

Practicing Amicable Means to Settle Public Law Disputes

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ABSTRACT

In the modern era, the amicable disputes settlement process, though older than the arbitration system, has gained widespread acceptance within the framework of amicable settlement of disputes arising from contracts concluded under public and private laws. Amicable dispute settlement is one of the mechanisms of the new universal system which seeks to resolve disagreements outside the domestic court and to achieve justice through negotiation, mediation, conciliation and arbitration. This is because of the slow pace of judicial measures and rising number of caseloads as well as increasing costs, especially in developed countries, insofar as amicable methods tend to be more suitable for disputes settlements. Courts are rested with a heavy burden of cases, and this ushered in a new way of using amicable instruments for dispute settlement at the domestic level; especially at a time when knowledge of this system and its advantages is growing. Looking at this issue, we will examine in two sections the characteristics of amicable processes and the grounds that help them be practiced: the first section is concerned with amicable techniques and describes their course of historical development, while the second section investigates the way amicable methods and relevant grounds are justified.

Keywords

Amicable instruments, Dispute resolution, Non-judicial procedures, Arbitration, Success, Mediation

Introduction

We already understand that the judiciary is vested with the jurisdiction and responsibility to oversee public disputes settlements in all its justice departments; however, with the development of the international system and fast-pace changes in the contemporary life, the international community has gone through significant developments when it comes to organizing its interests based on the latest procedures. These procedures already exist within the framework of public and private law contracts and seek to safeguard the interests of the government and the rights of individuals in the society. It is natural to see disputes arise between the parties involved when contracts are concluded. Some of these disputes may have international characteristics, rendering the dispute settlement unfeasible in domestic tribunals. Despite the fact that the judiciary is a specialized system to settle these disputes, the rising caseloads facing the judiciary and the relevant complexity have led the involved parties to engage in amicable methods to get their disagreements resolved.

Significance of the research:

Paramount significance is given to new methods of settling public law disputes in the new age as these methods could lead the government to meet its stated goals in the area of the international development. Settlement of disputes arising from relations within the framework of new methods could render independence, subject-specificity, and impartiality for the states. Thus, many governments seek to organize these methods within the construct of domestic laws to keep up with their development when resolving disputes in the new era.

Research objectives:

The present study aims to explain new methods of public law dispute settlement through peace, conciliation, mediation¹ and arbitration, and describes a historical development of these methods and the relevant justifications that put them into effect; it also demonstrates the characteristics of each of these methods in facilitating conflict resolution to get rights of either party protected.

Statement of the problem

The research is concerned with an increasing popularity of amicable method of dispute resolution in the absence of legal organization of these methods, as well as the novelty of the subject matter that has led different governments across the world to opt for such methods over traditional ones.

Research methods

The research method is historical-analytical and is built on the amicable methods development in old societies as well as on the rating of legal provisions in their course of evolution, leading to their consolidation into the legal system of

¹ *Mediation* is an alternative to trial. *Mediation* is a settlement process. It can help you resolve issues in your court case. *It* is a way to work the case out without going to trial.

many countries, and causing legal texts and international treaties to be reviewed. This has greatly contributed to standardizing and organizing these methods and using them at the international level and within the construct of resolving disputes from the contracts struck under public laws.

Research framework

Looking at this issue, we will examine in two sections the characteristics of amicable methods and the grounds that help them be practiced: the first section is concerned with amicable methods and describes their course of historical development, while the second investigates the characteristics of practicing amicable methods and relevant justifications.

First section

An introduction to amicable methods and their historical development

The first part of this section concerns amicable methods and the second section deals with their historical development as follows:

Part I

Defining amicable methods

Amicable methods refer to the mechanisms used by the parties to a dispute (the government or a member of the public law with other persons, whether be natural or legal persons), in order to reach a compromise without having the case referred to a Court of Administrative Justice².

Building upon this, amicable methods are the instruments used short of litigation and are aimed at resolving disputes peacefully. This way of ending conflicts is an innovative method of dispute resolution in a concordat way; because the principle of disagreement resolution requires resorting to courts and having them resolved through the judiciary³.

These instruments serve as appropriate mechanisms⁴ to resolve disagreements as they speed up the cases, increase the accuracy, protect secrets, reduce costs, and result in flexibility in terms of dispute resolution measures.

Amicable dispute resolution, commonly known as Alternative Dispute Resolution (ADR)⁵, refers to mechanisms used by disagreeing litigants, as they prefer to practice them rather than refer the case to the court⁶. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. The term 'Alternative Dispute Resolution' (ADR) means a variety of dispute resolution mechanisms that are used as alternatives to the formal court process, where the disputants are encouraged to negotiate directly with each other. ADR methods encourage the parties to come to mutual agreement which allows a win-win situation for the disputed parties rather than winner-take-all, as in formal adjudicatory process. Accordingly, litigation has no place in this definition and is not considered as an alternative instrument to resolving disputes; rather peaceful resolution of disagreements is assumed to be a key method in this regard, because the principle requires the litigants to go to a court and to file a case⁷.

