Mediation Choice, the new Arab's trend to protect internal and International investments

Hoda Magdy Nour

Commercial and civil proceedures Department, Faculty of Law, Helwan University, Cairo, Egypt
hoda.magdy@yahoo.com

Abstract: It is apparent that the new trend in modern writing of commercial, investment and contract law, also consrtuction and family affairs as well, is to resort to mediation and conciliation more than arbitration, because of many troubles in arbitration process face specially in the last few years in many "faces". This article would contribute to raising mediation practise, and encourage to carry out an in-depth study of mediation as a suitable and preferable ADR.

[Hoda Magdy Nour. **Mediation Choice, the new Arab's trend to protect internal and International investments.** *J Am Sci* 2015;11(11):57-67]. (ISSN: 1545-1003). http://www.jofamericanscience.org. 6

Keywords: Mediation, Confidentiality, International, investments

Preface:

Recently, mediation has become an alternative to litigation and arbitration disregard of its bindingness, suit the needs of the construction investment and commercial community, but the effect of mediation in political conflicts was presented, but not fully developed([3]).

Where as common law jurists consider conciliation and mediation one technique, some civil law countries see conciliation as a mythod or technique different from mediation ([1]).

I had the privilege of,and I was keen to offer anarticle covering the basic notions of the Mediation as an "Alternative Dispute Resolution" (ADR).

There is no possbillity to offer a comprehensive doctinal or practical work case law, even adversarial mediation in this paper,but I will basically focus on mediation as a peaceful settlement of disputes being an important issue that needs special consideration ([2]).

That is introducing simple ADR technique,and It is rather an attempt to set out the feature of mediation in Egypt and arab countries.

Definitions:

Continuous development of international trade and the acceleration of commercial and economic relations between partners became the largely resort of Peaceful settlement of disputes through ADR techniques, because of the effectiveness of mediation techniques in certain disputes.

ADR now regards as being an important as well as an appropriate mean in investment transactions and international trade.

Mediation means a process whereby parties request a third party to assist them in their attempt to reach an amicable settlement to their dispute arising out of, or relating to a contractual or other legal relationship.

It is a voluntary, non-binding process, the mediator is a neutral, his mission is to guide the parties to a mutually benificial resolution of their dispute, helps the parties to decide for themselves whether to settle or not, and to what terms.

Mediation is a Process in which parties confer upon the mediator the power to help settle their disputes by suggesting what he may consider just and fair according to what was agreed upon, and let them see it as it is, without binding decisions.

Mediator is authorized not to settle differences between different people by suggesting settlement, but helping them reach it, and accepting voluntary.

The agreement of the parties defines the limits of authority in each case, the procedures and the rules of negotiation is originally,and mainly directed by the parties under the aspects and observation of the mediator,who does not impose neither his decision, nor his opinion.

Why parties perefer Mediation:

There are many reasons why parties make the settllement by agreement, especially the execution one,and it is important that they consider the future performance of one or both parties.

There are fundamental differences between litigation and mediation process, mediation techniques provide certain advantages compared with the adversarial process of litigation.

Since they might induce men to enforce the rights created by law,in doing so,to neglect the traditional rules of behaviour decided by customs and moral rules that "Every court case,by its mere existence,is a scandal troubling the natural order", and it is in the common interest of the community to prevent that matters reach this last stage ([3]).

Features of Mediation:

Mediation is a Peaceful settlement of commercial differences and disputes,that require the assistance of a neutral or neutrals to settle them.

The settlements should be brought forth from within the parties themselves,on the basis of their interests rather than their rights,

The settlement or the agreement not imposed on them from the outside, and that finally emerges may be surprisingly different from any initial proposals, ([4,5]).

The popularity of mediation as an ADR technique is limited because of that does not end with a binding decision, but voluntary and self making decision binding only if they agree upon them.

But Mediation as an ADR method have the following advantages:

- Confidentialiy
- Cost effectiveness
- Party procedural control([4,5]).
-Voluntary execution.

Significant differences between arbitration and mediation:

The main distinction between arbitration and mediation as ADRs that the latter have no power to issue binding awards or decisions.

The problems related to arbitration agreement and the consent of the parties to submit to arbitration which is called "The arbitrability", Is that disputes fall within the extent to agreement to arbitrate,besides the "Party autonomy", and "competence de la competence",the validity of the agreement arbitration, the diffuculty of appointing the arbitrators and their recaution, and problems of determining the applicable law, finally the annulation of the ward and the problems of execution.

These difficult problems that face not only the institutional arbitration, but also the state courts, lead benefactors to prefer other methods.

The different legal systems are Sharia tradition,common law,civil law, were influnced of mediation cultures according to its own circumstances and historical developments, every one who takes part in the mediation process has his own features, but there is no significant difference in essence between commomn law,civil law and Sharia in mediation process.

But the role of parties, lawyers, courts, and the mediator himself differ drastically between these systems.

According to Sharia, the duty of the judge is to encourage the parties to settle their dispute amicably ([1]).

