

MEDIATION



Attorney Rabi Sfeir

المجلة
القضائية
سنة ١٩٧٧

From North Africa to the Middle East,
An overview of Mediation in the Arab
World

2023 - 08 - 24

INTRODUCTION

The practice of mediation in the Arab World goes back to a very long time. Traditionally, this practice of conflict resolution went under different names, many preferred using the terminology of conciliation, some were keen on calling it negotiation, whereas others simply called it by its Arabic term of “*Al Mousalaha*”. The denomination differed, yet the process was somehow the same with some specificities to each country. Some Arab countries were attached to the traditional and/or religious aspect of mediation, while others voted new laws and regulated this conflict resolution process as an alternative to their judicial system.

Not all mediation laws were drafted equal, some Arab countries adopted the international legislative direction whereby Mediation was considered as an independent alternative to conflict resolution, while other Arab countries integrated the process to their existing judicial system with some particularities.

Through this article we will go through an overview of the situation of Mediation in the Arab countries, starting with the African Arab countries moving towards the Near East (or Levant) to finishing with the evolving countries of the Arabian Peninsula.

I. Between traditions, customs, and innovation:

Mediation in the African Arab world

1 Morocco:

Mediation isn't a new concept to Moroccans. Since 1913, the process of mediation has been introduced into the Moroccan civil code “*The Dahir*” as a method to resolve conflicts outside courts. In 2004, when the Moroccan Parliament passed the reform of the Family Code, the process of mediation was considered as an important step of divorce proceedings. According to the new Code, the mission of a mediator aimed to facilitate communication between parties, help them resolve their divorce disputes and reach an acceptable agreement while preserving the relationship.

In 2007, Law number 05.08 published on December 6, 2007, modified the Code of Civil Procedure (CCP), creating a general framework for arbitration and conventional mediation. According to Article 327-55 and seq, conventional mediation was defined as “*a voluntary, amicable, and confidential process that takes place outside the judicial system*”; Mediation is therefore considered as an alternative for disputants to reach the best possible solution for their conflicts. Conventional mediation is implemented through the form of a mediation clause included in the contract aiming at preventing any future conflict, or in the form of a separate agreement aiming at solving an actual conflict.

Disputants may refer to mediation in all conflictual civil matters, unless provided otherwise by a legislative text (transaction, commercial, inheritance, employment...). Mediation can occur either prior to any referral to the judicial system or during the trial proceedings, and in this case the trial shall be interrupted until mediation is over.

Bound by the principle of confidentiality (Article 327-66 of Law 05.08), a mediator is an independent, impartial and neutral third person that **helps parties in conflict reach a negotiated and acceptable solution for their dispute.**

A mediator is a dialogue facilitator and as such he doesn't give nor suggest a solution especially that a mediator is not a conciliator.

Upon reaching a successful solution by both parties, the mediator prepares and signs alongside the parties an agreement or a transactional document. If mediation occurred during a trial proceeding, the transactional document shall be ratified and endorsed by the competent judge. If mediation wasn't successful, then the mediator delivers a signed document to the parties stating the non-successfulness.

Fifteen years later, the long-awaited Law number 95.17 was published in the official Moroccan gazette in June 2022. This new law created a separate and independent framework to conventional mediation and arbitration, as a consequence of the ratification of the Singapore Convention of February 17, 2022. The long-awaited law creates an attune framework for the recognition and the enforcement of the international settlement agreements resulting from mediation.

In fine, Morocco chose to regulate conventional mediation as an efficient independent alternative to conflict resolution.

2 Tunis:

In the actual status of the Tunisian Law, the concept of mediation is very unclear. Till date, no clear legal text that defines mediation exists. Unfortunately, few fragmentary dispositions related to judicial mediation confuse the concept of mediation with the process of conciliation as a result of the wordings of "amicable conflict resolution".

3 Algeria

Mediation, in its modern definition, saw the light in Algeria with the Law adopted on February 25, 2008. This Law amended the Algerian Code of Civil Procedures organizing mediation rules and principles (Article 994 and seq). In some Algerian regions, the new mediation legal provisions did not put a term to the implementation of local secular customs.

In fact, in some of the tribal Algerian regions, local Chiefs resolve conflicts by implementing the customary Law and Principles based on the ideas of reconciliation, parties' dignity and the restauration of Honor. In other community regions, customary law is implemented through a committee of wise individuals named "*the Kabyle*" or through traditional tribunals. This customary law is usually known by the name of "*The urf*".

Article 994 of the recently amended Algerian Code of Civil Procedures (CCP) defined solely the judicial mediation as follow, "*in all matters, except family disputes, employment lawsuits and cases that would likely prejudice the public order, the judge should propose mediation to disputants to solve their conflicts. If both parties accept, the judge appoint a mediator to listen to them and help them bridge their different perceptions in order to find a solution for their conflict.*"

According to the CCP, the mediator has the obligation to remain neutral, impartial, and independent during every mediation session. If by the end of the mediation session(s) both parties reach a solution, then the mediator will write and sign with both disputants the mediation minutes and send it to ratification. Once ratified by the Judge the minutes or agreement shall be considered as a final judgment.