However, the recently increasing tendency to use these methods by parties involved has brought about a term called "amicable", as widespread use of this method often made them be regarded as key instruments and that the parties to the dispute should use them when disputes unfold⁸. On the other hand, these methods are useful in that they help speed up resolution of disputes, protect the secrets, reduce costs in various situations, and help dispute resolution measures and applicable laws be as much flexible as they can⁹. It should be noted that amicable dispute settlements are appropriate for disagreements and, moreover, it is critical when it comes to disputes from administrative and commercial contracts or the international arena as well as consumer protection, and also disputes from the Internet environment and e-commerce and intellectual property in the digital age and other types of disputes (to the extent that

2 Ammar Awabedi, *General Theory of Administrative Disputes in the Algerian Judicial System, Part II, Administrative Case Theory*, University Press Office, Second Edition, Algeria, 2003, p. 366.

3 Mohammad Al-Saghir Ali, *Existence of Administrative Disputes*, Dar al-Uloom Annaba, 2005, p. 218

4 Abdul Aziz Amaqran, *On Tax Complaints in Direct Tax Disputes*, Journal of the State Council, Tax Disputes, Sahel Publications, Special Issue, Algeria, 2003, p. 07.

5 Ebrahim Gohar, *Proponent of Arbitration Contract in Civil Case*, Law Book Institute, Cairo, p.45.; Alternative dispute resolution (ADR), or external dispute resolution (EDR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party. However, ADR is also increasingly being adopted as a tool to help settle disputes alongside the court system itself

6 Saleh Mohammad Mahmoud Badraddin, *Arbitration of International Border Disputes*, House of Arab Thought, Cairo, 1991, p.56.

7 Mohammad Al-Saghir Ali, *Existence of Administrative Disputes*, Dar al-Uloom Anaba, 2005, p. 218

8 Fatima Zazawa, *Tax Dispute Resolution*, M.Sc. Memorandum of Public Law, Tlemcen University, 2005, unpublished, p. 124.

9 Ibrahim Jawaher, *Ibid*, p.36.

they are called "appropriate ways of resolving conflicts"¹⁰ as their names suggest). Though in most cases, referral to arbitration has been necessarily conditional on working through mediation or conciliation in advance¹¹.

Part II

Historical development of amicable dispute settlement

The judiciary has been a critical power for resolving disputes; however, other means of resolving disputes have emerged alongside the courts as domestic and international business and investment conditions have unfolded. Consequently, the arbitration process was established, and evolved along the development of the international commerce, actually finding its way into the field of judicial proceedings. Then after, international contracts were introduced to protect it and uphold its rulings, in a way arbitration could no longer be considered an alternative means of resolving civil and commercial disputes, as it had largely transformed into a means that would reconcile commercial disputes at the international level¹².

Concomitant with arbitration, mediation and conciliation gained popularity. The former, i.e., mediation is a relatively old concept and is seen as one of the oldest types of state justice mechanisms; put it simply, mediation did exist in the past in a simple form which was based on conciliation and derived from the customs and traditions prevailing over the society.

In ancient France, this term was used to mean compromise and used again after the French Revolution in 1789¹³. It also surfaced in the United States from 1965 to 1970. Family mediation, as influenced by mediators of the Quebec province in Canada, was introduced in France. Then, the General Law was drafted on Jan. 3, 1973 as the first law stipulating this matter, followed by another law drafted on Oct. 24, 1967 paving the way for the appointment of the Republican Dispute Resolution Board¹⁴.

Conciliation and mediation held on until they became part of an amicable dispute settlement approach. The Arab Investment Guarantee Institute Agreement also considered mediation and conciliation-based negotiations to be an alternative means of settling disputes prior to arbitration. As well, The World Bank Agreement on the Settlement of Investment Disputes between Countries and Citizens of Other Countries also emphasized on this, directing some guidelines for pre-arbitration settlements and adopting measures to settling down the disputes. This is another example of amicable dispute settlement. The International Chamber of Commerce's conciliation and arbitration system also adopted a volitional conciliation system and approved some measures to facilitate it. UNCITRAL (United Nations Commission on International Trade Law) enacted conciliation legislations into law which could be enforced in international disputes, and contributed to finding conciliatory ways as a means of resolving disputes amicably. However, conciliation and mediation remained as two alternative methods of dispute settlement replacing courts and arbitration. It should be stated that these two were regarded as two theoretically impractical instruments as the court played the fundamental role¹⁵. Arbitration was adopted as an amicable dispute settlement tool in the United States until 1997, with one single lawsuit remaining unresolved for about three years, leaving lawyers, disputants, experts, proceedings, documents, expert fees, court costs, and lawyers completely exhausted. The lawsuit bore cumbersome pressures on both parties, taking a lot of time and imposing hefty costs. Then, an idea of an alternative means to settle the dispute raised the feasibility of setting up a small tribunal for each side; a move that would appoint an expert with a knowledge of the matter from each side of the litigation to the tribunal in order to select an individual to preside over the lawyers. The two sides embraced the idea and suspended the proceedings, as the small court convened a hearing that did not require any of its provisions, and the hearing lasted for half an hour¹⁶.

