Ong, Best Practice in Construction Disputes: Avoidance, Management and Resolution (LexisNexis Butterworths, 2013) 355 (citations omitted).

³⁶ UNCITRAL Legislative Guide (n16) 174-5.

³⁷ Sundaresh Menon, 'The Rule of Law and the SICC' (Conference Paper, Singapore International Chamber of Commerce Distinguished Speaker Series, 10 January 2018) 4-5 (emphasis added).

4.4 Privacy and Confidentiality Issues

Court litigation can be detrimental to the privacy and confidentiality of the parties involved in a PPP project. The *Administrative Court Act*, with certain exceptions, requires that court proceedings be open to the public.³⁸ The open nature of court proceedings can pose a risk to the reputations of the government, the SPV, and other project participants, particularly in cases where the PPP project is of significant public interest. This is especially true for the SPV, D&C contractor, or O&M contractor if they are listed companies whose share price may be negatively affected by information disclosed to the public as a consequence of ongoing litigation proceedings.³⁹ Additionally, the non-confidential nature of court proceedings may impose public pressure on the government, hence also having an impact on the government's decision-making process and somehow decreasing the prospect of both parties reaching a mutually satisfactory agreement to settle the disputes.

5. ALTERNATIVE DISPUTE RESOLUTION: BENEFITS AND CHALLENGES

Fundamentally, ADR is based on the principle of freedom of contract and *pacta sunt servanda*. This means that parties involved in a dispute have the ability to select an independent neutral person to facilitate negotiations or determine their rights and obligations, thereby providing them with greater confidence that their disputes will be handled by qualified individuals. Using ADR also allows parties to have more control over the dispute resolution process. They can make decisions regarding the timeframe, rules of determination, rules of evidence, privacy, and confidentiality, giving them the flexibility to tailor the process to their specific needs. ADR can also be used for parallel dispute proceedings, where all relevant parties can agree to resolve disputes arising under different contracts together. Therefore, it is generally accepted that ADR provides contracting parties with a way to resolve their disputes more efficiently and effectively while maintaining a level of control and autonomy and allowing for a more customized approach to resolving disputes, which can lead to greater satisfaction for all parties involved.⁴⁰

Given these common benefits of ADR, this Part will now explore the benefits and challenges for using different forms of ADR for resolving disputes under PPP contracts in Thailand. The forms of ADR that will be discussed are arbitration, mediation, expert determination, and dispute review boards, respectively.

³⁸ Administrative Court Act (n26) s 60.

³⁹ As an example, consider the prolonged litigation proceedings in the United Kingdom for the construction of the Wembley Stadium Project where the share price of the contractor (Multiplex) was greatly impacted by the six years of litigation, see Gerber and Ong (n35) 230.

⁴⁰ See Gerber and Ong (n35) 225.

5.1 Arbitration

Arbitration has been used as an alternative means of resolving disputes in Thailand for several decades. While its benefit in terms of cost over litigation can be sometimes called into question, arbitration still offers a valuable means of resolving disputes under PPP contracts given that it provides the parties with the ability to select their own arbitrator(s) and to determine the conduct of the arbitral proceedings, thereby allowing for a greater level of control over the dispute resolution process.

Compared to other forms of ADR, the key benefit of using arbitration is that arbitration is formally recognised by the *Arbitration Act B.E. 2545 (2002)* ('*Arbitration Act*').⁴¹ Consequently, arbitral proceedings are supported by courts in several ways 'which give the adjudicative process real bite'.⁴² By way of example, the courts are required to strike out a case where a party brings a dispute to court instead of referring it to arbitration as previously agreed,⁴³ and the arbitral tribunal may request a court to summon witnesses or demand the handover of evidence for the arbitration proceedings.⁴⁴ Perhaps more importantly, arbitration provides a higher level of certainty in terms of enforceability given that the *Arbitration Act* expressly provides that an arbitral award shall be enforced by Thai courts irrespective of the country where it was made.⁴⁵ Also, an arbitral award may be enforced by the government in foreign countries to the extent that they are parties to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*⁴⁶ ('*New York Convention*'). Clearly, this would greatly benefit the government where the SPV is a foreign entity or has material assets located outside of Thailand.

However, despite those key benefits, the use of arbitration as a way to resolve disputes in a PPP contract may have some major challenges, which will be discussed below.

