

Conciliation Mechanism: An Amicable Mechanism to Settle Business Disputes Advantages and Disadvantages

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Abstract

Conciliation is a dispute resolution mechanism which is broadly and globally to settle disputes. It is referred to in case of the desire to reach an amicable way of resolving disputes for example, business disputes. Dispute resolution mechanisms that are used in the international sphere can be classified into two categories, adjudicative and diplomatic resolution mechanisms. Adjudicative mechanisms are those involving a neutral third party who resolves the issue by rendering a decision that is binding on the parties, for example, judicial settlement and arbitration. In contrast, the diplomatic mechanisms of dispute resolution, some of which involve a third party, result in outcomes that are always non-binding in effect. Diplomatic mechanisms of settlement can be divided into two branches; on the one hand those that involve only the parties of the disputes themselves, for example, negotiations and consultations and those that engage a third party in the process on the behest of or with the consent of the disputants, for example, conciliation mediation, good offices and inquiry. This paper focuses on conciliation as a diplomatic mechanism of foreign direct investment dispute settlement. First, it sheds light on the nature and elements of conciliation compared to other mechanisms that engage a third party, mainly mediation. Second, it identifies the major advantages of conciliation. Third, it identifies cautions that accompany resorting to conciliation as a dispute resolution mechanism. Fourth, it identifies some concluding remarks.

Keywords: Achieving Justice- Alternative Dispute Resolution Mechanisms (ADRM) - Adjudicative Mechanism-Arbitration-Conciliation- Diplomatic Mechanism-Foreign Direct Investment (FDI)-The International Centre for Settlement of Investment Disputes (ICSID).

Nature and elements of Conciliation as a Mechanism of Settling Disputes

Conciliation is used to settle disputes which its parties desire to use this mechanism to settle disputes arising between them. Conciliation does not impose direct applications for law in relation to disputes, but rather it respects dispute circumstances, the parties' circumstances, and its effect on international peace and security. Conciliation is a legal political tool; thus, it differs and varies from other peaceful settlement mechanisms, whether mere political or mere legal. Conciliation is important in many ways, especially human, legal, and political aspects.¹ The human importance is illustrated when considering conciliation as a peaceful means to settle disputes. It is subject to what applies to other peaceful means. The substitute of the peaceful means in settling international disputes is using force to resolve dispute with its non-human effects suffered by international society in wars that erupted between countries in different regions. The legal importance of

conciliation is that it is a peaceful means subject to the rules of international law in settling international disputes. It interferes to resolve dispute according to specific legal rules, which assures to the parties concerned that it will be subject to objective legal rules rather than ideological or personal considerations. As for the political importance, conciliation is distinguished by being a legal means which uses political means to resolve disputes. That is, conciliation respects the circumstances of each party of the dispute and its effect on parties and international community. Conciliation does not force the parties to accept its results or impose them on the parties. The parties are free to accept or refuse its recommendations. Therefore, conciliation engorges them to adopt it with no fear of getting involved in an international legal obligation. That is because if they are not satisfied with its results, they have the right to refuse it and not to comply with it.²

Although conciliation has been used in some domestic societies for hundreds of years, on the international level it appeared in the early part of this century, evolving out

¹ Helmy, Nabil Ahmed, International Conciliation, 1990, p.7

² Ibid, p.8

of both the inquiry and mediation processes.³ Further, in the early years of its use, conciliation was implemented together with inquiry as a two-step procedure where, initially, the facts involved in the dispute were ascertained, followed by a reconciliation phase.⁴ As the practice of conciliation was refined, the two concepts merged so that it can be derived from the general definition of conciliation that, in an examination of the entire dispute, an elucidation of the facts by the conciliator is an integral element of the process.⁵

Conciliation has two meanings: the first is the broad one; the process of conciliation means a process of settling disputes peacefully through a third party's intervention who conducts this settlement between the disputants attempting to approximate their points of view. The second meaning is the narrow one; it means referring the dispute to a committee which gives its suggestions to settle the dispute; these suggestions are binding to both parties only if they accept them. Conciliation in the narrow meaning is subject to the settled rules of the international law.⁶ Thus, conciliation is a peaceful means to settle disputes arising between parties; it is based on choosing a conciliator to reach a dispute settlement through approximating different points of view without extending his role to issuing a binding decision for the disputants.⁷ This definition illustrates the basic elements included in conciliation, represented in:

1.1 Conciliation is a Peaceful Means to Settle Disputes

Conciliation is a peaceful means to settle disputes arising between the parties, and remove the problems that prevent the execution and completion of their relationships. Conciliation is not considered a legal or judicial means adopted to resolve disputes arising between parties; rather it is the most feasible mechanism by which decision is made through the parties' agreement and consent. Since conciliation aims, like all peaceful mechanisms, to settle existing disputes, it is also distinguished by being a primarily peaceful mechanism to resolve them. This feature may make conciliation not subject to the judiciary control; the conciliator's attempts are not subject to the judiciary control in general.⁸

1.2 Conciliation as an Optional Means to Settle Disputes

³ Herrmann, Conciliation as a New Method of Dispute Settlement, in *New Trends in the Development of International Commercial Arbitration and the Role OF Arbitral and Other Institutions* (P. Sanders ed. 1983), p.145 .

⁴Yaakov, N. Bar-, (1974). *The Handling of International Disputes by Means of Inquiry* pp.198-211.

⁵ Ibid, pp. 241-6.

⁶ Helmy, *ibid*, p. 8.

⁷Mousa, Mohammed Ibrahim. *International Commercial Conciliation and the Change of the Prevalent View about the Means Settling the International Trade Disputes*, (Alexandria, New University Press, 2005), p. 23.

⁸ *Ibid*.p.25

Conciliation basically depends on the parties' desire, even if this satisfaction in accepting this means or in serious participation leads to waiving some rights hoping to reach a solution which meets the parties' desires.

When a dispute arises, selecting conciliation springs from the parties' pure desire; hence, it may not be imposed upon them. Resorting to conciliation largely depends on accepting it and the parties' tendency to it. It is adopted at the time of choosing it, whether before or after the dispute arises, or before or after choosing the legal means such as arbitration. The parties' agreement to resort to the adjudication or arbitration and inclusion of an express condition in this regard in the contract concluded between them does not prevent adopting this peaceful means to resolve disputes.⁹ Conciliation results from the parties' agreement on a third party's intervention to settle the dispute. Although the legislator regulates the rules of the peaceful settlement, adopting this means depends on the parties' desire at its start. Conciliation starts with an application by one of the parties notifying the other party to take his opinion whether to accept this means or not, through the organization or the center to which the settlement application is submitted. The optional feature is obvious while agreeing on resorting to this means.¹⁰ Agreement on resorting to conciliation may precede submitting the settlement application or be while resolving dispute through the arbitration court; albeit some prefer to resort to it in the second stage. That is because in the latter, it is easy to reach a satisfactory solution. As much as a dispute develops, parties become able to estimate things in specifically and accurately recognize the possibilities of achieving their goals. This gives the parties appropriate chances for conducting conciliation.¹¹ Some think that this means achieve its goal only by preferring to resort to it before settling the dispute. Only here the intended results may be achieved, since the parties can find appropriate solutions for their disputes without affecting their future relations. This is certainly affected by starting the dispute between them. If the parties look forward when selecting conciliation, it is important to help them preserve their relationships and increasing them. This can be achieved only by adopting it before resolving the dispute before the last events. This is unlike resorting to arbitration or the judiciary, where the parties may select this means or that one, looking backwards to the results of either way such as ending their relationships and all sorts of cooperation between them. In addition, conciliation does not take a long time; consequently, its success is an alternative of resorting to other means which are characterized by being slow, complicated, and costly.

⁹ *Ibid*.pp.26-27 See MOHAMED HUSSAM LOTFY. *Legal Protection Execution and Disputes Settlement according to the Trade Aspects Agreement in Relation to Intellectual Property Rights*, (IOIP publications, 1997), p. 8.

¹⁰ Abu Elwafa , Ahmed, *Optional and Obligatory Arbitration*, (Alexandria, Monshaat Elmaaref , 1988), p. 21.