Consequently, the independent president of the court cited the verbal verdict of the members of this tribunal, and the representatives from both parties met in the side room and began a half an hour session. After that, they came out to announce their agreement, and the lawsuit was settled down peacefully, putting an end to all the waste of time, expenses, fees, and exhaustion. This method originated in the United States which became known as the Alternative Dispute Resolution, or A.D.R. This approach developed, took effect and spread throughout the United States. This happened at a time when arbitration in the United States was not as old as in Europe, because Americans still valued

10 Amzian, Aziz, Tax Disputes in Algerian Law, Dar Al-, Ein Melilla, 2005, pp. 64, 68.

11 Ibrahim Jawaher, Ibid, p.49

12 Hafiz Al-Haddad, Contracts concluded between governments and foreigners, Determination of what they are and the law governing them, Dar Al-Nahd Al-Arabiya - Cairo, 1996, p. 187.

13 Fatemeh Zaza a, Ibid, p. 44.

14 Saleh Mohammad Mahmoud Badraddin, Ibid, p.74.

15 Hafizat al-Haddad, Ibid, p. 172.

16 Fatemeh Zaza a, Ibid, p. 44.

the judiciary and did not easily give in to arbitration as an alternative means of settling disputes, i.e., contrary to the Europe where the tribunal remained strong¹⁷. For Americans, this new issue allowed the court to help arbitration to stand up to its feet and to play its role as an alternative dispute settlement process. Thus, in any case, even after the verdict was issued, it still remained under the control of the judiciary. Mediation as a dispute resolution tool in the United States was characterized by the two following issues:

First, it saved time because the maximum time to get a mediation through was one to six months, while court litigation lasted for many years.

Second, it was economical because where lawsuits are costly, mediation proves to be much more cost-effective as an alternative method of disputes settlement¹⁸.

Mediation saw remarkable progress that was out of expectation, as the parties to the dispute embraced it and moved aggressively towards it, to the extent that the number of cases settled down through conciliation and mediation as an alternative means of dispute resolution in the United States rose by 8 percent, and 37 percent in the Far East, with China, Canada, and Australia taking the lead; however, European states with civil rights codes were still taking a conservative approach in this regard, rejecting the amicable approach to mediation-enforced dispute resolution¹⁹. This process, known as ADR, took multiple forms in the United States, including:

- **Small tribunals:**

Here, a dispute is referred to a commission consisting of an independent president and two representatives appointed by the disputants from among their senior members who are cognizant of the details of the dispute. These two representatives, if disagree over the selection of the previous president, will select a president²⁰.

Both parties agree over the proceeding rules set by the court in the earnest, talking through a number of documents they will submit, as well as the deadline needed for the exchange of measures after the hearing, which must not exceed two days. The two employees, as members of the tribunal, convene for an exchange of ideas, and should they demand an independent third party to attend; they can give their views²¹. The negotiations between members of the tribunal could continue to reach a compromise, but remain secret, and if they fail to reach a compromise, the two parties refer to a judicial court, and if these negotiations continue unnoticed, the evidence submitted shall not remain unnoticed during the small court proceeding; however, if the solution to the dispute fails, the evidence shall be re-submitted to the court²².

- **Michigan mediation or velvet processes:**

As numerous litigations were filed, the Michigan court saw the solution as a way out that would reduce the burdens and could serve as an alternative means of resolving disputes through mediation. When the court took some measures, it wanted to obligate both parties to follow them before filing the lawsuit. The court, through a number of lawyers as mediators, drafts a bill according to which, each of the two parties shall, before starting the proceedings, i.e., prior to referring to the court, appoint an intermediary or mediator whose name is enrolled in this bill, with the two mediators enrolling a third one for the bill. Thus, the Michigan court judge sets a timeline for hearing the mediator and notifies both parties and the mediators of it²³. Ten days to the hearing, each party hands over a brief statement with claims on legal grounds as well as a report pertaining to these claims, while, on the day of the hearing, the lawyers appointed by both parties shall have the right to file a brief lawsuit. The hearing must not exceed more than an hour while the mediators have already filed lawsuits for the past ten days. Both sides have twenty days to accept or reject it. If they fail to respond, they shall be considered as accepting the request, and if the Michigan court issues a ruling substantiating the request before the mediators announce their decision, or should either party rejects it; the litigation shall resume in the same way in court with the mediators keeping the decision in an envelope sealed with a red candle; this envelope shall not open until the verdict is handed over²⁴. The verdict having been issued, the letter sealed with the red candle opens and the decision by the mediators is compared; if the court votes for less than 0.10 of what the mediators have opted for, both groups must bear their share of the court-incurred costs²⁵.

- **Mediator/arbitrator:**

A mediator is a person who attempts to make people involved in a conflict come to an agreement via a structured, interactive process where an impartial third party assists disputing parties in resolving conflict through the use of

17 Ibrahim Jawaher, *Ibid*, p. 123.

18 Ahmad Lavar, Nabil Saqr, *Judicial Encyclopedia of Tax Disputes*, Dar al-Gharb for Publishing and Distribution, First Edition, Oran, p.83.