The judge and the arbitrator may not at his own initiative encourage the parties to settle their dispute amicably or suddgest solutions,instead this would be considered unethical, where as,on the contrary,in mediation the mediator is the original player in suggesting solutions in the essence.

the mediator plays an active role,but not as the lawyers who develope their cases as an original player either in the judicial system or in arbitration.

The lawyers present their cases under control of the mediator who would exercise his duties as a fact finder,by asking his own questions,encourage the parties to settle their disputes,the parties exercise their roles under his help and support,sharing in facts and solutions.

The mediation procedures are oriented in oral hearings, no jury trial or written pleadings would be exchanged, but they are devoted to preparing the meetings, thus do not expect full disclousers, or have the documents or the exhibits attatched to them.

The important feature is that choosing the applicable law is not required.Usually the mediator uses the language of the parties,the mediator has no discretion to use another languge unless this language is spoken by both parties without need for translation.

The applications for judicial enforcement may be submitted befor the judge, but enforcement is granted if the agreement is issued according to general rules of law in that country.

Mediation to settle dispute in Islamic law:

Islamic law knew ADR techniques in the form of conciliation and mediation leading to a non-binding decision, and also arbitration with a binding decision as the "vital" difference between mediation and arbitration.

Until The Dawn of the Twentieth Century all Arab countrie were part of the Ottoman Empire. Most of the laws of these countries in civil and commercial matters were mainly based on as the first codification of the major views of the Hanafi Doctrine in civil and commercial matters which called Magallat Al Ahkam Al Adlia" [(6).]

In Arab countries which apply Islamic law, the HAKAM in islamic law is used to define an arbitrator or a conciliator.

Islamic law knew conciliation and mediation as preferable ways for resolving family Conciliation in family disputes is based on the KORAN([7]), civil and commercial, and some other disputes as a political conflict between nations.

, where as each party has the capacity to dispose of the rights submitted to arbitration or mediation, and the parties agree to submit their dispute with free and valid will.

"Solh" is a technique leading the parties to settle their disputes,Islam permits mediation and conciliation in civil and commercial, some matters subject to some exceptions like differntiate between crimes and the penalites on them. Islamic law did not determine restriction on settling disputes between conflicting parties in subject matter like property, debts, sales,even family and political affairs,except

what is related to any rights of God (This calls "Hodoud).

ADR in Arab legislations:

Many Arab countries began to adopt their own modern laws, The last decade witnessed important steps towards modernization of laws in the field of International Commercial Arbitration.

UNCITRAL has issued model law on conciliation adopted by the General Assembly of the United Nations on September 2002, countries may as with all model law be adopted as it is or varied.

Some Arab countries adopted the French law (Lebanon, Algeria), Most Arab systems modernize their laws by adopting the UNCITRALmodel Law of Arbitration (Egypt, Jordon, Tunisia, Bahrain).

UNCITRAL Conciliation Rules 1980 very clearly provide "The conciliator will be guided by principal of objectivety, fairness and justice, giving consideration to among other things,the rights and obligations of the parties, the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties([8]).

That Model law gives similar important to conciliation and mediation for the purpose of applications of this law, so that the Model Law may apply on ADR Art 1-3 provides that:For the purpose of this law, conciliation means a peocess,wether referred to by the expression conciliation,mediation or an expretion of similar import,whereby parties request athird person to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.

But Kuwait has a genuine system of judicial arbitration issued by law no.11/1995.The Ministry of Justice forms arbitral tribunal each shared by a judge and two merchant members, or members of other specializations. The arbitral tribunals would settle the disputes submitted to them by the parties who agree in writing on this by their free will.

In Kuwait the law no. 38/1980 on Civil and Commercial Procedures included in articles 173-188 the provisions on voluntary arbitration.

These provisions did not permit the parties to authorize the arbitrators to rule as amicabl compositeurs except in cases when the arbitrators are nominated in the agreement of arbitration.

Also the United Arab Emirates on March 1992 the Fedral Law on Civil and Commercial matters was issued including articles 203-218 on arbitration.

Article 205 of that law requires mentioning the names of the arbitrators in a written document issued by the two parties if they are authorized to be amicable compositeur.

Sudan isuued in 1974 new arbitration law ifluenced to great extent by the English law.The rules would not permit the arbitrators to settle the dispute as amicable compositeurs.

The rules also provide for compulsory conciliation before arbitration if the judge having jurisdiction decides that,or if the agreement of the parties provides for that.

Mediation and conciliation in Egyptian Law:

Egypt now is an active member of international commercial community,Recent trends in Arabic arbitration legislations in general and the Egyptian law in particular,In 1959,Egypt adhered to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,and in 1974 acceded to the 1965 Convention of International Bank (I.B.R.D) which established the International Center for the Settlement of Investment Disputes(I.C.S.I.D), and issued Arbitration Law No.27 of 1994, adopting of the UNCITRAL law. Establishment of the Cairo Regional Center for International Commercial Arbitration (CARICA) model law was adopted.

Mediation to settle civil and commercial disputes, "Solh" is a technique leading the parties to settle their disputes, in art.25 in procedure Civil law no. 13 /1968.