¹¹ Mousa, *ibid*, p.31

Thus, starting conciliation before starting disputation with its costs and difficulty is necessary, albeit the peaceful settlement process fails, since this agrees with the philosophy for which this means is legislated, namely the peaceful settlement of the dispute, and its accordance with the manner in which the process of the settlement between the parties takes place.¹²

1.3. A Means based on a Third Party's Intervention

The definition of conciliation illustrates the basic element on which conciliation as a peaceful means depends. This element is the intervention of a third party, either to approximate different points of view, giving help, and exchanging information and documents to make parties reach a meeting point in which their different demands are achieved, or to extend its function to be able to provide the parties with some solutions, some of which may lead to their satisfaction without being able to take a solution or impose it on them¹³. Since the decisions or recommendations issued by the conciliator do not represent an arbitral or judicial decision or a binding decision, the conciliation system cannot make use of the judiciary authority, unlike arbitration which makes use of the judiciary authority without being an alternative to it. Arbitration always needs the judiciary intervention to settle everything that enables the arbitrator to achieve his task, and to guarantee his commitment to his limited powers. In addition, after issuing the recommendation and approving it by the parties, the conciliator's procedures and recommendations are not subject to the judiciary evaluation to verify the validity of the issued recommendation. On the contrary, the award issued by the arbitrator is subject to a final evaluation to verify its validity when the sentenced party appeals.¹⁴

1.4. Conciliation Committees Issue only Unbinding Recommendations for the Disputant Parties

The conciliation committees' role is limited to issuing decisions and recommendations by which the disputants may abide if they find this settlement a meeting point they agree on. This is for the purpose of not resorting to the legal means which remove peacefulness from the settlement way. These parties may not abide by them if they feel that these recommendations do not achieve the least of their demands or desires. The third party doing the conciliation is a neutral person whose job is limited to lead the parties to a medial settlement without extending to issuing a decision or sentence on the parties. Thus, the conciliator does not do a judicial work; so the recommendations or decisions issued by him do not

reach the level of binding rules or decisions¹⁵. Although conciliation is not very different from the other peaceful settlement means, like mediation, good offices and fact finding, yet conciliation differs, for example, from fact finding. According to the rules of the international law, the fact finding committee works on discovering facts and reasons which have led to the dispute. Thus, it does not bind the parties to accept the results of the fact finding. Fact finding committees do not give any suggestions to settle the dispute, but rather they pave the way for parties to negotiate in order to reach a settlement for the current dispute between them. Therefore, fact finding committees differ from conciliation committees in that the latter gives suggestions and recommendations for the disputants, even though the recommendations of the conciliation committees are not binding for the disputing parties.¹⁶ Thus, the relationship between conciliation committees and fact finding committees is a special one; so there is a connection between them. It can be said that conciliation is a practical development and needed in some disputes in which the mere fact finding is not enough. On the other hand, fact finding committees are in some cases an image of conciliation committees. They illustrate and show, through studying facts and reasons which have led to the dispute, the hidden facts which may help the parties understand the situation, so that they can reach a medial settlement approved by the parties of that dispute. In addition, there is a trend which sees that conciliation is a medial way between fact finding and arbitration.¹⁷

1.5. Types of Conciliation

Conciliation, like arbitration, could be institutional or ad hoc. The institutional conciliation is a sort of conciliation which is adopted and steered by a certain institution which in turn identifies the procedures of the conciliation process, keeps a list of conciliators from which conciliators are selected by the parties concerned and determine the rules which guide and direct the steps of the conciliation process, which is more recommended and preferred by the parties concerned. On the contrary, ad hoc conciliation is free conciliation which takes place without institutional supervision or does not follow the rules and procedures of any institution. Resorting to ad hoc conciliation be accomplished in two ways. The parties can insert a conciliation clause into a treaty or contract; thus, any future conciliation would address disputes arising out of that particular relationship. Alternatively, the parties may consent to a discrete conciliation agreement which will usually address a specific dispute that has arisen. The concept of party autonomy governs the constitution of each conciliation. By their agreement,

¹² Ibid, p. 32.

¹³ Ibid, p. 33. See Salama, Ahmed Abdel Karim, National and International Arbitration Law, Comparative Theorization and Application, (no publisher, 2003), p. 46.

¹⁴ Khaled, Hesham, Basics of International Commercial Arbitration, (Alexandria, University Thought House, 2004), p.155.

