الدراسة التاسعة:

Judicial Mediation in Lebanon

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Mediation law was introduced in the Lebanese legal system though the Law No. 82/2018 relative to legal mediation. The law outlined the legal terminology of mediation, judicial mediation, the mediator, the mediation agreement, the parties to the mediation, the competent court, and the referral decision. Article one the Law no.82/2018 defined mediation as an alternative mean of resolving disputes in which the parties resort to a neutral third party the mediator whose role is to assist and encourage them to communicate and negotiate to resolve the dispute that arose between them. In addition, a new legislation related to conventional mediation was introduced by law no. 286 /2022. The implementation of the two laws is pending the approval of the decrees of application.

○ Motives of mediation

From the least to most coercive, there are several approaches to conflict management and resolution. It includes legislation, political action, negotiation, mediation, arbitration, adjudication, or force. Yet, mediation has its own theories and procedures. However, mediation has its own theories, skills. Mediation use communication skills, psychology, human resources, international relations, law, restorative justice, gender studies, peace and conflict studies, cultural studies, psychology, sociology, neuroscience, and other fields.

Christopher Moore considers mediation as the involvement in a conventional negotiation or disagreement of a willing third person with limited or no authoritative decision-making power but who supports the interested parties in voluntarily finding a mutually acceptable settlement of the matters in dispute[2]. The mediator

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[2] Moore, C. W. (2004). The Mediation Process: Practical Strategies for Resolving Conflict (3rd ed.). San Francisco: Jossey-Bass Publishers.

has no authority to issue judgments that bind the parties. In order to enforce the conclusion reached during the mediation process, the resolution or settlement agreement must be registered in court.

There are many motives to resort to mediation. The most important ones are: The permanent development and complexity of national and international commercial transactions; the blockage provoked in the judicial system the increasing number of litigations and the lengthy time to rule on lawsuits; the cost of litigations before the courts. An additional key difference between court's ruling and mediation is the fact that in court system there is always a winner and a looser, while the mediation agreement between the different parties that fits their expectations and satisfy their mutual interests. Moreover, in certain cases it is preferable to go to mediation instead of going to the courts were losing parties goes to appeal and cassation which make lawsuits much longer than mediation. Thus, arbitration can resolve disputes in a swifter, fair, robust, balanced negotiated compromise and less costly way in total confidentiality

Furthermore, law no.286 dated April 13, 2022 emphasizes conventional mediation through the insertion in the contract or in an independent one of a clause to resort to mediation if necessary.[1] This conventional clause stipulate an obligation to attend the first mediation meeting of the parties. After that meeting, parties may decide to continue in the mediation process or to leave the mediation.

○ Referral to mediation

According to article 2 of Law No.82/2018 mediation may be conducted in all types of disputes, which may be settled in a manner that does not conflict with the public order and the mandatory legislations in force. The recourse to judicial mediation may take place at any time during legal proceedings. Consequently, the competent court may issue a decision to refer the dispute to mediation at any stage of the proceedings, whether upon its proposal and approved by the parties or upon their request. Referrals are not subject to appeal.[2]

In the decision to refer to the mediation, the competent court shall provide the following information: Agreement of parties to resort to judicial mediation; name of the designated mediation center; and the subject of the mediation. Upon the issuance of the decision of recourse to mediation, all legal and judicial deadlines

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[1] Article 3 of law 286 dated April 13, 2022.

[2] Article 4 of Law No. 82/2018

shall be suspended and shall not return to force until the termination of the mediation, provided that the competent court shall take the appropriate legal actions to protect the rights of the parties.

○ The choice of the mediation center

According to article 6 of Law 82/2018, the mediation center shall be selected through an agreement between the parties from the list established by the Ministry of Justice. In case the parties fail to agree on the appointment of the mediation center, the qualified court shall appoint the mediation center, and the Registrar shall inform the referral decision to the parties and the mediation center. The designated mediation center shall notify the competent court in writing of its acceptance or refusal to conduct the mediation, within four business days from the date of its notification of the court decision. In case of acceptance, the parties shall provide the designated mediation center with their concise remarks about the dispute subject of the mediation, within three working days of the date of the court referral decision.

The centers that will be selected by the court to conduct the mediation must verify and make sure that mediators:

- Are accredited and registered on the list of mediators:
- Are not sentenced for a felony or infamous misdemeanor, and has not been the subject of any disciplinary decision by a professional syndicate,
- Are holder of a university degree in any discipline,
- Have completed a training course on mediation at an accredited center of not less than forty-five 45 hours followed by an evaluation,
- Have exercised the role of mediator in at least two civil, commercial or social mediation cases during the previous twelve 12 months to qualify to be appointed as a principal mediator.
- Have accomplished not less than six 6 hours per year of training on mediation in a center selected by the Court of Justice.
- Abide by the Code of Professional Conduct of the mediator attached to law 81/2018.[1]
- Have a well set system for assessing and dealing with complaints.
- Have a comprehensive system to review the list of mediators and the requirements of continuing professional development.

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[1] Annex 1 of law 82/2018.