5.1.1 Arbitrability

As previously noted, as per the *Notification on Draft PPP Contract and the Cabinet Resolution dated 14 July 2015*, the use of arbitration as a method of dispute resolution in PPP contracts is generally prohibited.⁴⁷ In order to include an arbitration agreement in a PPP contract, the contracting authority must demonstrate valid reasoning and the necessity that referring disputes to arbitration is required by the general practice applicable to that type of PPP contract or any other unavoidable causes.⁴⁸ At the time of writing, the authors are not aware of any PPP contracts that include an arbitration agreement following the implementation of the *Notification on Draft PPP Contract*.

⁴¹ พระราชบัญญัติอนุญาโตตุลาการ [Arbitration Act] (Thailand) 29 April 2002.

⁴² John Templeman, "Towards a Truly International Court of Arbitration" (2013) 30(3) *Journal of International Arbitration* 197, 220.

⁴³ *Arbitration Act* (n41) s 14.

⁴⁴ *Ibid* s 33.

⁴⁵ *Ibid* s 41.

⁴⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

⁴⁷ *Notification on Draft PPP Contract* (n9) cl 5(20); *Cabinet Resolution Dated 14 July 2015* (n11).

⁴⁸ *Notification on Draft PPP Contract* (n9) cl 5(20).

5.1.2 Lengthy Process for Enforcement

Despite Section 42 of the *Arbitration Act* requiring Thai courts to conduct proceedings for enforcement of arbitration awards expeditiously,⁴⁹ in practice the process of enforcing arbitration awards in Thailand through the administrative court can be slow and lengthy. This is particularly true when the party that lost the arbitration also seeks to have the award set aside or refused for enforcement in court. For instance, in the Bangkok Elevated Road and Train System (Hopewell) Project, where an arbitral tribunal ordered the government to pay damages for its unlawful termination of the agreement with the private investor, it took around a decade from the start of the court proceeding to the decision of the Supreme Administrative Court to enforce the arbitration award.⁵⁰

5.1.3 Finality and Enforceability of Arbitration Awards

Another major challenge with using arbitration in PPP contracts in Thailand is the enforceability of arbitration awards. While the exceptions to enforcement of arbitration awards under the *Arbitration Act* are written to align with those in the *UNCITRAL Model Law*⁵¹ and the *New York Convention*, Thai courts' interpretation of these exceptions may be more expansive compared to courts in other countries, especially when it comes to the ground that the enforcement of an award would be against public policy.⁵²

At the time of writing, there were at least two occasions where Thai Courts refused to enforce arbitration awards based on the public policy ground merely because the procurement procedure of a PPP project or the procedure for amendment of a PPP contract was not conducted in accordance with the PPP law and regulations.⁵³ However, a more significant challenge is perhaps that Thai courts generally interpret the public policy ground to also cover errors of an arbitral tribunal in deciding a question of law.⁵⁴ By way of example, in the *Supreme Administrative Court Decision Aor 676/2554* involving a construction dispute between the Department of Alternative Energy Development and Efficiency (the applicant) and its private construction contractor (the respondent), the applicant failed to pay the contract sum to the respondent, so the respondent terminated the contract and sought to recover damages from the applicant. The dispute was submitted to arbitration and the arbitral tribunal decided that the termination of the

⁴⁹ Arbitration Act (n41) s 42.

⁵⁰ Supreme Administrative Court no. Aor 221-223/2562 (2019). See also 'The Conclusion of the Hopewell Case that Lasted for more than 30 years' Thai Arbitration Center (Web Page, 24 July 2020) <<https://thac.or.th/the-conclusion-of-the-hopewell-case-that-last-ed-for-more-than-30-years/>>.

⁵¹ UNCITRAL Model Law on International Commercial Arbitration, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 June 1985) annex I, as amended by UN GAOR, 61st sess, Supp No 17, UN Doc A/61/17 (7 July 2006) annex I.

⁵² See Thanapat Yaemklin, 'Judicial Review of Arbitration Awards on the Ground of Public Policy under the Law of Thailand: an Excessive Judicial Intervention?' (2022) 2(1) Thai Legal Studies 51.

⁵³ Supreme Administrative Court Decision Aor 349/2549; Supreme Court Decision 2503/2552.

⁵⁴ Yaemklin (n55) 51.