Pursuant to Egyptian Arbitration law, the parties may agree, during the arbitral proceeding, on settlements ending the dispute, such decision should have the force of an arbitral award as far as execution is concerned.

And art 25 of the Egyptian procedure civil permits the parties to agree,during the juducial proceeding, on settlements ending the dispute, before the judge, such decision should have the force of the judicial award.

Mediation to settle Egyptian Administrative disputes:

In Egyptian Law No.7/2000 establishing conciliation committees require referring the disputes which arise between government and person to these committees before litigation before administration courts.

Besides, the Egyptian Arbitration Law No. 27/1994 amended by the law no.9/1997 permits administrative bodies to go to arbitration,under some conditions, In administration contract in Egypt the disputes arising from administrative contracts maybe subject to arbitration if the minister having jurisdiction to approve the agreement.

And this law authorizes the parties to empower the arbitrator to settle the dispute amicably by a binding decision, without restriction by law and without reasoning if the parties agree.

This will give the parties whatever their capacity, moral or physical, to agree on mediation.

Mediation to settle egyptian investment disputes:

The egyptian prime minister issued on July 19/2004 decree No. 1272/2004 establishing a ministerial committee presided by the minister of justice to settle investment disputes.

Its recommendation would be obligatory for the state and would be enforced if the other party accepts that, This decree replaced the decree no.1057/2000 issued on 14 May, 2000.

The binding decision here may be rendered by the judge or the governor, as it is in that egyptian ministry decree.

It is clear that this is not arbitration, but a case of amicably special mission leading to a kind of judicial decision, decided to encourage investment in Egypt.

Mediation to settle international Commodity disputes:([9])

Mediation is the suitable method to settle international Commodity disputes, mediation mainly depend on the agreement of the parties which defines the type of authorization and the mechanism,and It is clear to the parties that the mediator has no jurisdiction to issue binding decisions or decide an order if they fail to agree on and sign it.[(10).]

There is no difference in between commomn law,civil law and Sharia in mediation process in commodity disputes.

Draft of The system of judicial mediation in Egypt:

To call upon a judge to decide in commercial or investment disputes is equal to giving oneself away,and ought to be the very last resort only,before deciding to go to this step all other posibilities for settling a dispute ought to have been tried.

But the ministery of justice in Egypt drafted a new legislation of judicial mediation,still rendered yet. It is expected to make a tribunals consists of judge and two merchant members, or members of other specializations. The arbitral would settle the disputes submitted to them by the parties who agree in writing on this by their free will

Judicial mediation in Egypt, The draft of mediation rules is a new trend:

The last decade witnessed very important changes in Egypt towards the modernization of its laws to overcome a conservative attitude towards international arbitration and mediation. In January 1978 the Asian African legal consultive committeeand the Egyptian govenment signed the agreementfor the establishment of the Cairo Center as a non profit organizationrxercising its mission according to the Uncitral rules,and in 1994 The issuing the Law of Arbitration No27, concerning Civil and Commercial Matters.

The features of this law draft states a kind of combind justice,that the ministery of justice will form arbitral tribunals each chaired by a judge and two members of other specializations,The arbitral tribunals would settle the disputes submitted to them.

The mediator"s" permitted to seek the opinion of the court in legal matters in the dispute submitted to them,and they should abide by the courts opinions.

The courts may return the ward drafted to the mediator to clarify or amend the decision,within one month, The courts are authorized to correct the decisions of the mediators and return the case for review, courts may also cancel the award and settle the dispute**.**

Accordingly,the party may challenge it before the court,It is worth mentioning that the application for challenge may not be admissible if it is not signed from the parties. Mediation agreements may only concluded by natural and judicial personshaving the capacity to dispose of their rights.

The speciality of the role of a mediator:

Because a mediator is more active in helping the disputing parties to negotiate amicably to reach a settlement,and his mission depends principally on shuttling between the two parties, trying to convience each of them separetly that a certain settlement would be for his sake and benefit([11,12]).

Type of mediation:

The contractual parties usually envisage a two-steps dispute resolution procedure,first, settlement discussions as friendly mediation or consultation and if this fails, arbitration or litigation([13]).There are two typs of mediation:

a-Facilitative Mediation:

In facilitative mediation the mediator does not evaluate the validity of each party's position, the mediator listen carefuly to views submitted by both parties, and help them to submitted a better case.

In many cases the facilitative mediation process itself can be seen as a way of obtaining the information reqired to find a compromise settlement.

b- Evaluative Mediation:

The mediator evaluates the validity of each party's position, possibly in private, and this changes the perceived strength of the party's rights, both legal and contractual.

The mediator can help evaluate and facilitate the parties' case, by separating the good justifications and and solid points from the unjustified ones.

The main difference between facilitative and evaluative mediation is not the greater formality, but the greater precuading and help in reaching the settlement ([14]).

Ad-Hoc or Institutional Mediation:

In Ad-Hoc choice,the parties may draw up their own rules of procedures, but Institutional clause may be adopted to save time and expenses.

The relevant institutional rules will deal with any contingencies that might arise,they are designated to

regulate the arbitral proceedings from beginning to end,especialy if the respondent fails or refuses to co-operate.

