

Amicable Means Of Settling Disputes Over Foreign Direct Investment (FDI)

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Abstract

This article explores the role of amicable dispute resolution methods—such as negotiation, mediation, and conciliation—in settling Foreign Direct Investment (FDI) disputes and their impact on attracting investment. It highlights the advantages of these methods, including cost-effectiveness, confidentiality, and the preservation of positive relationships between investors and host countries. The study examines legislative frameworks in Arab nations, such as Lebanon, Oman, Saudi Arabia, and Egypt, comparing their approaches to alternative dispute resolution (ADR). While some countries explicitly incorporate ADR into their investment laws, others, like Oman, lack comprehensive regulations, relying instead on arbitration or judicial processes. The article advocates for legal reforms to institutionalize mediation and conciliation, citing global examples like Malaysia's community mediation and the Singapore Convention on Mediation. The findings underscore the need for host countries to adopt structured ADR mechanisms to enhance investor confidence and reduce litigation risks. For policymakers, the study provides a roadmap for legal reforms to integrate mediation and conciliation into investment laws, particularly in Oman, where regulatory gaps persist. Investors and multinational corporations can leverage this research to assess dispute resolution frameworks when entering new markets. It concludes with recommendations for Oman to enhance its investment climate by adopting an integrated (ADR) system, aligning with its Vision 2040 goals to become a top destination for foreign investors.

Keywords: Amicable dispute resolution, FDI, negotiation, mediation, conciliation, investment climate, Oman Vision 2040

1. Introduction

Amicable means are considered to be one of the best ways of settling investment disputes, since they represent a principled alternative to adjudication or arbitration and can serve as a prelude to conceptualizing an investment dispute. The foreign investor and host country may resort to this approach, which offers several advantages. These include the ability to maintain a positive relationship between the parties involved, the potential for a quicker resolution, and the ability to maintain confidentiality. Additionally, amicable means can be less costly and less formal than traditional dispute resolution mechanisms, making them an attractive option for both parties. Ultimately, the use of amicable means can help to promote a positive investment climate and enhance a country's reputation as an attractive FI destination. Among the advantages of amicable means are the following:

1- The dispute is resolved amicably and in a way that is satisfactory for the parties.

2- Amicable means are shorter in duration than other means.

3- The costs incurred by amicable means are lower, compared to going before the courts or submitting to arbitration.

Nevertheless, these means have been criticized for not being mandatory. Hence, if neither side is satisfied with this solution, it is necessary to go back to the beginning, whereupon the time will be considered wasted if the parties fail to reach a conclusion. Looking at the legislation in Arab countries, Article 18 of the Lebanese Investment Promotion Law No

360/2001 may be cited:

Disputes between the enterprise and the investor arising from incentive contracts are resolved in an amicable manner. If an amicable solution is not possible, arbitration can be resorted to in Lebanon or abroad. This must be determined in advance of submitting the application. Provided that the project is subject to the provisions of this law with the approval of the board of Directors of the institution and the credibility of the authority of the trustee on the approval decision.

In the Sultanate of Oman, the Foreign Capital Investment Act No 102/1994 makes no mention of alternative means, although these do appear in the Omani Foreign Capital Law on arbitration, wherein Article 14 states: "It may be agreed to refer the dispute that arises between foreign investment projects and 'Others' to a local or international arbitration tribunal."

Therefore, the question of resolving disputes arising from FDI is one of the most important challenges facing countries in the contemporary context. As a result, states have turned to alternative means of settling disputes of this nature, such as administrative grievance, negotiation, conciliation, and mediation. The researcher will attempt to explain these in more detail in the following sub-sections:

1.1 Negotiation

Legal scholars have defined negotiation as "initial or direct communication between the foreign investor and the host country, with the aim of reaching a settlement of the dispute between them". The importance of the science of negotiation arises from two main angles: the first is its necessity, and the second is its inevitability. This is an era that is characterized by negotiations between individuals and nations alike, which is evident across all aspects of life. The importance of the science of negotiation is evident in today's world, where it is necessary to establish positive relationships between negotiating parties. This necessity arises from the fact that successful negotiations require a level of cooperation and understanding between parties, which can only be achieved through effective communication and negotiation skills. This represents the first angle of importance in the science of negotiation.

Meanwhile, the science of negotiation derives its inevitability from there being no other option or executor to address the subject of negotiation and reach a solution. This occurs where each negotiating party has a degree of power and influence, but no party has all power and influence to override the wishes and intentions of any other party. Negotiation then becomes the only solution available to the parties concerned. Thus, negotiations represent a stage in a dispute but can be resorted to in more than one phase

and under the right conditions. As a tool for dialogue, negotiation is more effective than other means, although it merely refers to an exchange of views between two or more parties, with the intention of unifying and consolidating those views. The overarching aim is to reach an understanding, so that relationships and transactions, whether commercial, economic, social, political, or of any other kind, may be established between individuals in areas where negotiation is essential.

