



Judicial and non-judicial mediation to resolve commercial disputes

A comparative study

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ABSTRACT

Mediation is as an optional and alternative means for amicable settlement of civil and commercial disputes that have arisen or that may arise between the parties to a legal relationship, whether contractual or non-contractual, and assisted by a neutral third party (the mediator), whether that mediation is judicial or non-judicial. Mediation is based on the parties' agreement to resort to it to resolve their commercial dispute. There is no compulsory mediation in UAE law, even if its basis is the issuance of a judgment from the court examining the dispute.

1. INTRODUCTION

The UAE legislator issued Federal Law No. 6 of 2021 on April 29, 2021 to regulate judicial and non-judicial mediation in civil and commercial disputes. The UAE legislator aims from this law to expand the circle of alternative mechanisms to the state's judiciary to settle disputes that occur between members of society in the field of commercial transactions, so that these friendly means ensure the continuity of individuals' relations after the end of the conflict.

The first article of this law defines mediation as "an optional and alternative means for amicable settlement of civil and commercial disputes that have arisen or that may arise between the parties to a legal relationship, whether contractual or non-contractual, and assisted by a neutral third party (the mediator), whether that mediation is judicial or non-judicial".

According to the text of Article 1 of the UAE Mediation Law, mediation is based on the idea of a third person, called the mediator, who undertakes the task

of settling the commercial dispute in an amicable manner, whatever the nature of the mediation, whether it is judicial or non-judicial.

This mediator must be a neutral party between the parties of the commercial dispute, and he does not favor one over the other. Otherwise, it is permissible to request the invalidity of the settlement agreement if the interested opponent provides evidence that the mediator is not impartial. The question of the mediator's impartiality is fundamental to ensuring the validity of judicial and non-judicial mediation procedures.

Also, the nature of the mediator's mission, which is based on making efforts to amicably resolve the commercial dispute between its parties instead of submitting it to the competent state judiciary. This is similar to the nature of the judicial mission, which is based on ending the dispute by judgment. If the judge must be impartial, then the mediator must be impartial a fortiori.

Mediation is an optional means for amicable settlement of civil and commercial disputes. The UAE Mediation Law No. 6 of 2021 does not define compulsory mediation. The parties may not be forced to resort to mediation, but they are free to submit their commercial dispute to this mechanism or not.

2-Definition of judicial mediation

Emirate's law defines mediation as "an optional and alternative means for amicable settlement of civil and commercial disputes that have arisen or that may arise between the parties to a legal relationship, whether contractual or non-contractual, and assisted by a neutral third party (the mediator), whether that mediation is judicial or non-judicial". Also, the optional nature of arbitration regulated by the provisions of Federal Law No. 6 of 2018 confirms this meaning. There is no compulsory arbitration in the UAE legal regulation, but the litigants have the freedom to choose the appropriate means for the nature of their dispute, whether it is arbitration, mediation or other alternative means.

Mediation after filing a lawsuit to the judiciary is judicial mediation. If the parties resort to mediation before filing a lawsuit, it is not judicial mediation according to the text of Article 1 of Law No. 6 of 2021. Judicial mediation is the mediation that the litigants use it in each case while they file a lawsuit of the same dispute before the competent court.

Mediation is based on the parties' agreement to resort to it to resolve their commercial dispute. There is no compulsory mediation in UAE law, even if its basis is the issuance of a judgment from the court examining the dispute.

The UAE legislator encourages members of society to submit their commercial disputes to mediation, even if that is after filing a lawsuit before the judiciary. This is also permissible at any stage of the lawsuit before the court, whether it is the stage of filing the lawsuit, or the stage of investigation of the lawsuit by the competent court.

However, the litigants may not be allowed to agree on mediation subsequent to the decision to close the pleading in the case in accordance with the provision of

the general rules of the Civil Procedures Law, which stipulates that the litigants may not agree to stop the case, or that incidental requests may not be submitted after closing the pleading in the case.

Also, if the competent court issues a decision to close the pleadings, this means that the litigants' relationship with the lawsuit is interrupted so that they are prohibited from submitting any request unless the court authorizes this. This decision also means that the court has formed its doctrine on the case, so if the UAE legislator allows mediation after filing the lawsuit, this depends on the court's decision not to close the pleading.