Some problems may be resolved if the parties adopted an instiutional clause, But this is not the assumption in mediation,because it comes in a mediation clause which forms part of the contract between the parties,or submission agreements after the legal or technical dispute arise, or even submitted to courts.

The need to agreement in mediation:

According to arbitration rules in most countries and institutions arbitration agreement must be, under pain of nullity, concluded in writing,but agreement to mediate may be exchanged by acceptance between them orally even if suggested by one party and not denied by other.

One important difference between arbitration and mediation agreements is that according to most arbitration Law the alleged agreements of arbitration by one party would not be considered as an agreement of arbitration because it is not in a written form according to the law.

Unwritten mediation agreement would be considered as a right agreement of mediation, but if it is alleged by one party and denied by other it will be refused not because it is not in a written form,but because lacks of acceptance of both parties.

The importance of mediation agreement is to enable the parties to impose the limited time within it they must reached the settlement, the mediator should put efforts to fulfil the mission within the timeframe agreed on.

however, time limits does not annuled the agreable solution, rather to ensure that the case is dealt with speedily.

Also it gives the parties themselves the chance to put the items, they may need legal advisorto help them in awarding the form of the agreement,or the mediator.

The form of the drafted award should not be in the formal shape or reasoned, but it must be signed by the parties and the date and the place where it was rendered, even if there is no signiture by the mediator or his name**.**

Any party,at any time can withdraw from the proceedings.

The valid Mediation clause:

A compromise settlement, is the purpose of mediation, there are two posibilities,the first that the parties include a mediation clause in their agreement, that the parties agree that in case of dispute they will submit and will have it settled by mediation.

The other, they accept the suggestion to go to mediation,even if this suggestion is coming from a judge or other authority not from the other party.

No doubt that The settlement of the dispute depends on the full and valid consent of the parties, specialy when the defendant agrees before the court to go to mediationin this case no need to be in accordance with the agreement as it in arbitration.

The ineffectiveness of mediation agreements:

Partners Invitably have conflict, differences and disputes, where there is transaction, there is the risk of the dispute, but it may not be suitable for disputes to involve legal problems ([1]).

The disadvantage of the ADR lies in their ineffectiveness,there being no binding decision to enforce the solution,if the parties do not agree or not enforced voluntary we are back to the beginning,with loss of money and time.

Althought the consent solution may be presented to the court for implementation, because the consent award lacks a measure of approval to the agreement reached by the parties, the court approval leads to a binding compromise settlement

In the most cases the parties acceptance and execution to the agreement solution depends upon what they thinks as just and fair,the balanced one would be accebtable and binding volountary to them,in some cases the mediation process itself can be seen as a way of obtaining a solution agreement and return to the court to execute the compromise settlement.

The form of mediation clause:

When a mediation clause included in a contract, the clause refers to future disputes,such agreement would have effect when the dispute has risen, the mediator may succeds in presuading the parties to enter into a mediation, but neither the the mediator or the court will impose on them, when one party refuses to honor the clause of mediation.

The mediation clause which deals with disputes that may arise in the future is not frequently drafted in details, it may be drafted as:

"Parties at that time of concluding the business contract hope that there will be no disputes, and if any they will be settelled by mediation".

The agreement to apply mediation may be before or after the disputes, stating:

"Any disputes arising from a contract shall be settled by the parties through mediation of a third party. In case no agreement is reached through the settlement in a fixed time, the dispute may be submitted by any party to arbitration or litigation".

The basic elements in Mediation agreement:

A short, simple and model clause recommended by parties or an arbitral Institution as a mere formality, and later the mediation agreement deals with an existing dispute, and its details.

The mediation clause has to be effective and clear, defective mediation clauses as inoperable,

uncertain or inconsistent,can be worthless, otherwise delay and cost consequences.

Unlike arbitration, mediation clause do not usually form part of a contract between the parties.

Mediation clause unlike arbitration, does not exclude of the jurisdiction of state courts,because of enforceability, and also may not exclude arbitration.

The agreement may include provisions as to the production of relevant documents and calling witnesses or experts.

It is important to include a provision for the parties attend lawyers or agents, but not presentedby them.

It is also important to include a time limit within which the settelement shall be finished, also parties may prefer to include provision for costs.

The parties may exclude some disputes from mediation which is not mediatable, or to facilitate to settle the other matters which they can do.

This agreement would states how many mediators are to be appointted, and the procedural matters and sequence are to be included.

Choice of a place of mediation:

parties are free to choose the place of mediation, the mediator would make the choice, unlike arbitration, no consideration should be taken into account before making this choice,the legal enviroment and the enforceability of awards and applicable law "lex arbitri",but Public policy and mandatory rules in the place of mediaion should be taken into consideration.

Agreement to mediation would stay the court's proceedings:

Mediation clause may be concluded after occurrence of a dispute even when a lawsuit has been submitted to the competent court.

There are no troubles that occur simply because mediation-unlike arbitration- would not have the effect to the exclusion of the court's jurisdiction.

