MEDIATION AS AN ALTERNATIVE TO COURTS IN THE SETTLEMENT OF CIVIL AND COMMERCIAL DISPUTES

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Abstract - The general principle is that the solution of civil and commercial disputes shall be through the judiciary. The judicial structure needs specialized agents from different activities to assist the judiciary in deciding on But because of the slow and complex nature of the judicial proceedings, the dispute may take a long time and more costs, such as experts, lawyers, judicial fees, and other expenses, as well as hatred between the individual For the logical and legal reasons, that the judiciary seeks to reach the judicial truth, which may be concurrence of the truth and may be real, and may be different The mediation came to solve these problems, through the third party to study the dispute and develop a solution and settlement that satisfies the parties to the conflict. The parties agree to appoint a person called the mediator whose mission is to limit the dispute through communication between the parties, individually and collectively, in order to bring each party closer together so that they meet and agree on a compromise between them. Mediation is therefore a voluntary process by its very nature. The mediator can not make a firm decision on the basis of the dispute. Rather, his role is limited to trying to bring the views of the parties or parties closer together and to offer alternative solutions to them without imposing on them.

Index Terms - Dispute, judicial, Mediation, solution

I. INTRODUCTION

The general principle is that the solution of civil and commercial disputes shall be through the judiciary, But alternative means emerged, most notably mediation, Mediation takes many forms: simple mediation approaches the conciliation system in the presence of a person who seeks to bring the views of the contestants closer. There is mediation in the form of a fictional judiciary, which is the formation of a body headed by the mediator includes agents from the parties to the conflict to reach an acceptable level of the parties. There is the advisory mediation in which the parties to the dispute request a lawyer or expert who has first consulted the subject of the dispute and then ask him to intervene as a mediator to resolve the dispute. There is arbitration mediation in which the parties agree that the mediator will perform arbitration if his mediation mission fails and there is finally the judicial mediation which is in force in the Anglo-Saxon system where the courts before the settlement of the dispute offer a proposal to the parties to resort to mediation. Mediation is characterized by flexibility and discipline so that each party presents its applications to the mediator and the mediator with his expertise and skills to propose satisfactory settlement solutions for all parties who wish to maintain the continuity of their relations and transactions with each other and respect their reputation and business name. Mediation as an alternative to the judiciary to solve civil and commercial disputes has been a general idea in societies since its inception, but it has not crystallized as a legal idea except in modern civil and commercial laws. It is a modern legal idea that has not been adopted by all contemporary laws. It has been codified in most modern legislations at the level of international conventions and domestic legislation. Civil laws have also regulated the peace from the beginning of the legislative movement. The mediation has been codified in many countries, but it has not been codified. In a detailed and extensive form such as arbitration and reconciliation.

II. THE CONCEPT OF MEDIATION AND ITS LEGAL DEVELOPMENT

Mediation is an alternative method of settling civil and commercial disputes and legal processes that provide a kind of dialogue for the parties to the conflict to meet and dialogue and bring the views closer to a neutral person who brings the views closer to reaching an amicable solution that satisfies all parties to the conflict. In the personal status laws of the Arab countries, the Iraqi Personal Status Law of 1959 and the Jordanian Personal Status Law of 1976 referred to the mediation and referred to the procedures that must be followed in mediation and specified its conditions. An example of these persons with experience, integrity and the ability to hold reconciliation, and many Arab countries stipulated a set of conditions must be available in person mediator such as the United Arab Emirates, Egypt, Kuwait, Libya, Algeria, Morocco and Tunisia.

A. Definition of mediation

The definition of mediation is an alternative mechanism for litigation, aimed at resolving the dispute, through the intervention of a neutral person, called the mediator, who helps the parties to the conflict negotiate, in order to reach a settlement of the dispute.[1]

It is also known as a "procedural dispute resolution technique through which a neutral, independent and impartial party can claim to help the adversaries resolve their problems through dialogue and negotiation to reach an agreement that suits them." Therefore, the idea of a new mediation on Arabian law and tribal Islamic society is an optional and consensual means, necessitating an open dialogue on an equal footing and self-determination. The mediator's role is limited to facilitating communication and dialogue between the parties and is useful and practical to the oppressed who They want a quick solution to the conflict between them.