3-International Commercial Mediation

The second article of the UAE Arbitration Law No. 6 of 2018 decided "this Law shall apply to: 1. Any Arbitration conducted in the State, unless the Parties have agreed that another law should govern the Arbitration, provided there is no conflict with the public order and morality of the State. 2. Any international commercial arbitration conducted abroad, if the Parties have chosen this Law to govern such Arbitration. 3. Any arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by State law, save as excepted by special provision". The general rule is the provisions of the UAE Arbitration Law apply to every arbitration that takes place on the territory of the Emirates in respect of a regional rule of UAE law

The exception is the agreement of the parties that an arbitration law other than UAE law is the law applicable to the arbitration. The scope of the arbitration agreement is so large that it includes the agreement that the arbitration taking place on the territory of the Emirates is subject to a law other than the UAE Arbitration Law.

However, the agreement of the parties depends on not violating the public order and morals of the UAE so that if this agreement violates the public order, this agreement may not be implemented, but rather the application of the general rule that determines that the UAE Arbitration Law is applied to every arbitration taking place on the territory of the Emirates.

It is the same as the text of the third paragraph of Article 2 of the UAE Mediation Law No. 6 of 2021, which decided that "the provisions of this law shall apply if mediation is conducted in the country". The UAE mediation law applies to mediation that took place on the territory of the UAE in application of a regional rule of UAE law, so that its provisions apply to all facts that occur on the territory of the UAE.

As for international commercial arbitration that takes place outside the territory of the Emirates and the parties agree to apply the provisions of the UAE Arbitration Law to it, the provisions of this law shall apply to it. It is the same as Article 2/3 of the UAE Mediation Law, which decides that this law applies in the event that "it is an international commercial mediation or conciliation that takes place abroad and the two parties agree to implement the provisions of this law". It is the case of the parties agreeing that the UAE Mediation Law applies to

international commercial mediation or conciliation, which takes place outside the territory of the UAE.

Therefore, this law does not apply to mediation or international commercial conciliation, which takes place outside the territory of the Emirates as long as the parties have not agreed on the application of this law to their dispute,

4-Referral to judicial mediation

The agreement of the litigants on the application of this law is the necessary criterion in this regard. According to the text of Article 5/1 of the UAE Mediation Law, the competent court may issue a decision to refer the commercial dispute to mediation at any stage of the case, whether by proposal thereof, provided that the parties agree, or upon their request, or in implementation of the mediation agreement. Article 3 of the Lebanese Judicial Mediation Law No. 82 of 2018 stipulates the same meaning: "The competent court may issue a decision to refer the dispute to mediation at any stage of the case, whether by a proposal from it accompanied by the consent of the parties or at their request or in implementation of a mediation agreement.

Therefore, the court has the power to issue a decision to refer the commercial dispute to mediation based on its proposal, provided that the parties agree. The consent of some parties without others is not sufficient for this judicial referral to mediation, and a fortiori, the lack of consent of all parties does not allow the court to issue the decision on this referral.

Mediation is also based on the opponents' cooperation with the mediator, and this cooperation does not achieve its goal based on an amicable solution to the commercial dispute unless the parties agree to refer the dispute to mediation by a judicial decision.

Also, the court may issue a decision of this referral based on a request submitted by the parties, whether it was an original request mentioned in the lawsuit statement, or an incidental request submitted during the sessions and before closing the pleading in the lawsuit.

This request must be submitted by all parties, so the court may not issue its decision referring the commercial dispute to mediation if the request was submitted by some of them. Also, the court may issue its decision to refer the commercial dispute to mediation in implementation of the mediation agreement between the parties,

In this case, the court's decision shall be an effect of this agreement so that the parties begin the steps of amicable resolution of the dispute, with the assistance of the mediator. Also, the court may issue a decision to refer the commercial dispute to mediation at any judicial stage as long as the decision to close the pleading in the case has not been issued. The general rules of the UAE Civil Procedures Law allow litigants to submit their requests and defenses during the sessions, and before the pleadings are closed.