The court retains their jurisdiction, only stay the case for limited time, then decide the dispute on their own rules because they retain their jurisdiction,or declare the settlement if succeded.

The court will order to stay the court proceedings,and refer the parties to mediation in a limited time.

The court might refuse to stay the procedure in some cases if there were good reasons for that,The court will not refuse to give effect to a valid clause for good reasons such as if the dispute involves people other than the parties to the agreement,or when it has not been freely accepted, if it relates to a non mediatable matter, or if its inoperative.

By virtue of the courts discerionary power may refuse to refer the dispute to mediation, retaining jurisdiction for itself and refusing to stay the action,the court will take into consideration that one of the parties is reluctant to refer the dispute to mediation.

How is a mediator appointed: must he be nominated in person?

In some cases like construction the choice of a suitable one or committee is best made in the contract, however It will be suitable to make the choice once the dispute arise.

Parties have the liberty to choose or designate the mediators or the way in which they are chosen,they may also empower a third party,or entrust the courts the role of appointing mediators. But judges or the third party may appoint the mediator,only with the consent of the disputed partie

When the court have jurisdiction to appoint a mediator,it should have a list to make the selection from,by mutual consent of the parties.

It is always very important for the parties in instiutional mediation to choose an acceptable mediator, the contrary will be loss of time,money and effort.

When the parties determine the person who will acts as a mediator whether in the contract,or in the settlement agreement,or each party may list some names considered qualified, with a brief note of relevant experience and qualifications of each, and exchang them, the parties deciding,and their advisor may help them to reach an agreement about the person they considered suitable**.**

Mediation Institutions may according to their published rules,help the parties to choose the mediator if the parties asked them to do so,or help the parties by giving a list of proposed names considered qualified ([15]), or choose the mediator from the list in accordance with the order of preferance, the mediator will not be appointed unless both parties agree on his appointment.

The Mediation institution-if any-may arrange at the request of the parties a preliminary meeting with the proposed one to presuade them.

The institution has no power to exercise its discretion in appointing the mediator,because it is unlikely to secure the parties feeling and confidence which enable the chosen one to presuade the parties toevaluate their position.

The court has no jurisdiction to make the appointment,but may introduce an available mediator list to choose from,in case the parties are unable to agree directly,the court goes to rendering the award.

If,for any reason, the appointment cannot be made according to this process,the parties may return to the court procedure in case they are unable to agree to choose the mediator.

How is a mediator replaced?

The parties may in any time replace the mediator, who is unable to perform his mission or who fails to perform it,or interrupts performance in amanner which leads to unjusifiable delay in the mediation proceedings.

The agreement between parties and a mediator determines the condition and all the important details,especially his removed.

The mediator can not continue without the acceptance of bothe parties, if a mediator does not abstain or is not removed by agreement between the parties, then the competent court may terminate his mission on the basis of the request of either party.

The parties not in need to particularize grounds for resignation if they agreed upon, either party may request the court to continue the proceedings and make an award.The requist may including the reasons for resign.

Must the mediator have legal capacity:

There is no certain requiements in mediator except the legal capacity, but the parties may agree on certain professional qualifications such as expertise in particular trade.

It will be wise to agree on a certain person in the contract, it will be important to replace the choice once the dispute arise,if he like in some cases missed his legal capacity, becaus the minimum requirement is the legal capacity.

What are the qualifications of a mediator?

The choice may be to one who are judges,consultants,university professors,whom are prepared to mediat.

There are no specific requirements,or limits on the freedom of the parties to agree on a person who may serve as a mediator,and no mandatory rules.

Ofcourse,the mission must be given to a physical not moral person.

The first question for the parties is to consider how many mediators they want,one or more,the parties are free to determine the number of mediators.

Appointing a sole mediator is less expensive,and involves less delay, and easier -unlike arbitration- to reach an agreed solution.

The basic elements in mediation,and may be more important than it is in arbitraton, is that the appointment of the mediator and his qualifications express minimal requirements that a person who act as a mediator should satisfy.

The succes of the mediation process dependes largely on the quality of the mediator, experienced in the practice of mediation.

The reputation of the mediation institution and the mediator also depends on presuasion of suitable solutions, because the disagreement frustrates all efforts.

The task of presuding requires a highly skilled and experinced person, over the conduct of the institution. The mediation process invitably would fail if not entrusted to suitably qualified candidates, or at least the parties should see and feel trust to accept the solution suggested.

In reality, a small dwindling group of practicioners, where as, mediation process depends mainly on developing the requiste expertise, trust, or at least the parties see and feel trust.

Ministry of justice in Egypt,training for judges to act as mediators,this mission is fitted to judges regarding to their education,expertise and psychology, especially in economic courts,whis is established by law No.120/2008,which is playing similar role.

The mediator must not only have adequate knowledge of the parties language,but must be fluent, otherwise translation (interpretation) adds not only cost and delay, but also difficulity that prevents to a settlement.

So some institutions offer training to new candidates([15]), this is generally easy due to not requiring certain categories or professions from the mediators appointed among them([16]).