¹⁵ Mostafa Elgammal, Abdel Aal, OKASHA, , Arbitration in Private Relationships, (Alexandria, University Thought House,1988), p.134.

¹⁶ Khaled, Hesham, The Beginnings of the International Commercial Arbitration, (Alexandria, University Thought House,2004), p.155.

¹⁷ Helmy, ibid, p. 27

the parties can determine the entire personality of the conciliation process: the number and identity of the conciliators, the extent of conciliator duties, and all aspects of the procedure. For conciliations involving international business disputes, the parties can avoid the uncertainties involved in designing their own rules by agreeing that the process will be governed by institutional rules such as the ICSID Convention provision concerning conciliation, International Chamber of Commerce Conciliation Rules²³ or the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules. On the other hand, ICSID conciliation represents a good example of the institutional conciliation. According to ICSID procedures concerning resorting to conciliation, the party wishing to institute conciliation proceedings shall address a request to that effect in writing to the ICSID Secretary-General who shall send a copy of the request to the other party. The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings. The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.¹⁸ The Conciliation Commission shall be constituted as soon as possible after registration of a request pursuant to Article 28. The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree. Where the parties do not agree upon the number of conciliator and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.¹⁹ The Commission shall be the judge of its own competence. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.²⁰ It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms; The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations. If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement.²¹ If, at any stage of the proceedings, it

appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.²²

1.6. Conciliation and Mediation

The concept of conciliation stemmed from and resembles mediation, with both methods using a third party to facilitate a non-binding result through the medium of communication with the disputants. Indeed, the two terms are occasionally used interchangeably. In the transnational system, a distinction between the two can be made in the degree of formality and level of initiative imposed on the third party. A mediation is more informal and the mediator, when making proposals, is expected to construct them based purely on the information provided by the parties. Comparatively, a conciliation is more formal in structure and procedure, yet retains a non-adversarial environment. The central objective of the conciliator is to facilitate an amicable settlement of the conflict by communicating with the parties, typically through structured conciliation proceedings, and by submitting written proposals for a resolution of the dispute. When conciliation is resorted to in name, however, the actual process that is utilized may be sometimes more akin to mediation than to conciliation as defined above.²² In reality, as the use of the conciliation process throughout the transnational system is surveyed, it is evident that variations on the theme of conciliation flourish.

To sum up, the core aspects of the conciliation process are identified as follows: first, the conciliator (or conciliation commission) must have the confidence of the disputants in order to be able to perform her function; second, the function of the conciliator is to examine the entire dispute, including clarification of the facts and a survey of both the applicable law and the non-judicial elements; third, the recommendations of the conciliator need not be based purely on the application of law. The relevant legal principles may be supplementary grounds or may be absent altogether; and fourth, the resolution proposed by the conciliator is not binding on the disputants, who can refuse to implement the recommendations.²³

2. Advantages of Conciliation

Although conciliation as a means of peaceful settlement is characterized by the same features and characteristics as those of other peaceful means, conciliation, as arbitration, enjoys a specialty and an identity which

¹⁸ ICSID Convention, Article 28.

¹⁹ Ibid, Article 29.

²⁰ Ibid, Article 32.

²¹ Ibid, Article 34.

²² Ibid, Article 34.

²³ J. COT, *International Conciliation* (1972), (trans. Myers). See Dress, (1988). *International Commercial Mediation and Conciliation*, 10 *LoY. L.A. INT'L & COMP. L.J.* pp. 569-574.

distinguish it from these means. This is due to using it as a means of settling economic disputes and disputes related to the international trade affairs, mainly foreign direct investment disputes. In accordance with the provisions of the Convention of The International Centre for Settlement of Investment Disputes (ICSID) provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The provisions of the Convention states that "Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party".²⁴ Moreover, "the request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings."²⁵ Conciliation is distinguished in the economic and commercial field by many advantages which make many parties prefer resorting to it to resorting to arbitration. These advantages are represented in the following:

2.1. Economization in Procedures

The philosophy of conciliation as a peaceful means of settling disputes depends on many principles on which the procedural law is based. The most important principle is economization in procedures, which is the one that the legislator seeks to achieve in all the legal means by all means, even if by shortening the settlement period or by establishing a new mechanism to resolve disputes between the parties. This mechanism would achieve the stability of the legal situations and absolute justice. These goals are undoubtedly difficult to achieve through the judicial or the arbitral means, while they are easy to achieve through the friendly means, like conciliation. This means achieves the principle of economization in procedures in its general sense; i.e. exempting the disputing parties from being subject to the formal rules and, consequently, shortening the period of litigation and providing a quick justice for these parties. However, it is not only limited to achieving time-effective justice, but also this means fulfills the parties' desires in getting a less costly justice.²⁶

2.2 Achieving Justice

Achieving justice is the most important goal which the legislator seeks to achieve. Many countries produce conciliation due to its advantages presented in avoiding lengthening the dispute procedures, not being preoccupied by formalities, and finding a solution which ends the dispute and does not allow its appeal through

the parties' direct participation in all procedures, exchanging points of views, and reaching a satisfactory solution. Conciliation fulfills the parties' desires in getting medial justice, which is achieved through getting a quick settlement by simple procedures and the parties' effective participation.²⁷ Thus, conciliation leads to shortening the time; this might be due to the simplicity of its procedures; the mechanism, by which this operation occurs, helps to a large extent in the speed of settling rights and satisfying the parties.²⁸

2.3 Cost-Effective Justice

There is no doubt that economizing in procedures and avoiding formalism lead to achieving cost-effective justice. If conciliation provides the parties with an effective and quick means for settling disputes, it definitely leads to decreasing the cost they bear in order to reach a fair satisfactory solution. Unlike arbitration, conciliation allows the parties to get cost-effective justice in a short time. Although the arbitration shares conciliation in the short period taken in settling the dispute, even if some see that this feature is not always attributed to arbitration, yet conciliation is distinguished by being not exhausting to the disputing parties. If arbitration is distinguished by its easy procedures and quick settlement of disputes, it differs from conciliation in terms of the high costs to be borne by the disputants in order to resolve their disputes. Thus, arbitration is like the judiciary in the sense that it burdens the parties with excessive costs, which is avoided by conciliation. According to conciliation, help is required from a third party who is qualified to remove the dispute reasons and bring back cordiality. This does not cost the parties a lot.²⁹

2.4 Maintaining Contractual Relationships

When the disputant parties select conciliation, they do not think of settling their current dispute at the time of the dispute, but rather they consider their future relationships. The settlement they reach expresses the parties' satisfaction and persuasion. The solution is not imposed on the parties, which allows conciliation to maintain the peaceful relationships between the disputants. This is illustrated in the memorandum on the peaceful relationships between the disputants. This is shown in the memorandum presented by the UN committee of the international commercial law in relation to the draft of the typical law of the international commercial conciliation. It stated that the UNCITRAL has issued this law to help countries produce dispute settlement procedures aiming to decrease its costs, facilitate maintaining cooperative atmospheres between

²⁴ ICSID Convention, Article (28)

²⁵ Ibid.

²⁶ Mousa, *ibid.*, pp. 55-56.

²⁷ Hashish, Ahmed Mohamed, *Towards a General Idea of Procedural Mediation as a Substitute of the Judiciary*, (no publisher, 2001), p. 14

²⁸ Mousa, *ibid.* p. 58.

²⁹ Redwan, Abuzeid, "General Principles in Commercial Arbitration", (Cairo, Dar Elfikr Alaraby, 1981), p. 3

parties, avoid having more disputes, providing faith in the international economic transactions, educating the parties engaged in the international economic transactions, and educating the parties to seek non-judicial means to settle disputes. This would reinforce the stability in the field of settling these disputes.³⁰ Conciliation aims not only at repairing the damage resulting from the failure of the relationship, but also at directing it to the right direction through amending the contract and making some sort of balance in the obligations resulting from this relationship.