19 Abu Zaid Sarag Hassani, *Arbitration in Oil Contracts*, Dar Al-Nahda Al-Arabiya - Cairo, 2004, p.

20 Abu Zaid Sarag Hassani, *Arbitration in Oil Contracts*, Dar Al-Nahda Al-Arabiya - Cairo, 2004, p.

21 Ahmed Belkassem, *International Arbitration*, Algeria, Darchoma, 2004, p. 332

22 Abd al-Basit Muhammad Abd al-Wasi al-Darrasi, *The Legal System of Arbitration Agreement*, First Edition, Modern University Office, Alexandria, Egypt, 2005, p. 137

23 Saleh Muhammad Mahmoud Badr al-Din, *Arbitration in International Border Disputes*, Arab Thought House, Cairo, 1991, p. 247.

24 Abu Al-Qasim Saadallah, *International Law for Conflict Resolution*, (Algeria: Dar Houma, 2008), p. 129.

25 Abd al-Basit Muhammad Abd al-Wasi al-Darrasi, *Ibid*, p. 45.

specialized communication and negotiation techniques. The mediation determined by both parties shall serve as a reference for the mediating role. As a result, when mediation fails to keep up with the presumed role, it serves as an arbitrator in settling down disputes. This type of amicable dispute resolution method generally founds on an unacceptable basis such that the mediator/arbitrator bears some responsibility s/he has undertaken via mediation²⁶. This type of amicable technique gives the mediator some kind of binding power, making him/her an arbitrator, as soon as the mediation fails²⁷.

- **Renting a judge:**

This appellation may sound strange, but this is what Americans have called and, in fact, vests the judge with the task of resolving disputes. This system was unveiled in two states of California and New York, where the disputing parties shall present a lawsuit to the court in order that the jury appoints a retired judge to look into the case informally, and to issue a ruling that shall be obligatory upon them to practice, if deemed advisable by the court. The system does not appear to have been enforced in any country except for the United States. This system is found to contravene with many legislative and judicial systems of many of the world's legal systems.

- **Arbitration based on the final suggestions:**

This amicable method of resolving disputes does not rely on mediation but on arbitration, but the tribunal of arbitration does not have full discretion to hear the disputes; rather it is free to build its method on a request from the parties involved, and this must be accomplished without adding or deleting anything to the requests²⁸. The idea behind this approach seeks to force the two parties to wind down their demands, because an undue request leads the tribunal to base another request on it, with the request involving more claims. Also, the arbitral tribunal²⁹ has no jurisdiction except for freedom to choose one of the two requests as they are³⁰.

One would argue that the amicable method of resolving disputes through a mediator which first appeared in the United States and then crossed over to Japan, Canada and Australia and developed in Switzerland is a discrete process wherein a mediator takes the negotiations forward and provides an environment for aggressive dispute resolution. Accordingly, the mediator is a key character to whom the success or failure of negotiations depends. In countries where this method of dispute resolution gained popularity, its role became novel, while focusing on it also demonstrates that this method is rooted in a certain social and cultural ground, thus contributing greatly to resolving disputes in a modern way³¹. In particular, this process has also achieved great success in the societies which view arbitration as a modern and fast-paced alternative to judiciary, whereas Europeans have lagged behind in this regard³².

Second section

Characteristics of amicable methods and its executive grounds

Amicable methods are characterized by some mechanisms which make them more appealing than traditional dispute resolution processes. These characteristics set the stage for the parties involved to achieve great objectives in a fair and active manner; thus, in order to express these characteristics, we bifurcated this section, where the first part deals with amicable dispute resolution methods, and the second concerns the practical grounds of these amicable tools in resolving disputes as follows:

Part I

Characteristics of amicable dispute resolution methods

Each of these amicable dispute resolution methods are characterized by some certain issues when practiced, the most important of which may be the following:

1- Negotiations

Negotiation is a dialogue between two or more people or parties intended to reach a beneficial outcome over one or more issues where a conflict exists with respect to at least one of these issues. A negotiating process is the mechanism which relies on direct dialogue between the two parties involved for a dispute to be resolved. This kind of negotiation does not need a third party, rather directly emphasizes the dialogue between the disputants. Put it simply, the two parties can also have their lawyers engaged in the negotiating process, and as long as the lawyers are rested with this authority, they can make decisions on behalf of their clients as their engagement does not conflict with the negotiation³³.

2- Mediation

26 Abu Zaid Serag Hosni, *Ibid*, p. 123.

27 Muhammad Abdullah Numan, *International Protection of the Marine Environment - A Special Legal Study on the Red Sea*, Dar Al-Nahda Al-Arabiya, Cairo, 2004, p. 65.

28 Abdul Basit Muhammad Abd Al-Wasea Al-Darrasi, *Ibid*, p. 149.

29 An arbitral tribunal is a panel of one or more adjudicators which is convened and sits to resolve a dispute by way of arbitration. The tribunal may consist of a sole arbitrator, or there may be two or more arbitrators, which might include either a chairman or an umpire.

30 Ahmad Serhal, *Law of International Relations*, University Foundation for Studies, Publication and Distribution, Beirut, 1993, p. 56.