In 2010, the Center of Legal and Judicial Research, reunited 140 mediators and established the National Association of Algerian Judicial Mediators.

Despite being an additional alternative to conflict resolution, judicial mediation managed to prove its efficiency in resolving a big number of conflicts between parties.

4 Egypt

Egyptian history includes many embracing examples of Mediation; From ancient pharaonic times till present days, religion in Egypt played a major role in encouraging the recourse to mediation whereby mediation is referenced clearly in Muslim and Christian texts. Along this religious tradition to use mediation as a technique to solve conflicts, the elderly family culture maintains a considerable impact on conflicts resolution; Quarrels, disputes even criminal conflicts, are still settled and resolved in the Egyptian countryside by the “Authority of the Elderly”.

Nowadays, the Egyptian Judiciary system suffers from an oversaturation of its courts; Alternatives to Dispute Resolution proved to be a possible substitute to reduce the number of disputes referred to Egyptian courts. Moving towards such an objective, the Ministry of Justice worked on a draft bill aiming to incorporate mediation among the judicial court procedures, making mediation a mandatory pre-requisite before referring any dispute to the relevant court be it Civil, Administrative or Criminal courts. Unfortunately, till date, the bill remains work-in-progress and no Mediation Law has been adopted yet.

Despite the absence of a clear legislative text regulating the process of mediation, many ADR centers have been established in Egypt, offering a private process of mediation as an extra judicial alternative to conflict resolution, alongside arbitration and conciliation.

II. Mediation in the Middle East:

1 Lebanon

Traditionally, the practice of mediation was very common in Lebanon; Whenever two individuals were in a conflictual situation, they always sought the help of their clan or religious leaders to solve their quarrels. This primitive form of mediation was known by “*Al Mousalaha*” or “*Al Soleh*” and was a common recourse among Lebanese, before the instauration of the Lebanese Judicial System.

In 1933, the Lebanese Legislator legalized, in the former Code of Civil Procedures (CCP), the process of “*Mousalaha*”, creating alongside the Court of First Instance the role of Judge of Conciliation known as “*Kadi al Soleh*”. The Judge of Conciliation had the specific mandate to conciliate the disputants before the settlement of their disputes by the competent court. If the said “*Kadi al Soleh*” succeeded in conciliating the parties, he used to document the conciliation terms in the judicial minutes of records. Once ratified, the conciliation terms were considered as a final enforceable ruling. Half a century later, in 1983, the new Lebanese Code of Civil Procedures abolished the role of “*Kadi al Soleh*” and delegated its conciliation mission to the ruling Judge examining the case.

Thirty years later, on October 10, 2018, the Judicial Mediation Law was adopted. The first article of the new law defined the process of Mediation as an alternative to conflict resolution, entitling parties in conflict, to seek the assistance of a third impartial person to help them communicate and encourage them to negotiate in order to

find a solution to their dispute. Accordingly, Judicial Mediation is the process by which a Judge refers the disputants at any time during court proceedings, upon their consent, to mediation. Unfortunately, the multiple Lebanese crises delayed the issuance of the implementation decrees of the Judicial Mediation Law, putting at halt the use of the Judicial Mediation. This Law regulates the conduct of mediation sessions, determines parties' obligations, and includes a series of articles that set forth a code of conduct for mediators.

Four years later, the Lebanese Parliament adopted in April 2022, the Conventional Mediation Law #286/2022. Encouraged by The Singapore Convention, this new law gave to any party the right to appoint privately a professionally certified, independent, impartial, and neutral third party, the mediator, to help them communicate and find a solution to their conflict.

Today, the Judicial and Conventional Mediation are in dire need of coming out to the light and be presented as available alternatives to dispute resolution, in a country torn by economic, financial and social collapse, especially when the Judicial system is halted with recurrent strikes of Judges, court clerks and even lawyers.

2 Jordan:

Jordanian Mediation is a special form of mediation since it is largely court- based.

In 2006, the “Mediation in Resolving Civil Disputes Act”, established a Judicial Management Centre at the Court of First Instance, known as the “Mediation Management Centre”. The said center is formed out of “**Mediation Judges**”. When a civil lawsuit is registered at the Jordanian court of First Instance, the registrar asks the disputants if they want their case to be reviewed by the Mediation Management Center. If the parties approve, the Judge refers the dispute to the “**mediation judge**” to solve the dispute amicably. The first instance court judge may approve the appointment of a private mediator.