Article 3, paragraph 3, of the 2002 UNCITRAL Model Law on International Commercial Conciliation defines mediation as "any process, whether referred to as conciliation or mediation or in other words of similar meaning, in which both parties request another person or persons (conciliator or conciliator)) To assist them in their quest to reach an amicable settlement of their dispute arising out of a contractual relationship or other legal relationship or related to that relationship and the conciliator has the power to impose a solution to the dispute on the parties "

As defined by Article 1 of the Arab Center for Settlement of Disputes in Jordan as "the means by which the dispute can be sought without any authority of the mediator or conciliator to impose its decision in the dispute by bringing together views and providing advisory opinions that provide access to the solution by this means." In general, mediation is one of the mechanisms of alternative dispute resolution solutions offered in many countries and includes various forms, including "judicial mediation, private mediation, mediation"

It aims at resolving the dispute amicably through conciliation and reconciling the litigants with more flexible procedures to avoid litigation proceedings before the courts. This reduces the burden of accumulating cases in the courts and achieves the interest of the litigants in ending the dispute in the easiest and quickest way possible at the lowest possible cost. The mediator seeks to help the parties to the conflict to meet and dialogue and to bring together views and evaluate them to try to reach a compromise acceptable to both parties.[2]

B. Brokerage properties

Mediation has become a prominent place in the legal and economic thought at the global level of the mediation of the characteristics of the distinction from the traditional means of resolving differences, and these features become acceptable to resolve disputes, in terms of reducing the burden of the judiciary, and its speed to resolve disputes and flexibility and confidentiality, Friendly relations between the parties to the conflict. These characteristics can be summarized as follows:

First: the speed in the separation of disputes

Speed is a feature of the modern era, and there is no doubt that slow justice is a denial of justice. Therefore, the process of mediation serves, in large measure, the speed at which disputes are resolved. This is demonstrated by the legislator's determination of the period during which mediation is accomplished . The legislation regulating the mediation determines the duration the duration of the parties to provide the mediator with documents relating to the dispute from the date of referring the dispute to mediation in order to ensure the speedy resolution of disputes, because the delay in resolving disputes goes to the rights of the conflicting parties and misses opportunities that may not be compensated Especially in the commercial field, especially if their dispute is not resolved after a long period of economic changes

Second: The Code of Procedures:

Perhaps the most important reason for recourse to alternative dispute resolution methods is the existence of traditional methods and the formal formalities complex, the solution of the dispute through the judiciary contains and includes several things must be followed under the burden of invalidity, which constitutes restrictions on the litigants, in mediation there is no procedure resulting in invalidity, so the mediation aims to follow any action that could lead to a satisfactory solution For the parties to the dispute, the mediator is not obliged to follow certain procedures as long as the objective is to bring the parties to the solution they desire.

Thirdly: a non-binding means for the parties to the dispute (any party have to right of refuse mediation and resort to the judiciary):

The parties to the dispute in civil cases may resort to disputes through mediation, but recourse to mediation is not compulsory. Any party has the right to refuse mediation and resort to the judiciary and to proceed in accordance with the law. The parties to the dispute derive this right from the Constitution , The right to litigation is a constitutional right associated with human character, and the realization of this right that one must not be forced to appear before the judge

The mediator can not oblige the parties to settle the dispute through mediation but must make an effort and use effective communication methods to settle the dispute in whole or in part, as appropriate.[3] The parties to the mediation dispute may at any moment withdraw from the mediation process and return to uphold all legal rights and defenses before the judiciary, without any effect on the mechanisms of alternative solutions to litigation proceedings, as well as a process that allows the intermediary to assess the legal positions of the litigants.[4] Article 13 Paragraph (a) Of the WIPO Mediation System, the mediator may settle the dispute in the manner he

deems appropriate without having the authority to obligate the parties to the dispute to accept it.[5]

Fourth: Mediation offers satisfactory solutions for both parties:

The mediation aims to achieve balance between the parties to the conflict), where a third party intervenes and neutralizes itself, and sets itself between two adversaries, moving them from adversity to conversation.[6]