31 Mahmoud Mukhtar Barbari, *International Commercial Arbitration*, Dar Al-Nahda Al-Arabiya, Cairo, 2004, p. 51.

32 Abdul Wahid Muhammad Al-Far, *Public International Law*, Dar Al-Nahda Al-Arabiya, Cairo, 1994, p.65.

33 Hafida Al-Haddad, *Ibid*, p. 172.

This is a pre-dialogue stage and is performed with the third party (mediator) in attendance as it facilitates dialogue between the two parties involved to help them resolve the disputes. It is also a mechanism worked out with the intervention of a third impartial party that facilitates communication between the parties; this impartiality helps bring closer the views of the two sides while at the same time facilitating an appropriate solution to the dispute³⁴.

Thus, while many dispute resolution means can, through direct negotiation, eliminate the need for either parties to have a mediator, many of the dialogues fail at various stages, or that the severity of the dispute sometimes does not allow them to kick start the negotiation process; this necessitates asking for help from a mediator in order to advance the process and to fill the gap between the two sides³⁵. Mediation is essentially a volitional act as the mediator does not reserve the right to make a decision on the substance of the dispute; rather s/he seeks to bring closer views of the two parties (or parties) and reconcile the differences and propose amicable solutions without imposing his/her will³⁶. The disputants in this case are those who produce the outcome, and the mediator is tasked with facilitating communication between the two parties, avoiding the arbitration proceeding. Accordingly, an important practical outcome ensues from the ability of the parties to reach an agreement in the sense that the parties can reach a compromise as soon as they desire, and that this is not imposed on them from outside. It is noteworthy that mediation has succeeded in 75 to 90% of dispute cases in which the parties have agreed to use this mechanism. Speaking of international commerce, this is the principle the ADR system relies on and is the method used in over half of large international trade contracts, such as international construction contracts. Mediation has taken various forms, including simple mediation, which is close to a conciliation system in which one attempts to get the views of the two sides closer together³⁷.

Formal justice-based mediation³⁸: Formal justice is the impartial, consistent and strict application of established rules or laws; here, a commission is convened presided over by a mediator with the participation of some lawyers as appointed by the parties involved. This is aimed at achieving a desired level of consent for both parties³⁹.

Consultation-based mediation: Here, the parties involved ask lawyers or experts to give them consultation over the matter under dispute, and then ask them to act as a mediator to resolve the disagreement.

Arbitration-based mediation: Here, the parties involved agree that the mediator should also act as an arbitrator if he or she fails to mediate.

Judicial mediation: This type of mediation is quite prevalent in Anglo-Saxon systems; in these systems, the courts, before resolving the dispute, propose to the parties involved to first turn to mediation. This is the same method known as the Summary Jury Trial. This means the civil jury provides a brief explanation of the disputed matter for the parties involve, finally issuing the verdict in the form of an advisory verdict, which serves as a basis for negotiations to be founded on mediation⁴⁰.

Thus, mediation is inferred to have a wider scope of compromise and be generally flexible:

1- Early neutral evaluation

Early Neutral Evaluation (ENE) is when disputing parties submit their case to a neutral evaluator through a confidential "evaluation session." The neutral evaluator considers each side's position and renders an evaluation of the case. Contracting parties can include an ENE clause in the contract, which represents their agreement to submit to ENE in good faith to resolve any contractual disputes⁴¹. After meeting with the two parties involved, the neutral evaluator also meets with each of them separately to hear details of the events that is disputed. Also, the disputants have the opportunity to provide the latter with their written statements⁴².

Finally, the neutral party makes a decision that sets out the legal positions of each party; in the meantime, this evaluation is not binding on them, i.e., neither has to practice that evaluation. Most often, the neutral evaluator, having expressed

34 Ahmed Abdel Karim Salama: International and Domestic Commercial Arbitration Law, Comparative Theory and Application, Dar Al-Nahda Al-Arabiya, Cairo, 2004, p.85

35 Mahmoud Mokhtar Barberi, Ibid, p.184.

36 Hamza Haddad, Al-Tahkim Kusila Alternative for Settlement of Commercial Disputes, and the Prelude to the Confrontation of the Future in Oman.1988, p. 159

37 Ahmad Abdul Karim Salamah: Ibid, p. 291.

38 Adel Abdul Aziz Al-Sun: Amicable Dispute Resolution Systems, Lecture for Postgraduate Students on Claims of Logistics and Dispute Resolution, Institute of International Transport and Logistics, Academy of Marine Science, Technology and Transportation, Unpublished Notes, 2009, p. 211.

39 Adel Abdul Aziz Al-Sun: Amicable Dispute Resolution Systems, Lecture for Postgraduate Students on Claims of Logistics and Dispute Resolution, Institute of International Transport and Logistics, Academy of Marine Science, Technology and Transportation, Unpublished Notes, 2009, p. 211.

40 Abd al-Hamid al-Ahdab, Intellectual Property Disputes, an article presented at the Cairo International Commercial Arbitration Conference on "Intellectual Property Licenses and the Settlement of Disputes" March 9-20, 1998, p. 341.

41 Mohammad Ibrahim Musa: International Trade Reconciliation and Changing the Dominant Concept of Resolving International Trade Disputes, New University Office, Alexandria, 2005, p.71.

42 Abdullah Abdul Karim Abdullah, Legal Protection of Intellectual Property Rights on the Internet, New University House, 2008 edition, p.278.

his/her views on the matter, plays the role of mediator, seeking to clarify the views of both parties after setting out their legal positions. This mechanism is also called non-binding arbitration⁴³.