The court may also, on its own or at the request of one of the litigants, offer to resolve the commercial dispute through mediation at any stage of the lawsuit.

The law gives the court the power to submit the commercial dispute to mediation if it finds that the circumstances of the case allow this. Article 5/1 of the European Law on Mediation in Civil and Commercial Disputes No. 52 of 2008, and Article 22 of French Law No. 125 of 1995 allows the judge to determine the judicial mediator after the consent of the parties to carry out mediation procedures at any stage of the case, even if it is an urgent case

Also, Articles 131-1 to 131-15 of the French Code of Procedure allows the judge to decide on his own to refer the dispute to mediation at the request of one of the parties. The consent of all the litigants is not required to submit this request, but only a request submitted by one of the litigants is sufficient. In this case, the court temporarily suspends the lawsuit procedures, decides to refer the dispute to mediation, and appoints a mediator for them.

5-Data of the decision to refer the commercial dispute to mediation

According to the second paragraph of Article 5 of the UAE Mediation Law, "The competent court must include in the decision to refer to mediation the following data: A- The parties' consent to resort to judicial mediation and their pledge to attend the specified sessions and to provide the appointed mediator with information and documents related to the dispute referred to mediation. B - The subject of mediation. C - The mediation period, provided that it does not exceed three months from the date of informing the mediator of the mission, and it is renewable for a similar period and for one time only according to a decision of the competent court at the request of the mediator and with the consent of all parties".

Article 5/3 of the UAE law defines the elements of the court's decision to refer a commercial dispute to mediation:

A-The consent of the parties

This statement is a legal confirmation that the agreement of the parties is the main element for resolving a commercial dispute through mediation, as are all alternative means of dispute resolution. The existence of an agreement between the parties to choose this alternative means for the state's judiciary is the most important element in this regard.

The required consent is the consent of all parties, so it is not permissible to use mediation with the consent of some opponents without others. It is a logical condition, because the success of mediation in achieving its results based on finding a solution to the commercial dispute depends on the cooperation of all opponents, not the cooperation of some without the others.

The cooperation of the opponents among themselves, and between them and the mediator is the most important element, for example their obligation to provide the mediator with all the information that helps him to perform his essential mission. The parties must attend the specified sessions and provide the appointed mediator with information and documents related to their dispute.

B- The subject of mediation

The second paragraph of Article 4 of the UAE Arbitration Law No. 6 of 2018 decided that "2. Arbitration is not permitted in matters which do not permit compromise. 3. Where a provision of this Law leaves the Parties free to agree on the procedure to be followed to determine a certain issue, each party may authorize a third party to choose or determine that procedure. A third party in such case includes: any natural person or Arbitration Institution inside or outside the State". The subject of mediation is the contentious issues between the adversaries

It is not permissible to arbitrate in matters of personal status, such as the issue of the validity or invalidity of the marriage contract, the occurrence of divorce, and other issues related to personal status. It is also not permissible to arbitrate in matters of public order, and it is not permissible to arbitrate in criminal matters because the criminal legislator determines the acts that are considered crimes, and the criminal penalties prescribed for them.

It is the same as the first paragraph of Article 2 of the UAE Mediation Law, which decided that mediation may be conducted in all disputes that may be reconciled, provided that they do not conflict with legislation or public order and public morals in the country, taking into account the local laws that regulate the provisions of mediation, for example commercial disputes.

Therefore, if the dispute accepts conciliation, then it accepts arbitration and mediation, also if the dispute does not accept conciliation, then it does not accept arbitration and mediation.

Article 2/1 of the Mediation Law mentioned some standards in this regard, for example, the legislation in force that may not be violated. Mediation is not permitted in tax disputes or criminal cases. It is also not permissible to violate the rules of public order and public morals in the country, for example the agreement on mediation to settle a gambling debt.