The 6th Annual International Mediation Conference for users of Mediation, to be held on November 10, 2015 about The techniques for effective conflict managementand dispute avoidance, it will discuss important subjects as mediating for a better business outcome, early dispute resolution and the efficient use of mediation,and effective dispute management for better Business, also will discuss Successfully mediating pending litigation, how preventing future disputes, skills for negotiating successfully,and how build an action plan managing the disputes.

Should the mediator disclose his relation to either parties,or the subject matter:

When the parties choose the person who will acts as a mediator whether in the contract,or in the settlement agreement, each party may disclouse to the other his relation to the mediator, or the relevant facts which considered relevant, and the mediator when accepting his mission in writting with a brief note of experience and qualifications and notify either parties his relation or position to the parties, or the matters in the disputes.

The parties deciding to choose him,if they considered suitable**.**

Mediation Institutions also may according to their published rules, declare that mediator will not be appointed unless,even if the parties do not asked hem to do so,disclose his relation to either parties,or the subject matter to both parties,and they agree on his appointment.

The mediator may not be impartial or independent:

The mediator plays an active role, and have their own rules, but as a perliminary issue, there is a contract between the parties and the mediator,it resembles a contract for services.

Because of the interests of the parties are in conflict, they must try by all means necessary to find a settlement, a compromise,taking into account the interests of both parties and the mediator will preventing that one becomes a winner and one becomes a loser.

The Mediator-like judge and arbitrator- has ethical duties, he works in an unbiased manner, taking an active role towards both of them, not enflunced by his relation or position to the parties, or financial and political matters in the disputes.

In mediation, unlike arbitration,the parties may choose a mediator- who may sympathise with them, personally, or with regards to his position and

-unlike arbitrator-even having relatioship or financial or family connections with both parties or any of them,where as it is known to the other, or may have strong beliefs or convictions on the matters in issue.

parties choose mediator they trust and belive in his qualification,and will continue until reached to asuituable solution to them or declaring that settlement has failed.

It is clear that there is a personal element which is lacking in case of arbitrators.

The mediator may have relation or some financial interests known to both parties, where as he is capable of giving an impartial view on the merits of the case, and point out weakness and strengthsin parties situations.

Parties should trust that the mediator will assist them,and perform their tasks with due care,they resign him if he has a conflict of interest.

However,it is evident that the mediator shoud disclose all facts that may raise doubts about his impartiality or independence.If no objection is made, there is no reason for any party to replace him or leave the procedure later,but he is not obliged to accept the suggestion or leave any rights.

Since the acceptance of the mission entrusted to the mediator would be in writtin form,the resignation should be aswell.

A mediator's obligation of Confidentiality:

All information relating to mediation process should be kept confidential except otherwise agreed by the parties, or where disclosure is required under the law, also for the purpose of implementation or enforcement of a settlement agreement.

Mediator may disclose any information concerning the dispute received from a party to the other,but when a party gives any information to the mediator, subject to a specific condition that is to be kept confidential, that information shall not be disclosed to the other party.

As Model Law art "8" states: When the conciliator receives information concerning the dispute from a party,the conciliator may disclose the substance of that informarion to any other party to the conciliarion. However,when a party gives any information to the conciliator,subject to a specific condition that it be kept confidential,that information shall not be discloused to any other party to the conciliation.

And Model Law art "9" states that: Unless otherwise agreed by the parties, all information relating to conciliation proceedings shall be kept confidential except where disclose is required under the law of for the purpose of implementation or enforcement of a settlement agreement.

Should the mediator keep transcripts of the proceedings?

Modern methods of computer-aided transcription allow for a virtually instant record in hard or soft copy,as Art 33 of the Egyptian Arbitration Law provides that a record process-verbal should be made of each meeting, and acopy of it should be delivered to each party unless both parties agree otherwise.

this is neccesary in arbitration proceedings, but in mediation the parties are free to decide wether to keep transcripts or not,the parties decision depends on the need to record in regard to the parties situations.

If the mediation fails to reach a solution, all transcripts and records will be worthless, and cannot be presented to court as an evidance, unless the parties agree on that in any time.

The freedom of the parties to choose language is restricted by knowing it,so that the language of mediation shall be the one fluent to both the mediator and the parties, and this will be the language of written statements, memos, oral pleadings, meetings, discusions and all communications transmitted, translation will be uneffective if the mediator and the parties knowing the same language.

Mechanism of mediation work:

After the mediator gives a definite acceptance to the mission,he makes a realistic assessment and sufficent commitment,the parties have to give him the necessary information and related documents.

The mediator-unlike arbitrator - may engage in ex-part communication with the parties regarding the facts and the merits of the case,taking into considration that he is at the same time capable of being impartial in his state of mind.

The mediator -unlike arbitrator- go further with the dispute without involving in judicial evaluation of the evidences,even if he is a lawyer.

The mediator should be open minded to views submitted by both parties,listen carefeuly, not favorably dispose to either party, kindly with both, but they must not allow this to override their conscience and help them to submitted a better case and evalution supporting te parties.

The mediator can help evaluate and facilitate the parties' case without legal reasoning, by separating the good justifications and and solid points from the unjustified ones.