2.5 Repairing Resulting Damages

Similar to the judicial and arbitral systems and means, conciliation aims at repairing the damages which affect one of the parties of the relationship due to the failure in execution. The solution, aimed by the judicial or arbitral means through issuing the arbitration award or the judiciary decision, is achieved by conciliation through repairing the damage resulting from the failure in executing the relationship or from executing it in a way different from the one agreed on. Conciliation primarily aims at repairing the damage resulting from the relationship through a peaceful solution arising from the parties' sincere will in avoiding a disputing position settled in a traditional way through the judiciary or the arbitration authorities. This reparatory function is clear in the short-term contractual relationships which end upon contacting. This occurs if one of the parties does not execute its obligations as agreed or breaches its obligations, so the dispute arises between the parties. In this case, the conciliator's role is limited to repairing the resulting damages through giving the parties a satisfactory solution through which they can compensate the damaged or persuade the party who has breached its obligations to retract this and perform its duties as agreed in the contract.³¹ Actual reality may greatly help the conciliator do this role. Although the solution he reaches is merely a recommendation not binding for the parties, yet the necessities imposed by practical life may sometimes elevate them to the binding level. The pressure practiced by the public opinion or by some groups may force the parties to accept the solution suggested by the conciliator. In spite of the conciliatory role played by the conciliator and his attempt to repair the damage resulting from the relationship, yet the external circumstances may in many cases help to add the binding nature to the issued recommendation. Then, it achieves the conciliator's reparatory role for which this means has been legislated, and it leads to the desired result.³²

³⁰ Mousa, *ibid.* p. 62. See in Qindeel, Mostafa Elmetwaly, *Conciliation and the Judicial Medil: A Comparative Study between the French Law and the Egyptian Law* (Paris, 2001), p. 7.

³¹ Mousa, *ibid.*, p.64

³² Reneah, David, (1982), "Arbitration in the Field of International Trade", *The Economic*, p. 12.

2.6 Establishing Balance and Equality between Parties

Conciliation aims not only at repairing the damages resulting from the contractual relationships, but also at finding a kind of balance or equality between the parties' obligations. This ability springs from the conciliator's style of work; eventually, he reaches solutions which express the disputing parties' satisfaction and which are clear in the efforts he exerts attempting to approximate the different points of view, reaching its final settlement. The conciliator's activity focuses on reality rather than on law; he deals with the dispute events. He does not discuss legal issues, but rather he values and weighs situations through these events, reaching a conciliatory situation, not submitting to the judgment of law in them; the conciliator here has no power to confront the disputing parties.³³ The logic of the commercial conciliation greatly helps in the continuation of the contractual relationships between the parties and taking them from dispute to execution. When different viewpoints meet, this would establish a kind of contractual balance between the parties' obligations; a balance which allows to a large extent the continuity of the relationship between them. The conciliator creates a kind of preparation for the parties' obligations; a preparation which helps bringing back the balance to the obligations resulting from the contractual relationships.³⁴ This role is familiar to the parties of the contractual relationships since they often revise periodically the contracts they have concluded, especially the long-term ones; a revision which establishes equality between those their rights and obligations. There is no doubt that the parties have the means which enable them to do this revision and achieve this equality. This procedure becomes easier if a qualified third party persuades the parties of this preparation and the definiteness of this balance. The conciliator's role is not only limited to repairing the damages resulting from the relationship, but also it extends to preparing the contract with the requirements imposed by the justice rules. Originally, if the content of the contract is not united, it is not possible to modify it by increasing or decreasing; since this is considered an application of the binding power of the contract. However, the latter does not prevent the possibility of modifying the contract through the parties' agreement, since those can always modify the contract concluded between them according to the changes happening to the latter.³⁵ The conciliator may have the power of modifying the obligations resulting from the contract if certain conditions exist making the modification essential to achieve justice between the parties, albeit this affects the binding power of the contract. The conciliator usually resorts to using

²⁵ Salama, Ahmed Abdel Karim *Internal and International Commercial Arbitration Law*, *ibid.* p. 47

³⁴ *Ibid.* p. 47

³⁵ Mousa, Mohammed Ibrahim, "The Judicial Settlement of International Contracts, The Essence of Rules", (Tanta University, Faculty of Law, 2000), p. 4.