Article 213-5 of French Law No. 1547 of 2016 stipulates that the dispute must be submitted to mediation, whatever the nature of the legal rule applicable to this dispute, whether the rule issued by Parliament, or the regulatory rule issued by the executive authority

Also, according to French legislation, the range of disputes that may be resolved by mediation is wide, for the disputes may be a commercial one, for example, the disputes between the partners. Consumer Protection Law Disputes, and Agricultural Law No. 1170 of 2014 issued on October 13, 2014

It is the same as the text of Article 2/2 of this law, which decided "2 Mediation may deal with all or part of the subject matter of the dispute". Also, the UAE mediation law gives the litigants a mechanism to determine the subject of the commercial dispute so that the mediation may relate to the whole or part of the dispute. They may agree to resolve all aspects of the commercial dispute by the mediator, or resolve some of these aspects

If the litigants have an agreement on mediation to settle the commercial dispute, they may specify the points of contention that the mediator shall resolve

through an amicable solution.

However, part of the commercial dispute is resolved depending on the indivisibility of the dispute, so that if the dispute is divisible, it is permissible to submit some of it to mediation.

Article 3/5 of the UAE Mediation Law stipulates that "the mediation agreement must specify the subject matter of the dispute under mediation". If mediation is an alternative mechanism for settling disputes that occur between members of society, the parties must specify the subject of the dispute in the mediation agreement concluded between them. Determining the dispute in the mediation agreement is the subject of this agreement. The mediation agreement is not valid without its subject matter, which is based on the existing dispute between its parties.

C- Mediation period

Setting a date for the mediator to complete his mission is one of the advantages that encourage members of society to submit their commercial disputes to mediation, because the opponents know the day when the mediator will finish his mission. Article 5/2 of the UAE Mediation Law specified the maximum period for mediation and said the mediation period does not exceed three months from the date of informing the mediator of his mission.

The mediation period may be renewed once and for a similar period after the approval of the competent court upon the request of the mediator and the approval of all parties. While the French legislator allows the mediation to be extended once at the request of the mediator, and without the consent of the parties.

To renew the mediation period - according to UAE law - there are conditions:

- 1- Issuance of a decision by the competent court to renew, this renewal does not happen automatically
- 2- The mediator's request, the court decides to renew based on this request
- 3- All parties agree to this renewal. If some of them reject this renewal, the court does not allow the renewal.

According to the text of the fourth paragraph of Article 5 of the UAE Mediation Law, the legal and judicial deadlines must be suspended during the mediation period, for example, the deadlines for the forfeiture of the right to appeal against judicial decisions. It stipulated that "all legal and judicial periods shall be suspended since the issuance of the referral decision, and shall not return to effect until the mediation ends".

These periods of time shall not be resumed except in two cases:

The first case - the mediation ends, whether successful or unsuccessful

The second case is the expiry of the mediation period.

6- Mediation expenses

In order to avoid the parties' disagreement over the mediator's fees, the UAE legislator granted the judge the authority to determine the mediator's fees

and the mechanism for distributing it among the parties, by the decision to refer the dispute to mediation.

However, the UAE legislator did not clarify the effect of non-payment of these expenses. Does the non-payment mean that it is an implicit refusal of the adversaries to mediate, or does the case remain suspended during the mediation period? It is preferable to interpret the non-payment of expenses as an implicit refusal by the litigants of mediation procedures, which was supported by the French legislator by Executive Decree No. 1876 of 2016. The judge's determination of the mediator is considered as if it were not if the opponent did not pay the amount of expenses specified by this judge.

7-Appealing the decision to resort to mediation

The UAE Mediation Law No. 6 of 2021 prevents appealing the court's decision to resort to mediation or extend its duration by any of the ordinary appeal methods such as appeal or unusual appeal methods such as the way of cassation (Article 5/3).

The scope of the legal prohibition of appeal includes all decisions related to mediation, whether the decision to resort to mediation, the decision to stop it, or the decision to extend it for another period, and the UAE legislator has done well; Because saying that it is permissible to appeal against these decisions allows the dismemberment of one case between its referral to mediation and the court that hears the appeal against mediation decisions, and thus the possibility of conflicting decisions related to the dispute, which is what the French legislator adopted by Law No. 1547 of 2016.

The decision to refer the commercial dispute to the mediator is a final decision that cannot be appealed in any of the ways of appeal stipulated in the Procedures Law.