The parties may authorize the mediator to settle the conflict by "Solh",it depends upon what he thinks as just and fair, he is not demanded to invistgate evidence even if he is a lawyer,or base his verdict upon evidence,the award would not be binding on the parties unle ss they agree to it.

The arbitrator also authorize to settle the dispute as a mediator,as Art 41 of the Egyptian Arbitration Law incorporate settlement terms in an award,which states that "If the parties agree, during the arbitral proceeding,on a settlements ending the disput,they may request that conditions of the settlement be evienced before the arbitral panel,which must in such case issue a decision containing the conditions of the settlement and terminating proceedings.Such decision shall have the force of an arbitral award as far as execution is concerned".

Voluntary termination of the mediation proceedings:

The mediator completes his mission when the parties reach a final settlement to their dispute, and also he fulfils his work when the parties fail to agree,this ends the role of a mediator,then cease to have any further authority.

The mediator cannot extend the deadline,even if he deems such extension necessary, unless both parties agree,otherwise declares that the mediation has failed.

The mediator is to declare to the parties, with written notice, if so agreed by the parties,otherwise either party will request the mediator to stop, such declariation shall be made in writing,and shall be notified to the parties the day after the end of the determined period.

After declaring that either settled or failed the mediator become "functus officio",and the powers given to him by the parties would be terminated.

The parties may-unlike arbitration - at any time agree to terminate the proceedings, no ristrictions are imposed to that effect.

If the mediator exceeds the limits of the mediation period,either party- notifing the other - may ask the mediat or the court, as the case may be, to declare that the mediation has failed and terminate the proceedings,either party may return to the court to continue.

Interim and partial settlements:

Preliminary decisions or solutions is an effective way of determining matters which could be resolved first, like the case in construction disputes or in continous contracts, which the interim settlement could save time and money for all the parties involved.

The parties may agree on issuing an interim or perliminary solutions,especialy when the relation still stands for continous work.

The importance and necessity of such interim settlement is to permit the project or the contract to continue.

Such interim settlement may be enforeced voluntary, the mediator not able to issue interloctory decisions, the parties can be declared enforceable by the court.

The mediator upon the parties agreement helping them to reach to a partial solution, this partial solution is an effective way of determining matters which could be resolved on steps, like the case may be in damages.

Making a decision:

The mediator completes his mission when the parties reach a final settlement to their dispute, and the mandate of the mediator will ends.

But a draft of the award made by the parties themselves, or their representatives.

If the mediatoris convinced by the parties situations, he is bound to be more persuaive than one who is merely doing what he sees as his duty towards the parties, although the mediator does not form his own view of the case,or put his own conclusion,It is invetable that he will try to work out a compromise with the parties to reach a settlement.

It is necessary to make deliberations between the mediator and the parties, helping the parties to reach their own determination.

Key evidence in suggested solutions:

The case has to be prepared, there is no jury trial,the mediation procedures are oriented in oral hearings, may be written pleadings would be exchanged, but they are devoted to preparing the meetings, thus not expected to be in full disclouser, to be detailed or have the documents or the exhibits attatched to them.

All details of the case mainly be pleaded at the oral meetings,unless they agree that this has been done in the written statements.

Cross - examinatiotn of witnesses by both parties, identify and disclosuer of documents in the possession of the other party are considered the most significant features of mediation,and the best method to test the crediability of witnisses and re-evalution of the parties positions.

Discovery of evidence which was not available to him,parties may give evidence as witnesses not under oath,and this will not be introduced to the court unless the parties agree.

The oral hearing and testiomony is the key,and nothing prevents the dependence on written submissions,In this regard mediation is very flexible, even if he has legal experiance,should not conduct his own inquries into the facts and legal issues.

Parties to mediation may choose either approach followed by the courts, in many instances the procedures adopted will depend on the background and experience of the mediator and the parties' advisors.

The Mediator is not involved in the court proceedings, before or after the settlement.

If the mediation process include parties from different legal systems,the procedureal patterns will reflect the harmonization of legal cultures depending on party autonomy which permits the parties and the mediator to benefit from harmonizing to realize procedural flexibility,so long as every party is having full opportunity to present their case,and be treated on equal bases with the other parties.

The court authority mediation decision:

The parties may agree with mediators to elimentary or interim measures, such measures may be enforeced voluntary, because the mediator not able to issue interloctory decisions.

Mediator dont have or need sovereign powers.

These measures made by parties not by the mediators,this will relay on the parties co-operational role to ensure the proper and efficent measure and procedures which to be conducted and to be enforced voluntary.

The parties may ask the court to issue interim measures of protection, because the mediator has no jurisdiction to impose interim measures.

These measures will enforced merely by the parties agreement.

otherwise the parties can be declared enforceable by the court.

The drafted award:

The mediation proceedings will end with a writtin draft, which will be final and binding upon the parties signing it.The parties undertake the responsibility to carry out the award without delay.

The court will render an award in accordance with the provisions of the article 25 of the code of civil and commercial procedures,and shall be enforceable in conformity with the present law.