- Are equipped with the administrative and logistic facilities required to carry out the mediation process effectively.

According to article 8 of Law No.82 /2018 in case the parties do not agree to appoint a mediator within three business days from the date of approval of the mediation center, the latter shall appoint one or more mediators chosen from the names listed in the list of mediators within ten business days from the date of their notification of the referral decision.

The mediator must sign a statement pledging his impartiality and independence towards the parties and the subject of the dispute within three business days from the date of his appointment. Likewise, during the mediation process, he shall inform the center in writing of any facts or circumstances that are arising or may arise, which prompt one of the parties to question his neutrality or independence. In either case, the Mediation Center shall notify the Parties of this statement and invite them to make their observations within three business days of the date of notification.

In case any of the party's objects to the mediator and asks for his dismissal or if the mediator is unable to pursue his mission for any reason during any stage of the mediation process, the Center shall appoint another mediator within three business days from the date of objection to the mediator or from the date of the notification of the latter of his incapability of pursuing his mission. The mediator shall be subject to the provisions of articles 120 and 121 of the Code of Civil Procedure concerning the reasons for requesting the dismissal of a judge.

○ The mediator

The mediator performs his mission independently, impartially and objectivity and works through mutual dialogue to help the parties to identify their own issues, interests and needs within the framework of respect and equality among them so that they can reach a solution that they would reach willingly. (article 13)

The mediator does not give a solution to the dispute and does not have the power to investigate. However, for the purposes of the mediation task, and with the consent of all parties, he may hear the third persons with their consent.

The mediator shall have the right to organize private meetings with each of the parties to the mediation. He shall not be entitled to disclose to the other party any

information that has been circulated in the private meeting, unless after obtaining the approval of the party who has stated such information.

In multilateral disputes and with the consent of the competent court, the parties may agree to continue the mediation proceedings when one of them abstains from

participating in them, if such abstention does not affect its process and the solving of the dispute between them.

○ Proceedings of mediation

Certain models may be followed in the selection of the mediation strategy. Four of them were formulated in The Promise of Mediation by Folger and Bush in 1994[(1)]. The first is the "satisfaction story", which claims that mediation is superior to adversarial conflict resolution because it employs collaborative and integrative tactics to produce outcomes that are beneficial to all parties involved. The second point view is “social justice narrative” asserts that people may get together to pursue social justice based on shared interests. The third strategy is the "transformation tale," where participants concerns and objectives might be stated in their own terms. The forth strategy is "oppression story," which makes the argument that mediation is risky since it is informal and allows the stronger side to control the weaker one.

The satisfaction story, which Folger and Bush claim to be the prevailing one, is based on the idea that conflict is a problem that has to be solved, while transformative mediation fosters must choose between transformational or problem-solving techniques.[(2)]

In addition, the stages of the mediation process can be arranged in a variety of ways such as preparing, opening, exploring, negotiating, and concluding before the start of mediation in the preparation phase. It is necessary to make arrangements for the time, location, attendance and exchange of documents. Pre-mediation coordination with the parties in conflict give arbitrators a sense of the parties' personalities, needs, and possibly previous settlement negotiations.

According to article 12 of Law No. 82/2018, the parties must attend the meetings in person or through their legal representatives. The mediator is legally bound to treat all parties equally, and into consideration their concerns. The mediator shall have the right to organize private meetings with each of the parties to the mediation. He shall not be entitled to disclose to the other party any information that has been circulated in the private meeting, unless after obtaining the approval of the party who has stated such information.

[(1)] Baruch, R. A., & Folger, J. P. (1994). The Promise of Mediation: The Transformative Approach to Conflict (2nd ed.). San Francisco: Jossey-Bass Publishers. 2004.

[(2)] Yevsyukova, M. (n.d.). Summary of "The Promise of Mediation: The Transformative Approach to Conflict". Retrieved from Beyond Intractability:
https://www.beyondintractability.org/bksum/bush-promise

The parties shall attend the mediation sessions in person or through the legal representative who has the authority to assign and settle if they are legal persons.

Parties shall be entitled to consult with them during the course of mediation. The mediator can limit their numbers. Mediation sessions are confidential and may not be attended neither by persons who are not involved in the conflict nor by persons who are not representing one of the parties, as indicated above. According to article 17 of Law no.82/2018, the parties involved in the mediation are required to act in good faith, and transparency. They are called upon to agree on a settlement that would reserve the rights of all parties. In fact, mediation aims to protect the businesses of all parties. This is less likely to happen in the court where there are winners on one side, and losers on the other one.

The mediation should last a maximum of 30 days from the date of the referral. However, the mediation center may extend that period for an additional 30 days based on a written request presented by the mediator and by all the parties. These practices are time-effective and reflects the advantage of mediation compared to traditional court litigation process.