If the parties to the dispute agree on the mediator's report, they shall be bound by them, and they shall not have the right to review the court in what has been waived and agreed upon in the mediation. The Jordanian legislator decided in Article (8) of the Jordanian Mediation Law that: "The mediation procedure is confidential. It may not be invoked, or any concessions made by the parties to the dispute, before any court or any body whatsoever."[7]

Inasmuch as the parties are not obliged to mediate, they thus maintain friendly relations between them, which is difficult to achieve when the dispute is resolved arbitrarily or through arbitration. It is also a voluntary process, and therefore the final decision is not binding on the parties to the dispute. Unless they sign the mediation agreement.[8]

Mediation creates a mutually satisfactory solution. The judiciary often leads to a judgment in which one party to the conflict can be described as a loser and the other a winner. In mediation, the parties to the conflict emerge, each of whom is convinced of the result that he is neither a winner nor a loser.

But the mediation agreement must be legitimate. Otherwise it is void, that is not contrary to public order and public morality, if it was agreed between the lessor and the tenant to keep the rented premises as a place for the practice of vice, the agreement was null.[9]

Fifth: mediation leads to reduce the burden on the judiciary:

Since mediation is a means of resolving conflicts far from the courts, it will undoubtedly contribute significantly to reducing the burden of the judiciary by resolving disputes that would have been resolved by litigation, especially if we know that the volume of cases before the courts is constantly increasing, That the mediation of the dispute to resolve and resolve through it will avoid the presentation of these disputes to the judiciary, adding that the mediation gives a final solution to the conflict, which also leads to not to present this dispute to the appellants and therefore the application leads to reduce the burden on the judiciary.

III. HISTORICAL DEVELOPMENT OF MEDIATION

Man has known mediation since the emergence of disputes and rivalries among the members of society, so this method of conflict resolution has its roots in the ancient civilizations. In the Bible, there is evidence that Christ is the mediator between God and man. In Timothy's commentary, There is one God, and one mediator between God and man, and this mediator is Jesus Christ, who gave Himself to us all, to bear witness in the right time "

Islam has called for mediation and urged the Islamic Sharia law to follow in resolving disputes arising between individuals. Therefore, Islam urged the issue of reconciliation between the opponents, and called on the believers to intervene to reach the solution to the parties to the conflict, in the Qur'an and Sunnah of the Messenger of Allah Muhammad. In the Holy Quran, there is something that urges reconciliation. Allaah says in the Qur'aan: " If you expect the development of Conflict between spouses, determine a ruling from the family of the wife and a ruling from the family of the husband and if he wants reconciliation God bless them".

Also said:" The believers are brothers, you have to Corrected between your brothers and fear God, that you may be merciful. "[10]

A. Mediation in the US system

Where the United States is one of the countries that relied on mediation in civil disputes, mediation in the United States has played a major role in resolving conflicts outside the judicial system in America because of the complexities of the judicial system and the high costs of litigation, especially lawyers' fees, because lawyers in America Are take their fees commensurate with the hours spent in the judicial decision in the dispute. In the first instance, the mediation of American laws in relation to the resolution of labor disputes began with the enactment of the "Addiction" Act of 1898. The committees of the mediation were formed to deal with labor issues by the promulgation of the Railway Act of 1926.[11]

Also In the case of family disputes in the United States, the Association of Magistrates and Family Courts was established to promote reconciliation in family matters, as an alternative to litigation, also established the Family Mediation Association and the Family Mediation Academy, were established. Until mediation in the United States became mandatory in family matters, in particular marriage and divorce.

B. Mediation in the French system

The French Code of Procedure issued in 1806. In Article (48) that any subject of reconcilable dispute, in which he filed a petition to open a lawsuit for litigation, is acceptable only if preceded by an initial attempt at reconciliation, before the Magistrate's Court. It follows that the French legislator forced opponents to seek alternative means of resolving the dispute before being brought to justice. Also the General Assembly of the United Nations issued on 29

November 1985 its resolution No. 34/40, which states in its article VII that "informal mechanisms for the resolution of disputes, including mediation and arbitration The occasional means of administering justice or the use of local practices where appropriate to satisfy and remedy the victims. "If the purpose of this conference is to discuss the general problem of amicable methods .[12]

IV. COMPARATIVE MEDIATION EXPERIMENTS:

We refer to some of the comparative experiences in which the mediation succeeded:

A. Experience in the United States of America:

B. Florida, the first state to adopt alternative means of conflict resolution, is a pioneering experience based on practical experience and practice without the laws. This experiment was extended to other states. The percentage of cases resolved by mediation and other alternatives was 95%, with the period of settling the dispute ranging from 4 to 6 months.