2- Arbitration

Arbitration has currently become one of the most widely applicable tools to resolving commercial disputes and is seen to be a jurisdiction-specific method. It is an alternative tool for state justice, wherein the parties involved can, at will and freely, resort to arbitration to resolve a dispute that has judicial value at present or in the future⁴⁴. Accordingly, arbitration can be defined as: "the means the disputants choose to settle down the disputes between themselves and by means of litigation, so that a binding verdict may be issued by the person or persons (called judge) designated by agreement". This is stipulated in the laws as the parties involved choose or vest the relevant laws to enforce legal positions⁴⁵.

The two parties are allowed to resort to arbitration at the very beginning, and before a dispute arises. In other words, they can set out a clause based on which they can resort to arbitration should a disagreement arise. They are also legally bound to draw up an agreement to propose details of the disagreement after the dispute arises and to announce their agreement to refer the case to arbitration⁴⁶.

It is clear that establishing arbitration serves as an appropriate method for resolving disputes. This is an alternative to going to court. International trade disputes underscore the necessity to refer to arbitration because both parties to the case are often reluctant to succumb to the judges from the other side⁴⁷. Unlike early neutral evaluation, outcome of the arbitration is binding in the sense that the arbitrator or the arbitral tribunal wields the power to make a decision over dispute and to interpret it. This is also unlike mediation where the mediator forfeits this authority⁴⁸; this is also true of arbitration which becomes binding when it is agreed upon (before or after a dispute arises) and it is necessary for the parties involved to practice the issued award throughout the course. Arbitration award is binding and is equal to the decision made by the court⁴⁹.

Part II

Executive grounds of amicable dispute resolution methods

There are several grounds by which amicable methods of resolving disputes take precedence over traditional ones, including:

- 1. Reducing the number of lawsuits referred to the court:** Amicable dispute resolution methods reduce the number of lawsuits referred to the judiciary. Experiences of the countries that have adopted this system show that these methods reduce a burden of caseloads imposed on the courts⁵⁰.
- 2. Reducing costs and saving time:** Amicable methods reduce costs and save time in the early stages. Because it is undoubtedly faster and easier to reach a solution outside the justice system⁵¹.
- 3. Serving as a sanction:** Amicable dispute resolution methods serve as a sanction that is highly enforceable relative to a court order as it is founded on the existing facts of events, while this fact changes form when presented to a judge. This system is suggested to be closer to reality than justice is.
- 4. Protecting the privacy:** Amicable methods protect the privacy of the parties involved. This method is aimed at creating new relations between individuals or institutions, as is the case with family mediation. The system allows the couples to evaluate the affairs and exchange views over the benefit to the children and establishment of better ways for the future through mutual respect and dialogue; this could safeguard social ties⁵².
- 5. Materializing common achievements for the disputants:** Amicable settlement helps both parties involved materialize common goals. The final settlement using this system (especially mediation) is based on a satisfactory solution from both parties involved.
- 6. Flexibility:** Amicable means for dispute settlement are flexible if there are no clearly defined rules.
- 7. Maintaining concordat relations between the parties:** Amicable means help create friendly relations between the parties involved. Unlike litigation cases, which is often based on the severance of relations; amicable and concordat relations between the parties involved are based on mediation.
- 8. Providing the parties with an opportunity to meet before the trial begins:** Mediation sessions provide an opportunity for a final meeting between the parties involved that may help resolve their dispute.

43 Hafida Al-Haddad, Ibid, p. 172.

44 Muhammad al-Shawah, Ibid, p. 51.

45 Mohammad Al-Morsi Zahra, Computer and Law, Kuwait Foundation for the Advancement of Science Publications, Kuwait, 1995, p.71.

46 Abdul Basit Mohammad Abdul Wasi Al-Darasi, Ibid, p. 39.

47 Fathi Vali, plbid p.85.

48 Muhammad al-Shawah, Ibid, p. 124.

49 Hafiz Al-Haddad, Ibid, p. 172.

50 Abdul Basit Mohammad Abdul Wasi Al-Darasi, Ibid, p.72.

51 Fawzi Mohammad Sami, International Commercial Arbitration, House of Culture of Publishing and Distribution, Aman, 1992, p.41.

52 Muhammad al-Shawah, Ibid, p. 62.

9. Providing creative solutions:

Amicable methods yield creative and innovative solutions to disagreements. Mediation proposes new ideas for resolving family disputes where priority is given to joint decision-making and reviewing the family system with individual rights on the agenda⁵³.

10. Practicing a resolution agreement:

The courts' supportive role in arbitration is significant to enforce arbitration agreements in cases where one of the parties refuses to nominate arbitrators.

The court may appoint the arbitrator where parties could not agree on a certain arbitrator. Moreover, the court will refer a case to arbitration where the defendant

objects to its jurisdiction due to the existence of an arbitration clause or arbitration agreement. During arbitration proceedings, the court may be requested to make provisional measures orders.