The mediator gives different solutions and suggestions but,the task of making the award is to the parties themselves,the parties must reconcile their views sufficiently and delibrate to reach a drafted award.

The award may cover many points of the disputed matters including punitive damages, compensation costs, intersts, and specific performance.

After making aproposal signed from the parties, it should be submitted to the court to enforce:

The award may be enforced according to procedures in line with the provision of the law.

The court must not agree on the solution to order the inforcement, but the court control on the agreed settlement, and shall correct errors either in computation,clerical ortypographical,or any errors of similar nature,either c on its own initative,or upon the request of either party.

The draft of egyptian mediation law - which is not rendered yet - deals with the relationship between state courts and the mediator or mediation comittee, and regulate all aspects, in which the mediation is to be conducted,and the way in which the draft will be rendered as an award to be enforced.

In reality, most cases rarely occurs the need to relay on the cooperation of state courts, the parties co-operation produces voluntary enforceing in accordance with the mediation mechanism.

When the parties reject to execute a mediator's suggestion for decisions made by the parties,he might under certain circumstances,let another person or lawyer intervene to influence the decision-making consequently.

But the intervention of the lawyers in some cases, present at all the meetings follow the case closely, but passively until called upon to break the tie or formulate a compromise.

Any decision, settlement or reached agreement unless applied voluntary,is subject ultimately to the court control of the law as to order public and general condition,which in this respect the court has the final word.

Either party may resort to the court to ensure the proper and efficent measure to protect his rights, When the parties agree on mediation, this does not mean that they grant the court's power to the mediator.

The intervention of courts in mediation process is likely to take place at one of the three stages:

1- It may take place at the beginning of disputes arising, and stay the action to enable the parties to agree amicably.

2- During the actual course of mediation process,if it fails, or facing difficulties.

3- Following making an agreement to settle the disputes, to render an enforcable dicsion.

Conclusion:

Although mediation is not new, it becomes prefable because it has its own features, as a result of the huge development in international trade that the

world witnessed the last few decades, mediation increasingly express the international features of an amicable settlement, in both internal and international investment disputes.

Mediation have no effect to exclude of the jurisdiction,because of the importance of the personality of the mediator, it is desirable that the parties choose him themselves or bothe accept the candidate one. The parties are free to determine the number of mediators.

Mediation will succes where the parties have all joined together in a form of agreement which makes such a solution.

If the solution adopted voluntary,the potential problems of recognition and enforcement are avoided.

In mediation, it is important to distinguish between interests and rights, in litigations,disputes are resolved by reference to the parties rights,where as mediation is more imphasis on parties' interests.

The most experienced mediator allows the parties to choose-directly or indirectly - the suggested solution regardless his independence and impartiality, the parties acceptance of the solutions is necessary.

Without the parties co-operation in presenting the mediator with any information in connection with the dispute, the mediator may not be able to conclude his mission.

The mediator is under a duty to act impartially,and to help the parties to reach their own determination of the matters in a fair and unbiased manner.

It goes without saying that the mediator is not an arbitrator, he assists the parties to overcome their contedence and find asolution based on legal and objective justifications or, rather on factual and acceptable bases.

Refrences

1. M.I.MAboul-Enein,Peaceful Swttlement of commercial Disputes, 2005, p.38.
2. Richard Hill, Non Adversarial Mediation, Journal of International Arbitration, 1995, Vol.12, No.4.
3. Richard Hill,The Theoretical Basis of Mediation and Other Forms of ADR: Why They Work, Arbitration International, Vol.14, No.2LCIA, 199.
4. Mark E Appel, Partnerning: New Diminsions in dispute prevention and resolution' (1993) Arbitration Journal.
5. International Chamber of Commerce. Crossing the Line: Dispute Mangement and Dispute Avoidence through Partnering, International Chamber of Commerce conference, International Commercial Disputes:New Solutions? Bruxelles, 24, Oct, 1995.
6. Magallat Al Ahkam Al Adlia", Art 4 as the first codification of the major views of the Hanafi Doctrine in civil and commercial matters.
7. KORAN, Surah al-nisa,verse 35&128, they confer on the "HAKAM" the power of mediation, also Sura"Hujurat " verse 9.
8. ICCA Congress Series, No.1, December,1983.
9. Alan Redfern-Martin Hunter. Lae and Practice of Internartional Commercial Arbitration, Sweet & Maxwell, 2003.
10. Derek Kirby, Internatioal Commodity Arbitration, LPP, 1991.
11. Abdel-Homid Al-Ahdab, Arbitration in the Arab Countries, Kluwer Law International,1990.
12. Mustill & Boyd. Commercial Arbitration, 1982.
13. JOHANNES TRAPPE, Conciliation in the Far East, Arb Int, 1989.
14. Richard Hill, The Theoretical Basis of Mediation and Other Forms of ADR: Why They Work, Arbitration International, Vol.14, No.2, LCIA, 1998.
15. CARICA in Egypt offering such training programs in cooporation with intennational Bank.
16. The 6th Annual International Mediation Conference for Users of Mediation, to be held on November 10, 2015.

10/11/2015