C. Experience in France:

The Paris Bar Association announced in 2013 the year of mediation and the importance of this event is undoubtedly reflected in the selection of mediation as the most important alternative to resolving commercial disputes. The amendment, which was defined in the text of Article 131 of the Civil Procedure Code contributes through its content to involve parties in making solutions to their disputes, The success rate of cases solved by mediation was 96%.

D. Experience in England:

In this country legal mediation is not organized but it has succeeded through field and applied practice. A solicitor in England is obliged to seek mediation before going to court and has to discuss with his clients the possibility of mediation under the pretense that he is violating his professional duty. The success of mediation in England was between 70 and 80 per cent, with cases dropped by 34%.

E. Experience in Belgium:

Belgian law expressly provided for mediation, arbitration and judicial mediation. It was more precise and detailed than the rest of the other legislations, especially the French legislation.

The law regulating mediation was issued at the beginning of 2005. The Civil and Administrative Procedures Code 08-09 of 25 February 2008 provides for mediation as an alternative to dispute resolution and is provided for in Article 12 of Article 994 to Article 1005. However, this law is exempted from judicial mediation of family matters and labor cases As they have their own procedures, while family and labor disputes are the most in need of judicial mediation.

V. LEGAL PROCEDURES FOR MEDIATION

Mediation is an advanced means of resolving disputes between the parties in friendly ways, by agreeing without resorting to the judiciary. The parties appoint a person called the mediator whose task is to limit the dispute through continuous communication between the parties, in order to bring each party closer to the other. Mediation is therefore a voluntary process by its very nature. The mediator can not make a final decision on the basis of the dispute. Rather, his role is limited to trying to bring the views of the parties closer together and to offer alternative solutions to them without imposing any of them on them.[13] Mediation is an optional and flexible form of conflict resolution through which a neutral third party assists parties in working towards a negotiated settlement of their dispute. The parties retain control over the decision whether not to make a settlement under any conditions. Mediation is a quick, confidential and low-cost service, and is an excellent opportunity to maintain commercial and civil relations between the parties and give them maximum control over the mediation and its results. To find a solution to the dispute it without being bound by the procedures set out in the Code of Civil Procedure, but this does not mean that there are no restrictions or procedural assets to be complied with by the mediator, but the mediator must do his work according to specific assets that help him to get the parties to a mutually satisfactory solution.

A negotiated leading to a resolution of the dispute in the shortest time will have an agreement in the self-report if the mediator seeks to bring the views of the parties together to reveal to the mediator their basic interests and concerns so that he can find satisfactory solutions for all parties.) The Evidence Act regulates the issue of evidence in civil cases and establishes certain methods of proof, and therefore the judge can not rule on a matter, except on the basis of the evidentiary rules established by law and in the specific legal ways.

The mediator is not subject to these rules and does not comply with the evidence specified by the law; he may render his judgment based on other than the evidence established by the Evidence Act to establish the issues on which the judgment may be based. Obtained by non-parties to the dispute. But all this is constrained by not to violate public order and public morals. All proceedings and deliberations during the mediation process shall be conducted in strict confidence and shall not be disclosed or invoked before the courts or any other body, even if certain rights are waived, unless they are contrary to public order and public morals.

The legal procedures that the mediator must consider are:

F. Initiate mediation procedures and keep the secrets of the litigants

The first is a session of acquaintance, in which the broker identifies himself, asks the opponents to identify themselves, explains his role as intermediary, and affirms his neutrality and confidentiality of the proceedings, and then shows them the importance of mediation and the need to trust him, The parties in the broker itself are more important than their trust in each other.[14] The mediator must preserve the secrets that he is aware of, because these secrets have reached his own person by virtue of his work as an intermediary, if not for what he has obtained. Therefore, the area of secrets that must be preserved includes the information and documents received as mediator but the secrets that may reach him not as an intermediary, but as a normal person is not obliged to maintain them.