⁵⁵ ประมวลกฎหมายแพ่งและพาณิชย์ [Civil and Commercial Code] (Thailand).

contract by the respondent was lawful pursuant to Section 387 of the *Civil and Commercial Code*,⁵⁵ given that this provision of law permits a party to terminate a contract if the other party is in default.⁵⁶ The defendant sought to have the award set aside, citing the public policy defence. The Supreme Administrative Court ruled that the tribunal erred in deciding the dispute because the tribunal failed to apply the principle of administrative law to the case, resulting that the enforcement of the award was contrary to the public policy.⁵⁷

5.2 Mediation

Mediation can be broadly described as a ‘private, informal process in which one or more neutral third parties assist the parties to achieve a settlement of their dispute’.⁵⁸ Conceptually, the fact that the government or its private contracting party is prepared to litigate does not necessarily mean that the dispute cannot be resolved by mediation. A mediator can bring both parties closer to dispute settlement by using ‘a wide variety of techniques to guide the process in a constructive direction and to assist the parties in finding an optimal solution’.⁵⁹ Like negotiation, mediation allows the parties to a PPP contract to resolve their disputes in an innovative and collaborative manner, as the options available are not limited to the merits of the case, but can include any commercial considerations that may motivate the other party to settle the dispute amicably.⁶⁰

An example of innovative solutions in the context of PPP disputes can be observed in the case of Si Rat Expressway (the Second Stage Expressway) Project and the Udon Ratthaya Expressway (Bang Pa-in - Pak Kret Expressway) Project. In these two projects, the Expressway Authority of Thailand and its private contractors had previously brought 17 arbitration and court proceedings against each other, with damages at stake of over THB 170,000 million, including more than THB 30,000 million that the arbitral tribunals and courts already ordered Bangkok Expressway to pay the private parties.⁶¹ However, in February 2020, the Cabinet approved a settlement to extend the concession terms under the relevant PPP contracts for an additional 18 years, allowing the private parties to continue operating the projects and generate income

⁵⁶ Section 387 of the Thai Civil and Commercial Code provides that “[i]f one party does not perform the obligation, the other party may fix a reasonable period and notify the former party to perform within that period. If the former party does not perform within that period, the other party may terminate the contract.”

⁵⁷ Supreme Administrative Court Decision Aor 676/2554.

⁵⁸ Gerber and Ong (n35) 259 (citations omitted).

⁵⁹ Rui Cunha Marques, ‘Is Arbitration the Right way to Settle Conflicts in PPP Arrangements’ (2018) 34(1) *Journal of Management in Engineering* 1, 2.

⁶⁰ See Donald Charrett, ‘Construction Disputes after COVID-19-Jaw-Jaw or War-War?’ (2020) 193 *Australian Construction Law Newsletter* 6, 8.

⁶¹ Secretariat of Cabinet of Thailand, ขอความเห็นชอบการแก้ไขสัญญาโครงการระบบทางด่วนขั้นที่ 2 (ทางพิเศษศรีรัช รวมถึงส่วนดี) และสัญญาโครงการทางด่วนสายบางปะอิน (ทางพิเศษอุดรรัถยา) รวม 2 ฉบับ [Request for Approval to Amend two contracts: Contract for Second Stage Expressway (Si Rat Expressway, including Part D) and Contract for Bang Pa-in - Pak Kret Expressway (Udon Ratthaya Expressway)] (NorRor0505/5514, 19 February 2020) 2.

to recover their losses.⁶² Even if this settlement was reached through negotiations between the parties and mediation was not involved, it has proven that PPP disputes can be resolved by an innovative solution.

Having said that, the authors submit that there are three main challenges with mediation being used to resolve disputes in PPP contracts: mediability; contracting authority's unwillingness to negotiate; and enforceability of mediation agreement.

5.2.1 Mediability

In Thailand, out-of-court mediations are governed by the *Dispute Mediation Act B.E. 2562 (2019)* ('DMA').⁶³ Under the DMA, the scope of civil disputes which are capable of being mediated under the DMA is very restrictive.⁶⁴ Section 20 of the DMA limits civil disputes which can be mediated to only, inter alia, those civil disputes with up to THB 5 million at stake.⁶⁵ In this regard, it seems unclear to the authors as to whether this requirement applies exclusively to mediations where either party refers the dispute to the relevant government authorities without having an mediation agreement in place or generally applies to all mediations in Thailand. Regardless, if the latter is true, the use of mediation for resolving disputes in PPP projects in Thailand will be quite rare as any dispute with more than THB 5 million at stake will not be capable of being mediated.