Because a mediation-assisted settlement agreement is regulated by the parties themselves, it is mainly practiced upon their own consent, contrary to a mandatory court order. The amicable method system plays a complementary role to the judicial system and reduces the pressure piling up on the judiciary. This system operates side by side with the judiciary to accomplish justice, with the difference being that the role the judiciary plays is different depending on whether we are facing arbitration or mediation, and we need to distinguish this role in two areas:

In arbitration, the judiciary plays a supportive role for the parties to the arbitration, to the extent that this established role serves as a unique or alternative method for the judiciary to resolving disputes and its effectiveness can be materialized. The judiciary, because of its public authority which can force the parties involved to practice the decisions issued by the arbitrators, can intervene in their affairs. Accordingly, it is necessary for the judiciary to intervene in the arbitration process to make its decisions obligatory. In this case, the judiciary serves as a supporting role for the parties to the arbitration since the time the decisions are issued, such that the judiciary participated in the formation of the arbitral tribunal and approved Article 309 in its third paragraph reading: "If it is difficult to designate an arbitrator, or it is not already designated with one of the parties involved denying to appoint an arbitrator when a lawsuit is filed, the other side is authorized to submit a report to the president of the court, giving executive power to the arbitrators to issue a ruling not objectionable⁵⁴."

Accordingly, the power to designate an arbitrator under these circumstances is vested with the judge and the judge cannot voluntarily designate the arbitrator; rather one of the two parties involved must ask him to do so⁵⁵.

Thus, the judiciary continues to intervene in the arbitration proceedings, so it must find the most relevant arbitration rules to establish cooperation between the judge and the arbitrator. This allows the two sides to the arbitration to use a domestic court in order to make temporary decisions without the jurisdiction being solely confined to the court. The court has also a very significant role in post-arbitration. The arbitration award requires the state court's ratification for the purpose of enforcement. The award may also be challenged by the parties.

As stated, the authority of the judiciary extends to the post-arbitration award stage; this is because arbitration awards are not, per se, executive in nature and require judicial support in order to be binding. Therefore, the executive power of an arbitration award is binding when it is issued by a judicial expert⁵⁶.

When the award becomes executive or obligatory, it denotes that the judiciary has recognized the very formality of it, directing all sides to comply with it.

In this context, the judiciary underscores the provision of the necessary conditions for the execution of the award without interfering with the matter. As a result, the judge cannot demonstrate the justice of these awards or their correct execution because it is not considered as a review body in this regard; however, the judiciary still plays a critical role in overseeing arbitration awards to prevent them from being contrary to the previous rulings and public system of the country⁵⁷.

However, in mediation, the judiciary serves as the main actor and the main driver for the realization of justice, which is discussed later. Generally, mediation is here regarded as a source for the legitimacy of the judiciary. Concerning the justice system, it is quite clear that traditional methods of judicial functions provide an opportunity to respond to some issues closely. Mediation, on the other hand, seeks to create solutions agreed upon. Considering the fact that justice in practice seeks to achieve social compromise and the reconstruct social relations and communications, thus, it is called amicable justice, with mediation and related methods moving all the issue forward; this is what made the judiciary play

53 - Jamal Al-Saghir, Basic Regulations on Internet Crimes, First Edition, Cairo, 2001, p.71.

54 Mohammad Hossein Mansoor, p. 34

55 Siddiq Hisham, Ibid, p.134.

56 Fawzi Mohammad Sami, Ibid, p.45.

57 Mohammad Hussein Mansour, Ibid, p.34.

a key role to create amicable methods⁵⁸. However, some maintain that judges lose their ability to make decisions when implementing amicable procedures⁵⁹.

Speaking of various methods by which disputes are resolved, we concern the mechanism of choosing between justice or arbitration, then describe the quality of choosing between arbitration and amicable methods of resolving disputes. Concerning justice or arbitration, it is difficult for the parties to government contracts to agree on choosing domestic courts, as the choosing of third country courts is not desirable either.

Judicial measures are not usually prolonged, and this is primarily because state courts have burdensome caseloads, and moreover, there are different levels of litigation systems (e.g., trial courts, appellate courts and supreme courts) that allow the losers to apply for the details in the case⁶⁰. Besides, state courts do not always have the adequate expertise to resolve all commercial cases, just as judges do not always have the necessary proficiency and skills to settle commercial claims. It is noted, despite being an integral component in the impartial management of justice; judges do not produce the necessary sanctions for independence and neutrality in some countries. This is while in most cases, judicial measures are subjected to such requirements as strong and inflexible executive laws⁶¹.

International arbitration is arbitration between companies or individuals in different states, usually by including a provision for future disputes in a contract. A number of essential elements should be included in almost all international arbitration agreements, with model language available. These include the agreement to arbitrate, a definition of the scope of disputes subject to arbitration, the means for selecting the arbitrator(s), a choice of the arbitral seat, and the adoption of institutional or ad hoc arbitration rules. A number of other provisions can also be included in international arbitration clauses, including the language for the conduct of the arbitration, choice of applicable law, arbitrator qualifications, interim relief, costs, and procedural matters.

With regards to international arbitration, the nature of "authority of the will" prevails. The parties engaged enjoy the freedom to organize decisions by resorting to specific laws. They are also allowed to choose their own arbitrators and set the time limit for arbitration or referral to a third party. Arbitrators, like judges, should have full voting independence, though arbitrators differ from judges when being elected as arbitrators in a particular case demanding certain professional and technical competencies. Moreover, the secrecy of arbitration ensures the protection of privacy in decisions, and this is in contrast to the judiciary, where the hearings are held in public⁶².