8- Suspend of the main suit

The court must suspend the case temporarily, this suspend is a legal and obligatory suspension, and the court does not have discretionary authority provided that the parties agree to resolve their commercial dispute through mediation or that there is a written agreement between them to approve mediation, a verbal agreement does not produce the same effects

The requirement of the parties' consent to mediation leads to the suspension of the lawsuit procedures by the competent court. This suspension does not require a request submitted by the litigants; Because it is legal.

9- Judicial competence to rule the necessary measures

According to the provisions of the last paragraph, Article 5 of the UAE Mediation Law, "All legal and judicial periods shall be suspended since the issuance

of the referral decision, and shall not return to effect until the mediation ends, provided that during the mediation period, the competent court shall take the necessary measures and procedures to protect the rights of the parties, and issue urgent or temporary decisions. which it deems necessary.

This text allows the court to take all measures and measures it deems necessary, and does not tolerate delay, because delay in taking them may harm the parties to the commercial dispute.

The position of the UAE legislator was good, because saying otherwise may lead to the reluctance of the parties to the commercial dispute to resort to mediation; Because the necessary issues do not tolerate delay or wasting time in mediation efforts between the parties, the exclusion of the judiciary from the commercial dispute does not preclude the request for precautionary or temporary measures required by the nature of the commercial dispute.

10- Non-judicial mediation

The first article of the UAE Mediation Law defines what is meant by non-judicial mediation, deciding that it is "the mediation that the parties' resort to directly to resolve a dispute before resorting to litigation in implementation of the mediation agreement." This type of mediation depends on the following conditions:

1- Referring the commercial dispute to mediation before submitting it to the competent court. Non-judicial mediation does not take place if this referral takes place after filing a lawsuit related to the same dispute. This condition would exist if this referral was made before the case was filed with the case management office. Therefore, if a lawsuit is filed before resorting to mediation, then there is no consensual mediation, but rather judicial mediation.

2- The existence of a mediation agreement, mediation should not be imposed on the litigants, but recourse to it is to implement an agreement concluded between these litigants, which means that the mediation agreement is the essence of resorting to this alternative mechanism for amicable settlement of disputes, and without this agreement the dispute may not be submitted to this mechanism.

In other words, since the mediation agreement is an indirect waiver of the right of the judiciary, the resort of members of society to this alternative mechanism is not presumed, but rather an explicit agreement issued by the clear intention of the opponents to prefer mediation over the state's judiciary to end the conflict between them.

The issue of the existence of a mediation agreement is one of the issues related to public order so that it may be raised before the court at any time, and the court may also rule that the mediation agreement does not exist on its own, and continue the lawsuit procedures.

In accordance with the provisions of the second paragraph of Article 22 of the UAE Mediation Law, the mediation agreement must specify the language and subject of mediation and the appointment of the mediator or mediators or the method of their appointment, otherwise the agreement will be void.

The UAE legislator also decides that the mediation agreement is invalid if this agreement does not include one of these data, such as not specifying the subject of the dispute, or not appointing the mediator or the method of their appointment, or not specifying the mediation language.

11- Definition of a mediation agreement

The first article of the UAE Mediation Law mentioned what is meant by a mediation agreement, saying that it is "a written agreement between the parties with the aim of resorting to mediation in order to settle the dispute, whether this agreement was made before or after the conflict".

1- The mediation agreement is a written agreement. This agreement may not be verbal, otherwise it is a void agreement. Writing is an essential pillar of this agreement so that if this writing was absent from the mediation agreement, it was a void agreement.

The importance of the implications of this agreement, which are based on the parties' obligation to submit their commercial dispute to the mediator instead of the state's judiciary, which we can call an indirect waiver of the right to resort to the judiciary.

However, the UAE legislator did not require a specific form in the writing required to conclude the mediation agreement, so this writing may be official, customary or electronic. It is important that this agreement be written, regardless of the form of writing.

2- The purpose of the mediation agreement. Article one said about the purpose of the mediation agreement "the objective of resorting to mediation in order to settle the dispute," meaning that the purpose of concluding the mediation agreement includes resorting to mediation and settling the dispute between the parties to this agreement.

The phrases used by the UAE legislator to talk about the purpose of the mediation agreement are unjustified. It is sufficient to express this goal with a phrase in order to settle the dispute or resort to mediation; Because resorting to mediation means settling the dispute.