○ Arbitration Vs. mediation

Arbitration	Mediation
Arbitration is a method of resolving disputes outside the court in which both parties present their case to a neutral third party who makes a decision and then enforces that decision (award).	Mediation entails an independent third party assisting the disputing parties in reaching a mutually acceptable resolution.
An arbitrator's decision is enforceable in the same way that a court's decision is. Arbitrators control the outcome.	Settlement if only parties approve: Parties control the outcome
Arbitration is a formal process that can be similar to court proceedings in terms of calling witnesses and presenting evidence to argue the parties' respective cases.	Mediation is a non-formal process where exchange of information is voluntary.

Arbitrators are not allowed to directly address the issues with the parties or to create settlement or negotiation terms. Arbitrators listen to facts, evidence, and render an award.	A mediator is permitted to discuss disputed issues, develop options, and take into account alternative options to assist the parties in reaching a mutually satisfactory outcome.
An arbitral award is binding and legally enforceable, and it terminates the arbitral proceedings. The result is win/loose.	Mediation does not always result in a mutually acceptable outcome between the parties since it may reach a deadlock.. The result is mutually satisfactory.
It preserves the privacy of both parties in better means.	It is far more beneficial for parties to resolve disputes at the lowest level of resolution. By attending the hearing, both parties are able to avoid the unnecessary costs involved in the arbitration process.
The final award is enforceable within the judiciary system's premises.	It is less time consuming than arbitration.

○ Confidentiality

According to article `6 of law 82/2018 the parties, the mediator, each participant in the mediation, and the mediation center shall not disclose any information raised during the mediation proceedings without the consent of all parties. The parties participate in the mediation process in good faith and transparency and cooperate actively.

In case of violation of the terms of confidentiality, independence, impartiality, and objectivity provided by this law, the damaged party shall resort to the mediation center to take the necessary disciplinary measures against the mediator. He may also refer to the competent court to claim compensation for the damage inflicted to him. The Court shall apply the principles used in the referee judiciary when considering this request, and its decision shall be subject to appeal in accordance with the rules followed in appealing the judgments issued by the referee judiciary.

○ Outcome of judicial mediation

There are two possible outcomes at the conclusion of the mediation. In the first case, the dispute is not settled entailing the resuming of the court proceedings. In the second case, the dispute is settled in which case the court will grant the exequatur to render the award legally binding. This settlement is not subject to any appeal by the parties once it has been issued by the court. This demonstrate the time saving of mediation.

Mediation ends in the following situations:

- The settlement of the agreement and signing it by all the parties in the mediation
- The submission of a written statement by one of parties indicating his/her intention to withdraw from the mediation.
- A document signed by the different parties and the mediator indicating that mediation has ended.
- In case one of the parties was absent for two consecutive mediation sessions without a valid excuse.
- In case the duration of the judicial mediation and potential extension is expired.

The mediator shall provide the Mediation Center with a written report on the outcome of the judicial mediation within three (3) working days from the date of the termination of the judicial mediation for any reason, and the Center shall inform the parties and the Court of the results of the judicial mediation within a maximum of five (٥) days from the date of receipt of the mediator's report. And if the dispute continues, then the competent court shall return the case to the register of proceedings.

○ Ratification of the settlement agreement

Article 20 of law 82/2018 provides that upon on the conclusion of the mediation and when the parties reach a settlement agreement, the competent court shall ratify this agreement and grant it it's executory effect at the request of all parties or one of them in the light of the terms of the settlement agreement submitted to it. The request for ratification shall be settled in the form of a conciliation and the rules pertaining to the expeditious implementation of judgments shall be applied to the decision.

The decision to ratify the settlement agreement does not accept any of the ordinary or extraordinary appeals. The decision to give the executory capacity

before the competent court may be challenged by third parties in accordance with the provisions of article 681, paragraph 1, of the Code of Civil Procedure. It is important to mention that the mediator does not have the power to implement the agreements reached by the parties,

○ Conclusion

The recourse to mediation is spreading worldwide. Many countries have adopted mediation as a mean for solving conflicts because it is more effective, and affordable in terms of cost. Thus, instead of going to court, which can often be challenging in terms of procedures, time-consuming, and based on evidence sometimes difficult to establish, mediation offers an easier way for a resolution of a dispute. Furthermore, the mediator will help the parties in searching the reasons that are holding them from reaching an acceptable settlement rather than acting as a judge who rules on the resolution of the case before him. The mediation procedures allow the different parties the option to reach an agreement through giving the parties the possibility to meet and reach a settlement at the conclusion of the mediation process.

Yet, there is not a uniform method to mediation. In fact, mediation is a state of mind. Mediators have to be enthusiastic, supportive, sensitive, patient, and excellent listeners, intuitive, inquisitive and possess realistic expectations to solve the cases they consider.(1) Finally, mediation is a civilized cultural process to facilitate the resolution of commercial and civil disputes. This is especially true in Lebanon in this time of sharp economic crisis where disputes are exploding. For all the above, it is important to facilitate the application of the two laws related to mediation to ensure a quiet, cooperative, efficient, smooth, and rapid mean to solve business and civil conflicts.

(1) Unfortunately, sometimes, mediators have irrational and false expectations of what is the outcome for their clients. It is imperative to avoid such situation during mediating such weaknesses.