However, on entering into negotiations, the following are implicit:

1. The commitment to continued negotiation, meaning that the asset is an obligation to do the work, not an obligation to achieve a result.

2. The commitment to flag progress, as a logical consequence of the principle of good faith in transactions, which obliges each party to inform the other of all the circumstances surrounding a dispute. This was decided by the International Chamber of Commerce in Paris in a judgement issued in 1981, wherein the contractor could not invoke the inadmissibility of arbitration on the ground that this clause was not issued by government decree if the negotiator failed to inform the other of this condition.

In one Case, an agreement to negotiate was concluded between the Sultanate of Oman and the Arab Republic of Egypt. This recourse to negotiation was clearly stated in the following text: "If a dispute arises related to an investment between one of the contracting parties and an investor of the other contracting party, the Contracting Party and the investor will attempt to: End the dispute through consultation and negotiation." Besides, brief and friendly negotiation should take place under any conditions in the event of a dispute between a host state and an investor. In fact, most agreements of this nature involve the protection and encouragement of bilateral investment, thereby indicating the need to begin with negotiation and then only resort to arbitration if necessary.

It is also essential to obtain an outcome from negotiation, as this will help put an end to conflict. It can mean that there is no need to resort to arbitration or adjudication. Conversely, if the negotiating parties fail to reach an amicable solution to their mutual satisfaction, they will have the right to turn to mediation and conciliation. With regard to renegotiation, there are certain conditions that must be met, which are as follows:

1. A change of circumstances surrounding the contract.
2. The failure of the contracting parties to anticipate circumstances.
3. Disruption and financial imbalance in the joint investment contract.

The agreement with the most flexibility and deliberation in investment contracts is the agreement of the parties to resort to alternative means, such as conciliation, mediation, and arbitration, as alternative tools of dispute resolution. This is what should be present in all investment contracts. On the other hand, the potential disadvantage is that these approaches can take time. Therefore, a specific period that is acceptable to the conflicting parties should be determined. Moreover, it should be considered that negotiation can save time and money for the conflicting parties, compared to dispute resolution via the judiciary or through arbitration. Therefore, the researcher suggests referring to the Foreign Capital Investment Law on the legitimacy of negotiation as a means of resolving disputes between FDI parties.

1.2 Mediation

The law defines mediation as:

the agreement of the parties to resort to another party to assist them in removing misunderstandings among themselves. This is to reach an agreement that may spare them a lot of effort, time, and exorbitant expenses if they turn to arbitration or the judicial arena.

It is sometimes called 'the mediation convention', defined as a legal process that is based on the will of the parties to seek an amicable settlement of a dispute arising between them, wherever there is a contractual or non-contractual legal relationship. This takes place by narrowing the gap between the views of each party. The broker will explain the strengths and weaknesses of each side, in an attempt to bring them closer together in individual or joint sessions, but without trying to impose a solution. Therefore, the success of mediation will depend on the will of both parties through their conviction of the strengths and weaknesses of each party's position, as explained to them.

In Malaysia, however, so-called 'community mediation' is adopted, which is very useful in the context to help parties resolve local conflicts, thereby avoiding lengthy and costly court procedures. Similarly, in Oman, there are the 'Conciliation and Reconciliation Commissions'. These committees are distributed across Oman, with one in almost every Governorate. The above committees were formerly affiliated with the Ministry of Justice, but now come under the Ministry of the Interior. Committee members are well-known figures with proven integrity and expertise in the field of friendly conflict resolution. It is worth noting that while committees for dispute settlement can be effective in resolving disputes, most of the cases brought before them are legal or civil in nature, with very few commercial cases. This is due to the fact that commercial disputes often involve complex legal issues and high stakes,

which may require a more sophisticated dispute resolution mechanism. As such, the parties involved in commercial disputes may prefer to opt for more formal and specialized dispute resolution mechanisms, such as arbitration or litigation. Nonetheless, committees for dispute settlement can still be a useful tool for resolving legal or civil disputes, particularly those that are less complex and have lower stakes.

Nevertheless, the term 'mediation' is used quite loosely at this point, and there is no single definition or model of the process. Rather, there are numerous variations, with each likely to serve certain objectives better than others. Each is also likely to be more appropriate at certain points in the life of a dispute. Several international bodies and organizations undertake to regulate mediation as an alternative means of settling commercial and investment disputes. Examples include the World Trade Organization (WTO) and the International Chamber of Commerce (ICC). Some Arab jurisdictions have also legislated for mediation as an alternative means of dispute settlement, set out in a separate law, whereas other jurisdictions regulate it within the laws of civil or administrative procedure.