this privacy when he sees that one party is submitted to the other or when certain circumstances occur and make achieving the obligations difficult, which makes the continuity cause a lot of damages to the harmed party.³⁶ There is no doubt that the conciliator can play this role through preparing the parties to accept modifying the obligations resulting from the contract in a way that achieves a kind of contractual justice on which these applications should be imposed. In addition, the parties of the relationships obviously contribute to making the conciliator do this modification; he knows the limit of the right of each one of them in what he claims since each party knows in the depth of his heart the reality of his legal position about the current dispute between them. There is no doubt that resolving the dispute after consultation and satisfaction between the disputing parties will achieve the justice on which they agree and which often accord with the real justice which may be achieved by a judicial decision issued in the interest of one of these parties.³⁷ However, this system loses this feature if the conciliation fails; and in this case, the parties have one choice which is resorting to the traditional means to settle the disputes resulting from the concluded relationship between them. Meanwhile, the question is raised about the benefit of the peaceful means in settling the disputes and how they can waste the time in vain. However, the answer for that can be that the essence when accepting resorting to conciliation is good faith which means the existence of the parties' desire to reach a peaceful settlement through a satisfactory solution. If conciliation fails, this cannot be attributed to it, but it is attributed to the parties' inability to reach a meeting point which satisfies them. Thus, the success of conciliation depends not only on the conciliator's personality, but also on other means which support it. If this personality plays a central role in the activity of this system in the sense that the success or the failure of this attempt is attributed to it, this personality is supported by other means like the relationship between the disputants, the nature of the controversial matter, and the intention of each party in the necessity of reaching a conciliatory peaceful settlement of the current dispute.³⁸

3. Cautions accompanying Resorting to Conciliation

In spite of the several advantages that conciliation gives to the economic transactions, the caution that accompanies conciliation makes the parties avoid resorting to and adopting it as a means to settle their

disputes. Unlike adjudication and arbitration, and disadvantages as well as their inability to respond to the development and change of the international economic transactions, the commercial conciliation avoids these things and responses to these changes. Sometimes it surpasses the commercial arbitration in what it aims and the results achieved by commercial conciliation. This makes international institutions, like the international center of settling investment disputes, especially with the increase and of the development of the economic transactions, to refer to peaceful means like conciliation. Hence, conciliation starts to be adopted as a means to become the most important alternative means to settle the disputes. However, it remains a theoretical means which has not played its desired practical role in resolving these disputes, as if development stops at arbitration, without allowing conciliation to achieve its goals.³⁹ This is attributed to the parties who discard arbitration and adjudication do not acknowledge their easiness as an alternative means to settle disputes. In order to have the chances which most achieve their goals, the parties do not look for the easiest means, but rather they adopt what they take for granted to be the most appropriate means to reach their expectation even if it is full of some difficulties or exhausting somehow.⁴⁰ However, this caution is about to descend somehow after the codification of the typical contracts of this means and the preference to resorting to it before choosing the arbitration way. In addition, the conciliator's qualification reduces the probability of this caution. The conciliator appointed often has technical and scientific experience in resolving the problems resulting from the international trading contracts; this doubles its attraction and encourages the parties to adopt and resort to it.⁴¹ The caution and fears will disappear by good knowledge and by recognizing the features of this means and how much it is appropriate for the international contracts, especially the long-term ones. The important and effective role behind the success of this means lies firstly in the parties' conviction with the appropriateness of this means and its efficiency in settling the disputes arising between them. Moreover, this role lies in the means that settles the dispute and in the conciliator's ability to remove the fears that remain in the parties. Although the conciliator does not decide in the dispute, as the arbitrator does, but he helps the parties in reaching a settlement between them, yet he should persuade them with the positivity of this trial and its importance in avoiding litigation.⁴²

Some of the factors that help in marginalizing the role of conciliation in settling the economic disputes are the results of these means such as the conclusions and decisions. What distinguished this means is that the

³⁶ Mousa, *ibid.* p. 67. See in Mabrouk, Ashor, *Towards an Attempt of Conciliation between the Opponents, Comparative Analytical Study*, (Cairo, DAR AL NAHDA AL ARABIA, 2002), p. 12.

³⁷ *Ibid.* p. 70

³⁸ *Ibid.* p. 70. See in Antaki, NabilL, *The Contracts of the Commercial Means and an Attempt to Change the Nature of the Disputes and Finding Alternative Means to Settle Disputes*, (Saint Foy, Laval University, 1993), p. 16.