G. Achieving consensus between the parties to reach an agreement that satisfies the parties to the conflict

The role of the mediator is to correct the situation by asking questions about the authorized facts. The answers he receives may lead to the extraction of other vague facts, or the parties ignore them, which allows the formation of new perceptions of the mediator to help him resolve the dispute the parties. By facilitating means and ways of discussion between the parties to the conflict, by bringing together views and opinions and by enhancing the sense of legal responsibility of the parties to the conflict. And support the importance of resolving the disputed issue by placing the mediator in a range of legal alternatives, and appropriate to resolve the dispute. And to contribute to maintaining the independence of each party to the conflict. If the parties agree to terminate the dispute, this is a success for the mediator in his work. The mediator shall submit a document called the mediation agreement signed by the mediator and the parties to the dispute.

However, this agreement may be entirely conducive to a full resolution of the dispute and may in part lead to the resolution of certain issues, while others remain without agreement. If the agreement is fully, the record shall be transmitted to the court for ratification by the judge. The particulars agreed upon and signed by the mediator and the parties. The file shall be referred to the judge. The parties shall be bound by the signed agreement. The particulars that have not been agreed upon shall be referred by the judge to the competent court for final adjudication. The judge when ratifying the mediation agreement, does not ratify it as a functionary as a judicial authority, but it ratifies it as a state authority.[15]

H. Implementation of the mediation agreement and the period necessary to settle the dispute by mediation

If the mediator reaches a settlement of the dispute, he shall submit a report to the magistrate or magistrate of the peace, accompanied by the settlement agreement signed by the parties to the dispute, for ratification as a conclusive judgment not subject to any appeal.

If the judge approves the mediation agreement, the implementation phase follows, and the implementation of this agreement is voluntary in principle, because the parties have agreed to it, and are therefore more able to understand and respect it.

Many of the laws regulating mediation set a specific period for the mediator to reach a solution to the dispute, including the provisions of the Jordanian Mediation Law No. 37 of 2003. Provided that the mediation sessions shall be held in the presence of the parties of the litigants and their legal agents. The mediator shall, within a period not exceeding three months from the date of referring the dispute, to:

1. Appointment of the session and notification of parties to the dispute and their agents and deliberation as required.
2. Meeting with the parties to the conflict and their agents and dealing with them in the subject matter of the dispute.
3. To take whatever he deems appropriate to bring the views closer for the purposes of reaching an amicable solution to the dispute.[16]

The Tunisian legislator also stipulates that the intermediary in the field of banking shall undertake the complaints filed against him no later than eight days from the date of the arrival of the request for mediation, and shall propose the appropriate conciliation solutions not later than two months from the date of the undertaking.

I. The mediation process ends

Mediation ends in one of the following cases:

The first case is the failure of the mediator to settle the dispute amicably between the litigants. In this case, there are a number of reasons that result from the availability of one of them. The conclusion of the mediation process. Examples of these reasons are contained in Article 11 of the UNCITRAL Model Law on International Commercial Conciliation 2002 . Of the enumeration of situations preventing a peaceful settlement of the conflict as follows:

1. Issuance of interests after consultation with the parties to the dispute Declaring that there is no justification for further conciliation efforts at the date of the declaration.
2. The parties to the dispute shall issue a declaration addressed to the other party or parties and to the conciliator, if appointed, indicating that the conciliation proceedings have ended at the date of the declaration.

Second: If the mediator reaches an amicable settlement of the dispute between the litigants, if the mediator reaches a peaceful settlement of the dispute and the settlement agreement is approved by the parties to the dispute, the mediation process ends at

the moment of ratification of the settlement agreement.

Third : Expiry of the period specified for settlement of the dispute. The first paragraph of Article 7 of the Jordanian Mediation Law obligates the mediator to complete the mediation work within a period not exceeding three months from the date of referring the dispute to him.