5.2.2 Authority's Unwillingness to Negotiate

It is generally accepted that the effectiveness of mediation as a dispute resolution mechanism depends significantly upon the willingness of the parties to participate and actively engage in the process with the objective of reaching an amicable settlement.⁶⁶ In Thailand, it seems that a Thai government contracting authority may not be willing to settle a dispute with a private party at the early stage of dispute resolution proceedings. In 2018, the Thai Cabinet issued the *Cabinet Resolution dated 2 October 2018* setting out the approach for settling disputes between government authorities and private contracting parties.⁶⁷ According to this *Cabinet Resolution*, a government contracting authority would be able to negotiate a settlement with a private party if there was already an arbitral award requiring the authority

⁶² Ibid 3-4.

⁶³ พระราชบัญญัติการไกล่เกลี่ยข้อพิพาท [Dispute Mediation Act] (Thailand) 22 May 2019.

⁶⁴ Anne Coulon, 'Mediation: A Star in the Making as a Dispute Resolution Method for Commercial Disputes (Focus on Thailand)' DFDL (WebPage, 25 November 2021) <<https://www.dfdl.com/resources/legal-and-tax-updates/mediation-a-star-in-the-making-as-a-dispute-resolution-method-for-commercial-disputes-focus-on-thailand/>>.

⁶⁵ DPA (n66) s 20.

⁶⁶ Gerber and Ong (n35) 226.

⁶⁷ Secretariat of Cabinet of Thailand, แนวทางดำเนินการเกี่ยวกับข้อพิพาทของหน่วยงานของรัฐ [Government Authorities' Approach to Settling Disputes] (NorRor0503/Wor479, 8 October 2018).

to make a payment, and the award is awaiting enforcement through the Administrative Court.⁶⁸ Arguably, it is possible that the government may not be willing to negotiate a settlement unless an arbitral award has already been made binding the government to pay damages to the private party.

5.2.3 Enforceability of Mediation Agreement

Unlike the *Arbitration Act*, the *DMA* does not empower Thai court to strike out a case if one party sues the other party in court without first following a mediation process as contractually agreed. As a result, if either party in a PPP contract initiates a litigation proceeding without complying with the mediation agreement, the court may not be able to immediately strike out the case upon receiving a petition from the other party requesting such action. It is possible that the court may proceed with the case before eventually dismissing it on the grounds that the mandatory mediation process has not been exhausted. In this scenario, both the government and the SPV would have expended a significant amount of resources, including time and financial costs, on case preparation and trial, which ultimately turn to be futile.

5.3 Expert Determination

Expert determination is ‘a process whereby parties agree to refer their dispute to be resolved by a third-party expert’.⁶⁹ Conceptually, unlike an arbitrator or a judge, a third-party expert is not bound by judicial obligations and can make decisions based on their expertise, knowledge, and experience. Therefore, it can be a very useful tool for resolving disputes under a PPP contract which entails a highly technical issue. Furthermore, as it is not regulated by legislation under the Thai legal system, expert determination is a highly flexible process, enabling the parties to create their own procedure as they see fit.⁷⁰

A determination made by the expert can be binding or non-binding, depending on what is agreed upon by the parties. Non-binding expert determinations can also be useful for the settlement of the dispute under the PPP contract because it can be ‘a reality check showing the contesting parties what the possible outcome of the more expensive and usually slower binding procedures such as arbitration would be’.⁷¹ A binding determination process, on the other hand, can provide more certainty and efficiency for the parties, as the decision is binding without the need for further negotiation.

In this connection, it is submitted that there are two significant challenges with using a binding expert determination for resolving disputes under PPP contracts in Thailand. Each will be discussed in turn.

⁶⁸ Ibid.

⁶⁹ Djakhongir Saidov, ‘An International Convention on Expert Determination and Dispute Boards?’ (2022) *International and Comparative Law Quarterly* 697, 699.

⁷⁰ Gerber and Ong (n35) 295.

⁷¹ UNCITRAL Legislative Guide (n16) 178.