Therefore, the researcher believes that the legislator in the Sultanate of Oman and elsewhere in the Arab world should legislate for the comprehensive regulation of mediation. In these contexts, mediation should be available as an alternative means of settling commercial disputes in general, and FDI disputes in particular, due to its many advantages, some of which are listed below.

- 1- It maintains the continuity of civil and commercial relations.
- 2- It reduces the burden on the regular judiciary.
- 3- It can resolve a dispute in a single procedure, thereby saving time, effort, and money.
- 4- It provides for the acceptable settlement of disputes that arise between individuals or states that are governed by different legal systems.

Aside from the above, mediation has become a means of global importance, selected globally to resolve disputes in the field of trade and investment. In its 51st Session, the United Nations issued its Business Law Report, containing a draft resolution on the United Nations Convention on International Settlement Agreements Resulting from Mediation, based in the State of Singapore (consequently, the Singapore Convention on Mediation).

Furthermore, in Malaysia, as already mentioned earlier in this thesis, the federal government has established a community mediation programme for the management of national unity and integration. However, other bodies, such as the Malaysian Mediation Centre (MMC) and the Kuala Lumpur Court Mediation Centre, also provide mediation

services as a time- and cost-efficient means of dispute resolution for communities. The Malaysian government has thereby restructured traditional dispute resolution to create a contemporary legal framework and developed an organizational structure for community mediation. Meanwhile, in Pakistan, the traditional Jirga system of conflict resolution is still applied in the absence of an appropriate legal framework or structure, especially in the Khyber Pakhtunkhwa Province. However, there are also a number of Pakistani laws that cite mediation as an amicable solution. Unfortunately, while there are some provisions on mediation and other mixed methods of alternative dispute resolution in Pakistani law, there is no specific legislation for community mediation. The Kimberley Regional Pakistani Government and the Peshawar High Court have established a mediation centre, but with unsatisfactory results. Thus, to modernize the practice of community mediation in the Kimberley Process, a comprehensive legal framework and appropriate organizational structure is required, similar to the traditional and institutional Jirga community mediation.

As for the Sultanate of Oman, the mediation rules of the Oman Commercial Arbitration Center were set out in the Official Gazette of the Ministry of Justice and Legal Affairs, Issue No 1400 dated 7/7/2021 by virtue of Resolution No 8/2021. The researcher believes that through this latest development, mediation may be exploited to the full, having proven its importance. This would position Oman in the rankings of those countries that are attractive for foreign investors who seek to execute long-term investment projects.

Nevertheless, the researcher finds it important to establish community mediation in Oman, having examined the global impact of mediation centres as the face of conflict resolution around the world, and the proven benefits of appointing mediators in Malaysia. Therefore, the researcher recommends the development of a legal framework and structure for community mediation, referring to the Foreign Capital Investment Law to ascertain the legality of adopting mediation as a means of resolving disputes between FDI parties.

1.3 Conciliation

The third means of amicable settlement is known as 'conciliation', which is intended as the 'friendly' resolution of a dispute by an appointed third-party 'conciliator', with the aim of settling a dispute according to the consent of both parties. The means of conciliation will therefore depend on the convergence of views, although it is reserved as amicable, with no decisions that are binding on the parties. Jurists define conciliation as "a method or procedure aimed at bringing opposing points of view closer together, with the intention of reaching a compromise between the

parties, through a third party characterized by impartiality and independence".

In Saudi Arabia, the legislator has regulated conciliation through local laws, for example, in its Foreign Investment Law No (M/1) of 1431 AH, wherein it is prescribed to resort to friendly means. Article 13 of the Saudi Foreign Investment Law stipulates that, without prejudice to any international agreements to which Saudi Arabia is a party, disputes arising between the government and foreign investors in relation to investments made by the latter and licensed under this Law, shall as far as possible be settled amicably. If this is not possible, the dispute shall be resolved in accordance with the regulations.

The Egyptian legislator has likewise established two Ministerial committees with the aim of amicable settlement under Egypt's Investment Law of 2017:

1- (Ministerial Committee for the Settlement of Investment Disputes) in the text of Article 85: "A ministerial committee shall be established to be called the 'Ministerial Committee for the Resolution of Investment Disputes'. It shall be competent to consider any requests, complaints or disputes that may arise between investors and the State or to which one of its affiliated bodies or companies is a party..."

2- Ministerial Committee for the Settlement of Investment Contract Disputes Article 88 stipulates that a ministerial committee shall be established in the Council of Ministers to be called the 'Ministerial Committee for the Settlement of Investment Contracts Disputes'.