After meeting with the parties and discussing the subject matter of their lawsuit, the Mediation-Judge will evaluate the evidence, give his opinion, and present legal grounds that facilitate the session of the so-called mediation. Once the Mediation-Judge reaches a settlement with the parties, he submits it for ratification by the First Instance Court Judge. Once ratified, the submitted settlement will be considered as a final court decision.

The 2006 Mediation Act accepts private mediation and allows parties to choose their own mediators, but this form of private mediation often lacks the enforcement mechanisms provided by court-based mediation. With time the court-based mediation system was perceived as a non-reliable and inefficient alternative to dispute resolution.

In addition to this court-based mediation system, many efforts were deployed on expanding the recourse to mediation outside the judicial system. In fact, in 2016, a new bill of law suggested the settlement of cases outside courts to reduce their caseload, by establishing an independent mediation center where disputants could meet with a neutral impartial third party to help them solve their conflict. Unfortunately, this bill was not passed by the Parliament despite the signature of the Singapore Convention.

Many Jordanian legal activists consider that there is a strong need to establish an efficient mediation system to reach an effective alternative to dispute resolution.

3 Palestine:

Mediation in Palestine, as its Jordanian neighbor, has a special form since it is largely court- based. The Law number 32/2021 regulating “Mediation in Civil Disputes” established a “Mediation Management Cell” at the Court of First Instance. The said cell is formed out of “**Mediation Judges**” chosen by the High Judiciary Counsel among judges. The High Judiciary Counsel may as well designate “**Private-Mediators**” among retired judges for this task. Mediation is conducted through the same process applied in Jordan. Palestinian mediation law gives contracting parties the possibility to designate a mediator under a mediation clause, on the condition that this designation is ratified by the Judge of First Instance. Mediation in Palestine seems to be highly appreciated among ADR specialists.

III. Mediation in the Arabian Peninsula Countries

1 Qatar

The idea of settling conflicts throughout mediation is not a new concept to the Qatari legal circle. In 2005, the Qatar International Court and the Center of Dispute Resolution were established; these two entities laid the foundation for the mediation rules and the idea of resolving disputes in an amiable process.

According to the Center rules, Mediation was defined as “*an optional process through which an amicable solution is reached between disputants with the help of a neutral mediator*”. Unfortunately, the option of resolving conflicts through mediation wasn’t considered due to the major concern that any party could refuse to abide by the settlement agreement.

On November 4, 2021, aligning with the international approach of mediation legislations, Law number 20/2021 was issued to regulate mediation in settlement of civil and commercial disputes. This Law comes along with the signature of the Singapore Convention.

The first article of the Qatari Mediation Law defines mediation as an alternative process to disputes solving. Parties can resort to mediation voluntarily through an independent mediation agreement or a clause of mediation. Mediation law adopts both forms of mediation: the conventional and the judicial mediation. Courts do not have the right nor the power to oblige parties to resort to mediation, since it is conditional of their approval.

In order to establish an efficient process of mediation, the law deters parties from sidestepping their mediation agreement, fines any party that refuse to abide by the final settlement agreement, creates expedited confidential procedures and asserts highly qualified and professional mediators (i.e., neutral, independent, and impartial).

In fine, it is likely clear that the Qatari mediation law encourages parties to settle their conflicts through mediation whether it is through its conventional or judicial form.

2 Kuwait:

Till date, Kuwait did not adopt a law that regulates mediation. During the last twenty years, mediation was unofficially used as an alternative to settle divorce disputes. Presently, we observe a growth in Alternative Dispute Resolution (ADR) consciousness and in the need for Kuwait to adopt mediation as an ADR for its advantages in civil, commercial, and international conflicts.

However, despite the necessity of regulating mediation, arbitration remains the commonly used alternative to disputes resolution.

3 Bahrain:

Bahrain was an avant-gardist in the development of ADR legislations since mediation has been informally used among Bahraini as a method to resolve disputes and restore peace.

Ten years after the establishment of the Bahrain Chamber for Dispute Resolution (ADR center), a Mediation Law was adopted on October 13, 2019, by Royal Decree number 22/2019 that defines mediation as the process whereby disputants seek the help of a third party, named mediator, to settle their dispute. This law enshrined two forms of mediation: judicial and conventional. Noting that mediation is considered conventional whenever parties agree to solve any of their conflicts through mediation in vertu of a mediation agreement or via a mediation clause; whereas mediation is judicial whenever Court refers disputants, upon their approval, to mediation for the settlement of their dispute.

The Royal Decree specifies parties' obligations and responsibilities and sets forth ethical standards for mediators and determines their duties. Accordingly, the mediator's role is to facilitate communication and promote mutual understanding between disputants, allowing them to reach an agreeable settlement. Mediators must be chosen from the list of certified mediators established by the Ministry of Justice.