5.3.1 Enforceability of Expert Determination Agreement

One of the key challenges associated with using binding expert determination to resolve disputes arising under PPP contracts is that it is not a formally recognised dispute resolution process in the Thai legal system. Therefore, if either the government or the SPV brings a case to court without first referring the dispute to an expert, as per the agreement between them, the court may not immediately dismiss the case and refer the parties to the expert determination process. This is similar to the issue discussed earlier with mediation in 5.2.3.

5.3.2 Enforceability of Expert Determination

It seems uncertain as to the extent to which a determination reached by the expert may be enforced in Thailand. To the authors' knowledge, there is still no Supreme court decision which previously decided on the enforceability of an expert determination. The closest decision that may be considered is the *Supreme Court Decision 1982/2524*, in which it was held that a determination made by a superintendent (contract administrator) under a construction contract was enforceable. Therefore, by analogy to the *Supreme Court Decision 1982/2524*, as a matter of principle, a legal-binding expert determination may be enforceable in Thailand on the basis of the freedom of contract and the principle of *pacta sunt servanda*.

However, even if an expert determination is generally enforceable in Thailand, it is possible that it will not be enforced by Thai court to a greater extent than an arbitration award, which is explicitly recognised under the Arbitration Act. It is possible that the court may apply, by analogy, the rules for enforcing an arbitral award under the Arbitration Act to the enforcement of an expert determination. This is because Section 4 of the *Civil and Commercial Code*, which provides that '[w]here no provision is applicable, the case must be decided by analogy to the provision most nearly applicable'.⁷² If this proposition is true, it may follow that if the court finds that the expert's decision goes against public policy because the question of law was not decided correctly, it may order that the expert's decision be set aside or not be enforced in the same way as an arbitral award, as previously discussed in 5.1.3.

5.4 Dispute Review Boards

Originating in the construction industry, dispute review boards have been used as a dispute resolution mechanism in public infrastructure projects in several jurisdictions.⁷³ They may be referred to by other different names, such as dispute resolution adviser (DRA), dispute adjudication board (DAB), dispute avoidance and adjudication board (DAAB), depending on the scope of power and responsibilities of the dispute board in question.

⁷² Ibid s 4.

⁷³ UNCITRAL Legislative Guide (n16) 180.

Dispute review boards can offer value to PPP projects which cannot be achieved by other methods of dispute resolution as it is a ‘job-site dispute avoidance and adjudication process’.⁷⁴ Typically, a dispute review board is to be established from the beginning of the project so that each member of the panel would be familiar with the nature, needs, and unique features of the project and its developments through regular visits to the project site, meeting with each party’s key personnel, reviewing periodic progress reports and so on.⁷⁵ When a conflict arises, the panel is called upon to resolve that conflict through simplified proceedings, such as informally discussing the problem with all relevant parties as well as providing a non-legal binding recommendation.⁷⁶ The parties may, then, negotiate to solve the conflict or settle the dispute taking into account the dispute review board’s informal advice or recommendation. Failing which, if contractually permitted, the dispute review board may decide the dispute which will be binding upon the parties.⁷⁷

Therefore, due to its high level of involvement in the project, the dispute review board is not only able to resolve the dispute in a time-efficient manner but can also prevent problems and conflicts from escalating into disputes.⁷⁸ In other words, with a standing dispute board, the parties do not have to wait until a dispute arises before resolving it, rather they can prevent it from arising in the first place. This proactive nature of the dispute board process is the one of its most important benefits given that litigation and other forms of ADRs are reactive in nature.⁷⁹

Arguably, the use of a dispute review board as a dispute resolution mechanism for PPP contracts in Thailand can be seen as a hybrid approach that combines the benefits of mediation, expert determination, and arbitration. The dispute board, through its discussions with the parties and the provision of recommendations, can facilitate the parties’ efforts to reach a settlement agreement, much like mediation. At the same time, the panel’s decision-making process may be less formal and more flexible than that of litigation or arbitration, akin to expert determination. Additionally, the dispute board may have jurisdiction over a wide range of disputes related to the underlying contract, and, as permitted by the contract or agreed upon by the parties, may gather evidence and appoint experts to assist in resolving highly technical issues, similar to arbitration. Therefore, the dispute board process may offer the contracting parties the key advantages of the other three types of dispute resolution mechanism.