Fourth: Absence of the parties to the dispute or both of the mediation sessions without a legitimate excuse, as stipulated in Article (5) paragraph (b) of the Jordanian mediation law.[17]

CONCLUSION

At the end of the research, which dealt with the settlement of civil and commercial disputes through mediation, I see it has become through the study of some comparative legislation the extent of important the inclusion of mediation was recourse to the aim of reducing the pressure on the courts. and the mediation of the most important alternative means taken by these systems in the framework of its judicial policy. Through this research, we find that mediation and other alternative methods of resolving civil and commercial disputes have become accepted by the adversaries and are suitable for many disputes, especially in civil and commercial disputes, and do not lose sight of their importance in international disputes. Facilitation and speed, as well as disputes arising from the use of modern means of communication, such as the Internet and electronic commerce, intellectual property disputes and other disputes. Mediation as an alternative to the judiciary to solve civil and commercial disputes has been a general idea in societies since its inception, but it has not crystallized as a legal idea except in modern civil and commercial laws. It is a modern legal idea that has not been adopted by all contemporary laws. It has been adoption in most modern legislations at the level of international conventions and domestic legislation. but it has not been codified. And we found that mediation is one of the alternative means of resolving civil and commercial disputes. It is one of the methods that have been adopted since ancient times in solving disputes. However, the legislation has been regulated only in modern times, because of the procedural difficulties in the judiciary, And the lack of flexibility of procedures and other reasons to push the parties to resort to mediation as a means of dispute settlement, and since mediation is outside the scope of the judicial institution is not subject to the procedures under the courts, which gives them flexibility and speed in resolving disputes, but that Does not mean that they are done in accordance with the opinion of the mediator or the opponents, but there are certain procedures established by the custom in the settlement of disputes by mediation, as well as referred to some laws that organized mediation. The mediator has the largest role in the success of the mediation. The success of the mediation depends on the extent to which the mediator is able to bring the points of view between the opponents and the manner in which he adopts them. Therefore, the choice of the mediator is not random, but there are conditions stipulated by the laws regulating the mediation process.

The study resulted in a number of results, the most important of which are:

1. Mediation as an alternative to the judiciary to solve civil and commercial disputes, is a general idea in ancient societies since its inception, but it did not crystallize as a legal idea, except in modern civil and commercial laws, it is a newly created legal idea that it has not adopted all contemporary laws.
2. The main objective of mediation in various forms to resolve the dispute amicably through compromise and reconcile the adversaries with more flexible procedures to avoid litigation proceedings before the courts, which reduces the burden of the accumulation of cases in the courts and the interests of the adversaries to end the dispute in the easiest and fastest ways and at the lowest possible costs.
3. Mediation is one of the most important means of settling disputes in an amicable manner outside the framework of the judicial institution, due to lack of expenditure, speed, flexibility and non-compliance with judicial proceedings.
4. Not every person or institution shall be eligible for the mediation process and shall have a set of legal requirements.
5. The mediator can provide solutions to the contestants without relying on legal texts, provided that they do not violate public order and public morals.
6. The competent judge shall approve the decision of the mediator. If the parties agree on the proposal of the mediator and sign it, and the competent judge approves it, then this agreement shall be conclusive and shall not be challenged before any judicial body.
7. Decisions and solutions offered by the mediator to the parties, is not mandatory for them, and can be implemented only if approved by the opponents and they signed the mediation agreement.
8. The mediator shall assist the adversaries in solving their problems through dialogue and negotiation to reach an agreement that suits them and the waiver of the dispute by any of their rights in the mediation agreement shall not be permissible for them to claim before any judicial body.

The study also reached a number of recommendations, the most important of which are:

1. The necessity of spreading and consolidating the culture of resorting to mediation to solve civil and commercial disputes, since they have a positive role in alleviating the play on the judiciary and working

on holding specialized courses and seminars to qualify persons who are able to conduct mediation.

2. Activating the system of judicial mediation within the judiciary because the survival of mediation outside the framework of legislation in the state weakens its effectiveness in resolving civil and commercial disputes,
3. the need to work on the issuance of organized legislation for the mediation process as an alternative solution to civil and commercial disputes.
4. The establishment of an independent body or bodies with special rules and procedures that differ from those of the judicial authority. These bodies shall supervise the mediation between the parties.

The proposed body should attract qualified professionals capable of conducting mediation work, from retired judges and lawyers who have a long standing in this profession, and other reputable and well-respected individuals.

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