³⁹ Elahdab, Abdel Hameed, *Arbitration Encyclopedia*, the International Arbitration, (Alexandria, 1998), p.5

⁴⁰ *Ibid.* p.6

⁴¹ Mousa, Mohammed Ibrahim, "The Judicial Settlement of International Contracts", *ibid.* p.101.

⁴² *Ibid.* p. 15

decision issued from its committees is only a recommendation issued by the conciliator in the dispute referred to him. The parties may accept or refuse taking this recommendation into account. The lack of the decision issued for the validity of the judiciary or the arbitration decision leads to the parties' abstention from this means and resorting to other judicial means, whether national or international. These parties focus on the unsatisfactory solutions resulting from conciliation, which make them refrain from it and look for another means which achieves their expectations and meet the result of the decisions of effectiveness and support.⁴³ The nature of the issued decision plays an important role in decreasing the role of conciliation in settling the disputes; the parties of these disputes do not want to waste time and effort, but rather they seek to meet their expectation at the least losses. This is achieved under arbitration and what the arbitrator issues such as obligatory decisions subject to the compulsory execution according to the procedures confirmed in the general rules upon receiving the order of execution⁴⁴. However, this view on the parties' side at the nature of the issued decision is only a minor perspective contrary to what it is supposed to be. It is necessary that the view and the evaluation that conciliation aims to achieve should be comprehensive and perfect. This minor estimation and the imperfect evaluation damage this means. If conciliation fails sometimes, in many cases it achieves its goals, the most important of which is maintaining the continuity of the contractual relationship between the parties. Thus, these goals will certainly motivate the parties and push them to think many times before resorting to other means or refusing the conciliator's decision of whatever nature or unbinding feature. If the decision lacks conviction or non-compulsion, it may not influence – if the parties are aware – the role of this means in settling commercial disputes. If its decision is unbinding, it is better to take this way, since it allows the parties to play a positive role in order to reach it. The space it leaves for the parties to reaching a settlement make is inevitable to resort to it, since the conciliator's decisions are in fact the parties'. No conclusive decision is reached apart from them or outside their expectations; rather the latter springs from the negotiations, exchange of opinions, and proposal of suggestions by them.⁴⁵

Conclusion

No doubt that alternative dispute resolution mechanisms (ADRM), especially the diplomatic ones, play an important role in enhancing and fostering economic and political relationships between the states involved, the investors' states, the home states and the states where the investments are established, the host states. From the various diplomatic mechanisms, conciliation is

considered the most appropriate due the advantages it enjoys. There are a variety of advantages to the use of conciliation, often in the comparative sense relative to litigation or arbitration. Conciliation is less costly than the adjudicative methods, as it is a relatively informal and expeditious process. Also, if a small claim is involved, conciliation should be preferred since it will be more cost-effective than litigation. Similar to arbitration, party autonomy is emphasized and the disputants usually have considerable freedom to design the conciliation process, including the choice of location and conciliators with expertise in the relevant subject-matter (ad hoc conciliation). Although in the institutional context, the parties don't enjoy the same scope of freedom as the procedures and list of conciliators are previously determined by the institution, they have the freedom from the beginning to go to whatever institution they want to manage the dispute resolution process using conciliation and other ADRM if available. The informal conciliation environment is likely to be warmer than that of the adjudicative forum. The compromising, "win-win" character of the conciliatory process is a major advantage since it facilitates the maintenance of a harmonious business relationship, whereas the use of an adjudicative form may rupture this connection. Thus, conciliation should be preferred in situations where the parties wish to preserve their extant contractual and commercial ties.⁴⁶ However, a number of drawbacks to the use of conciliation can be posed. It has been argued that conciliation, because it results in non-binding recommendations, is likely to be a waste of time, effort, and money since the process may collapse entirely or the recommendations may not be accepted by the disputants.

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⁴³ Mousa, Mohammed Ibrahim, "The Judicial Settlement of International Contracts, *ibid*, p.104.

⁴⁴ Redwan, *ibid*. pp.106-107

⁴⁵ Mousa, *ibid*. pp.106-107.

⁴⁶ Herrmann, *ibid*, p.145

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