From another perspective, the parties do not bear the costs or experience exhaustion as judges do. Conversely, the arbitration process causes tiredness and incurs costs from holding the arbitral tribunal but that can be managed. This is while arbitrators do not have the authority to make judicial decisions and cannot adopt other precautionary and temporary measures, such as confiscating property or summoning witnesses or other parties refused to participate in such decisions. In some countries, the judiciary has broad experience in some areas requiring expertise (e.g., maritime and banking disputes and patents). Concomitant with regional development, it is made possible to immediately enforce commercial court rulings in some countries. This took effect in Western Europe under the 1968 Brussels Convention (revised many times) as well as in 16 African countries that were part of the African region which actually pertained to labor laws. Accordingly, although arbitration is seen as a common and accepted method for settling international commercial disputes, the judiciary is still viewed as an active option in some situations.

Concerning amicable methods to resolve disputes, a question is raised: How long is it better to use arbitration than to use other amicable methods (conciliation, mediation, etc.) in resolving disputes? This is completely different when it comes to selecting from between arbitration and the judiciary on the subject matter of the dispute; it is possible for conciliation or mediation to involve arbitration, and it is also possible for arbitration to involve conciliation or mediation. The arbitral award may be definitive and binding on the parties involved with the court recognizing the award, and also the award could be enforced against the loser who did not act upon it⁶³.

Concerning amicable dispute resolution methods, one would say that these methods have exclusively restricted their scope of activities to the consent of the parties who enjoy absolute freedom of action in enforcement or non-enforcement of the suggestions issued by the conciliator or mediator. These suggestions are in no way similar to the rulings issued by the courts, and as a result neither party can demand that the courts provide conciliatory or mediating suggestions or to seek another method settlement agreed upon⁶⁴.

58 Sadegh Hisham, *Ibid*, p.45.

59 Ibrahim Johar, *Ibid*, p.143.

60 Fawzi Mohammad Sami, *Ibid*, p.92.

61 Siddiq Hisham, *Ibid*, p. 122.

62 Muhammad Hosni Abbas, *Ibid*, p. 123.

63 Hisham Sadegh, *The Law Applicable to International Trade Contracts*, Dar Al Fikr University, Alexandria, 2001, p. 81.

64 Abdul Hamid Al-Ahdab, *Ibid*, p. 78.

Regarding the integration of arbitration and amicable dispute resolution methods, one would argue that many conventions have adopted the two methods for resolving disputes: using amicable dispute resolution methods as the first step, then resorting to arbitration decisions as the second step, should amicable methods fail⁶⁵.

In most cases, the parties involved do not agree to use these amicable methods at least implicitly before going to the court or arbitration. Sometimes the parties involved formally agree to follow to the system, but set out an appropriate clause in the contract should a dispute arise, such as the one proposed in the FIDIC (FIDIC contracts represent agreements in the construction and installation field, used as standards in the international arena) or International Bank contracts.

However, concerning the parties in a long-term project, maintaining good relations is critical, even if there is a difference between them, and this is because of coordinating business interactions in the future. It is also essential to resolve disputes amicably between the parties involved. When the parties arrive at a no-return point (for example, the termination of the contract unilaterally) and when there is no benefit from future trade relations, it is unacceptable for the parties to resort to amicably resolve disputes. In this case, there will be no alternative but to refer to arbitration.

Arbitration institutions have laid conditions that have brought together conciliation, mediation and arbitration. For example, the World Intellectual Property Organization (WIPO) stipulates in the mediation clause that it is subject to arbitration, stating: Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration and language shall be specified. "If the mediation does not resolve the dispute or conflict within 60 and 90 days from the beginning of the mediation process, the dispute shall be referred to arbitration at the request of the arbitrator or at the request of one of the parties to be resolved through arbitration and in accordance with the arbitration rules of the WIPO system. However, if one of the parties refuses to participate in the mediation process before the (60) and (90) day-timeline expires; the dispute shall be referred to arbitration at the request of the other party to be finally resolved through arbitration and according to the rules of Weibo arbitration. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. ... The language to be used in the arbitral proceedings shall be specified. The dispute, controversy or claim shall be decided in accordance with the laws.

Conclusion

Having discussed the characteristics of amicable methods in resolving managerial disputes and executive grounds, the following were suggested:

- 1- Amicable methods for dispute resolution are not novel ideas from a historic point of view, but have existed since old times; however, the way they are enforced is new as regards the field of public law contracts.
- 2- Arbitration methods are being increasingly relied on when resolving disputes under public law, especially disputes arising from international trade and investment agreements.
- 3- Using amicable methods for resolving disputes and the tendency to enforce them have been an important development in the field of public law contracts.
- 4- Amicable methods have demonstrated great successes in resolving disputes and facilitating the integration of the positions of the parties involved.
5. Considering the characteristics of amicable methods, they are considered to be ways for evaluating legal positions and individual skills sand are aimed at bringing peoples' views closer to each other.

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