Mediation is applicable to all domestic and international civil and commercial disputes. The recent amendments of the Code of Criminal Procedures allowed Bahrainis to seek mediation in some criminal lawsuits such as breach of trust crimes, petty theft, issuance of a bounced cheque or other misdemeanors.

Going with the international mediation legislative trend, Bahrain's Mediation Law recognizes the enforceability of mediation settlement agreement as a direct result of the Singapore Convention. Mediation is believed to have a promising future in Bahrain.

4 Saudi Arabia:

In 2014, a Saudi minister council decision established the Saudi Center for Commercial Arbitration (Center). The said decision aimed to organize alternatives to disputes resolution through arbitration and mediation in accordance with Saudi laws, regulations and procedures principles in force.

The services of the Center were closely inspired by Sharia principles and are aligned with international and professional standards. The Mediation Rules applied at the Center were directly inspired from the American Arbitration Association- International Dispute Resolution Procedures (AAA-IDRC).

In April 2020, a royal decree created the Commercial Courts Law, encouraging through several of its provisions the use of alternatives to disputes resolution, imposing mandatory conciliation and mediation under certain circumstances.

Recently, Saudi Arabia proposed a draft bill that regulates mediation as an alternative to conflict resolution. The said bill defines mediation as a confidential, non-judicial system, more efficient and cost-effective process, through which, parties in conflict agree to seek mediation to solve their disputes with the help of a neutral, impartial third party: the mediator.

Unfortunately, and despite the signature of the Singapore Convention, Saudi Arabia didn't adopt, till date, a law that regulates Mediation and set a legal sturdy framework to the ADR mechanism.

5 United Arab Emirates:

Conciliation and amicable resolution are deeply embedded in the Emirati culture as it is recommended by Sharia law.

Back in 2009, Dubai Law number 16/2009 established The Centre for Amicable Settlement of Disputes. The Center's mission is to attempt mediating conflicts before their referral to courts. Unfortunately, parties were reluctant to resort to the process of mediation as proposed by the Center due to the lack of a clear legal framework for the process and the lack of a confidentiality guarantee concerning the exchange of information during the so-called mediation sessions.

In April 2021, the UAE Government passed the Federal Law number 6/2021 on Mediation for the Settlement of Civil and Commercial Disputes. This Law sets out a clear and sturdy framework for the process of mediation, along with a code of conduct regulating the mediator's role and duties.

The law defined Mediation as a "tool" to seek an amicable settlement of civil and commercial disputes with the help of an impartial, neutral and free from any bias third party, known as the Mediator. Mediation can be *"conducted in all disputes where conciliation is possible, without contradiction to the other legislations in force or the public order or public morals of the State"*. According to the text of law, mediators shall be appointed from the "list of mediators" established at the Center of Mediation.

The UAE Mediation law provides two regimes of mediation, namely the 'Judicial' and the 'non-Judicial' mediation. With regards to judicial Mediation, the law allows courts, at any stage of the trial proceedings, to refer disputants to mediation, whether requested directly by them or decided by court for the purpose of implementing a pre-signed mediation agreement. If the parties reach an agreement, the mediator shall submit the settlement agreement along with his report to the competent court for ratification. Once ratified, the settlement agreement is considered irrevocable and equally authentic to a court judgment. If parties don't reach a settlement, then the mediator shall submit to court his report including the reason of failure.

For non-judicial Mediation or Ad-hoc Mediation, the law stipulates that parties can directly recourse to mediation to solve their conflicts before filing any lawsuit. In this case parties should approach the respective mediation center and seek resolution of their conflict under a mediation agreement, or a clause of mediation inserted in their civil or commercial agreement. If the parties reach a settlement, the settlement agreement shall be - upon ratification by the supervisory Judge at the Center of Mediation- deemed binding, irrevocable and behold a writ of execution.

In both mediation regimes, the ratification of the competent court, in judicial mediation or the center supervisory Judge, in a non-Judicial mediation, are considered as a security for the parties to benefit from the confidentiality of their communications and the enforceability of the settlement.

The introduction of the Mediation Law has paved the way to the development of the amicable conflict resolution mechanism in the UAE.

CONCLUSION:

Mediation in Arab countries gained momentum and importance in the mechanism of dispute resolution. In fact, several Arab countries acknowledged the need necessity to develop efficient alternatives to dispute resolution (ADR), thus adopting new legislations that create an attune framework for Mediation, in light of the recent international developments in that area.

On the other side, some Arab countries are wading through obsolete conflicts resolution techniques, integrating mediation to the judicial system, and even confusing this voluntary, independent, and transformative process with other disputes resolution methods. A lot needs to be accomplished, especially with individuals and their mediation consciousness. Whether Judicial, Conventional, or of eclectic special form, Mediation will eventually change the course of Conflict Resolution in the Arab World, due to its traditional mediation readiness that will lead to a highly peaceful social consensus.