⁷⁴ Peter Chapman, ‘the Use of Dispute Boards on Major Infrastructure Projects’ (2015) 1(3) Turkish Commercial Law Review, 219, 219.

⁷⁵ Paula Gerber and Brenan Ong, ‘Should DAPs Be Included in Standard Form Contracts’ (2012) 143 Australian Construction Law News-letter 6, 7.

⁷⁶ Mosley (n17) 13.

⁷⁷ Ibid.

⁷⁸ UNCITRAL Legislative Guide (n16) 180.

⁷⁹ Owen Hayford, ‘Want to Avoid Construction Disputes, Delays and Cost Overruns? Use a Dispute Board!’ Infralegal (Web Page, 12 March 2019) <<https://www.infralegal.com.au/dispute-avoidance-and-resolution/blog-post-title-one-9ayeg>>.

However, there are three key challenges with the use of dispute board process in PPP projects in Thailand, which will be discussed below.

5.4.1 Uncertainty Regarding its Status and Enforceability of Decision

Like expert determination, the use of a dispute review board as a dispute resolution mechanism in Thailand is not formally recognised by legislation or court decision.⁸⁰ As a result, the legal status and recognition of the dispute board process, as well as the enforceability of its decisions, may be significantly uncertain in the same manner as expert determination, as previously noted in 5.3.1 and 5.3.2. It is also worth mentioning that in some jurisdictions the dispute review board process is considered as an arbitration.⁸¹ If Thai courts adopted this approach, the dispute board process would be subject to the Arbitration Act, and thus face the same challenges as arbitration as previously discussed in 5.1.

5.4.2 Lack of Support from Judicial System

A dispute review board process, unless being re-characterised as an arbitration, is not able to enjoy the same level of support from the courts as arbitration. This means that the dispute board lacks the authority to summon witnesses or request the submission of evidence through a motion to a competent court. Additionally, even if the parties have agreed to aid the dispute board with the submission of evidence the failure to do so may merely be considered a breach of contract, entitling the other party to claim damages and to seek for specific performance through court litigation. Note, however, that seeking specific performance in Thai court may be an unrealistic option due to the time-consuming nature of litigation.

5.4.3 Expensive Dispute Resolution

The use of dispute boards as a dispute resolution mechanism has been known for its high costs.⁸² While all forms of dispute resolution impose financial burdens on the parties involved, the costs associated with the dispute board process seem to be particularly unique. With dispute boards, the parties do not only incur the costs of dispute resolution only after a dispute arises, but they already incur the costs at the outset of the project, namely at the time of the establishment of the dispute board. Such costs typically include a monthly fee for each member of the panel, expenses for site visits, and travel and accommodation costs.⁸³

⁸⁰ Chokchai Netngamsawang and Ukrit Sornprohm, ‘คณะกรรมการข้อพิพาท (Dispute Board) ทางเลือกใหม่ของไทยในการบริหารจัดการข้อพิพาท? [Dispute Board the New Alternative for Management of Disputes?]', Thailand Arbitration Center (Web Page, 30 December 2020) <<https://thac.or.th/คณะกรรมการข้อพิพาท/>>.

⁸¹ Giuseppe Giancarlo Franco, ‘The Legal Status and the Enforcement of the Dispute Board Decision’ (2019) International Construction Law Review 193, 197-201.

⁸² Gerber and Ong (n35) 127.

⁸³ Richard Linton, ‘Dispute boards: an essential investment or a costly mistake?’ Lexology (Blog Post, 9 June 2021) <<https://www.lexology.com/library/detail.aspx?g=bc4ddb37-6e5a-4d53-b91a-4f1fbfe3b1e0>>.

6. CONCLUDING REMARKS

In this article, the authors have highlighted the limitations of court litigation in resolving disputes under PPP contracts in Thailand and proposed the use of ADRs as a way to overcome these limitations. It is important to note that, while each form of ADR has its own unique benefits and challenges, most of the challenges identified in this article are largely a result of the current legal framework and government policies in Thailand. Therefore, it is within the hands of the Thai government to reform the legal framework and policies to facilitate the use of ADRs in PPP projects in Thailand. However, In the authors' view, it would be unfortunate if the government's reluctance to use ADRs was the only factor prohibiting the implementation of an effective dispute-resolution process for PPP projects in Thailand.