However, the UAE legislator's justification for mentioning these phrases may be based on the emphasis on the philosophy of mediation, which is based on amicable settlement of disputes that occur between members of society rather than submitting them to the competent state judiciary.

3- At the time of concluding the mediation agreement, Article 1 of the UAE Mediation Law permitted the conclusion of a mediation agreement before or after the occurrence of the dispute,

The litigants have the license to conclude this agreement at any appropriate time, whether before the occurrence of the dispute so that the mediator takes over the task of amicable settlement of disputes that may occur in the future, or after the occurrence of the dispute so that this person undertakes the same task for the amicable settlement of disputes that have already occurred.

This confirms the wide freedom enjoyed by members of society to conclude mediation agreements, so that they may do that at any time, whether before or after the occurrence of a commercial dispute, and this contributes to reducing the volume of disputes that may be submitted to the state's judiciary, and ensures the formulation of amicable solutions to these disputes.

To avoid the conflict or resolve it through the judiciary, the parties may agree to appoint a person called the mediator to work to stimulate and manage the dialogue between them so that they can reach a solution.

Mediation is basically based on the two parties' agreement to resort to it to settle all or some of the disputes that have arisen or may arise between them on the occasion of a specific legal relationship, whether contractual or not.

Therefore, the competence of the agreed-upon mediator to resolve the commercial dispute amicably, although it is based on the law that permits the resort to mediation instead of the judiciary, but in each individual case the jurisdiction of the mediator is based on the agreement of the two parties, and there is no mediation if this agreement does not exist.

Article 16 of the UAE Mediation Law specifies cases of termination of judicial mediation: "1 Judicial mediation ends in any of the following cases:

A- The signing of a settlement agreement by the parties, provided that all parties sign, and it is not permissible to sign some without others.

B - The agreement of the parties and the mediator to terminate the judicial mediation before reaching a settlement agreement for any reason. The mediator may find that the purpose of mediation is not achieved in the future, or considers that the nature of the dispute requires submitting it to the competent court for a decision.

c- Announcing to the mediator or center by any of the parties that they do not wish to pursue judicial mediation.

d - Notification in writing or electronically to the Center that it is not possible to reach a solution to the dispute,

E - Notify the center in writing or electronically that the judicial mediation has ended due to the absence of any of the parties for two successive mediation sessions without an excuse.

f- The expiry of the mediation period, regardless of its duration, so that the litigants must refer to the competent judge immediately after the expiry of this period without reaching a settlement agreement between them.

Conclusion

1- Mediation in commercial disputes is based on the parties' agreement to resort to it to resolve their commercial dispute. There is no compulsory mediation in UAE law, even if the basis for that is the issuance of a judgment from the court examining the dispute.

2- The UAE mediation law applies to mediation that took place on the territory of the UAE in application of a regional rule of the UAE law which its provisions apply

to all facts that occur on the territory of the UAE.

3- Mediation is based on the cooperation of the opponents among themselves and with the mediator. This cooperation does not achieve its goal based on an amicable solution to the dispute unless the parties agree to refer the commercial dispute to mediation by a judicial decision.

4- Mediation may be conducted in all disputes that accept conciliation, provided that they do not conflict with the legislation or public order and morals in the state.

5- In order to avoid prolonging the commercial dispute period, Article 5/2 of the UAE Mediation Law sets the maximum period for mediation, by stipulating that the mediation period does not exceed three months from the date of informing the mediator of his mission.

6- The mediation period may be renewed once and for a similar period, provided that a decision is issued by the competent court in this regard, the mediator's request and the consent of all parties.

7- The UAE Mediation Law No. 6 of 2021 prohibits appealing the court's decision to resort to mediation, stop it, or extend its duration by any of the normal appeal methods such as the appeal method or the unusual methods of appeal such as the method of cassation.

8- The court must temporarily suspend the proceedings, which is a legal and obligatory stay. The court does not have discretion, provided that the parties to the case agree to resolve the dispute through mediation, or if there is a written agreement between them to approve mediation.

9- A mediation agreement is a written agreement between the parties in order to resort to mediation to settle a commercial dispute, whether this agreement was made before or after the dispute.