Conversely, in Oman's former Foreign Capital Investment Law No 102/1994, the text of Article 14 is indirect, as follows: "It may be agreed to refer any dispute arising between foreign investment projects and 'Others' to a local or international arbitral tribunal." When the modern law was drafted, it did not refer to any of the alternative means of dispute settlement that are highlighted above. Rather, the Law only mentions the Omani judiciary and arbitration, as reflected in the text of its Article 17:

The Omani courts shall have jurisdiction to hear any dispute arising between the investment project and 'Others', and the cases of investment projects shall have the character of urgency when they are heard before these courts. Disputes and disputes may be settled by arbitration.

However, Article 30 of Oman's Foreign Capital Investment Law 50/2019 mentions the establishment of one or more committees to consider grievances against decisions, whether these decisions are issued by the Ministry or the competent authorities. These committees consist of a counsellor from the Court of Administrative Justice, a first instance court judge, or an experienced member of the Chamber of Commerce and Industry. The committee is competent to consider

grievances submitted to it within 60 days of the date of notification of the decision. According to Article 31 of the same law, it shall be decided within 30 days of the date of submitting the grievance, and the period may be extended just once for a similar period if the grievance is deemed invalid for a decision. Moreover, the committee's decision shall be final and binding on the Ministry and the competent authorities, although it should be noted that the complainant may resort to the courts to appeal a decision.

In conclusion, the researcher believes that the Foreign Capital Investment Act should clearly indicate the legality of using conciliation as a means of resolving disputes between investment parties. This would have a positive effect on Oman's reputation as a host country for FDI. For example, amicable dispute settlement took place in Jordan over the establishment of a casino on the banks of the Dead Sea, after the Jordanian government had signed a contract with an English company to construct the project. However, the Jordanian government later decided to terminate the contract on the ground of it disturbing the public order under Jordanian law. This matter was later settled through reconciliation between the parties. To achieve such a reconciliation, there needs to be legislation that allows the parties to do so.

For the purpose of clarifying the appropriate procedures, the text of the Jordanian Investment Promotion Law, art 43 establishes a mechanism for settling investment disputes. If there is no amicable agreement or recourse to arbitration, the national judiciary shall be considered to have jurisdiction and will adjudicate on these disputes, which is what is required to create an arena for amicable agreement between conflicting parties. Article 43 of Jordan's Investment Promotion Law stipulates:

Investment disputes between government agencies and the investor shall be settled amicably within a maximum period of six months. Otherwise, the parties to the dispute may resort to the Jordanian courts or settle disputes in accordance with the Jordanian Arbitration Law or resort to alternative means of resolving disputes by agreement of the parties.

2. Concluding Remarks

To conclude this discussion of friendly means of resolving FI disputes, the researcher sees the need for Oman to build an integrated system that will attract investors. This could be achieved by activating and disseminating information about friendly means of dispute resolution. Its advantage would thereby be highlighted, and attention paid to putting together teams of trained cadres to resolve such disputes. These professional cadres could even be recruited globally to hone the capabilities of Omani youth

working in the field. Moreover, Vision 2040 would be fulfilled by placing Oman among the world's most attractive countries for investors. Part of this attractiveness would be due to a capacity for rapid and efficient resolution of investment disputes.

REFERENCES

1. Assistant professor of private law at the College of law at A'SHARQIYAH UNIVERSITY. salim.almusalhi@asu.edu.om
2. Assistant professor of private law at the College of law at A'SHARQIYAH UNIVERSITY. salim.almusalhi@asu.edu.om
3. First legal secretary in the Supreme Court in Oman, Doctor in law.ttss9696@gmail.com
4. Mohamed Abouelainen, "The Role of the Cairo Center in Resolving Trade and Investment Disputes through Negotiation and Mediation" (paper presentation, Seminar on Mediation in Trade and Investment Contracts, Cairo, July, 1998).
5. Law No 360 dated 16/8/2001 (encouraging reality in Lebanon).
6. Royal Decree No 102/94 Article 8 of the repealed Foreign Capital Investment Law.
7. Meaning government agencies.
8. Royal Decree No 102/94 Article 8 of the repealed Foreign Capital Investment Law.
9. Al-Barawi, Hassan Hussein, "Convention Mediation as a Means of Resolving Intellectual Property Disputes", Journal of Legal and Political Research, December (2018): <https://qspace.qu.edu.qa/handle/10576/16364>, (accessed 18 February, 2022).
10. Adel Mohamed Kheir, Introduction to the Egyptian Arbitration Law, (Cairo: Dar an-Nahda Al-Arabiya, 1995), 43.
11. AJPlus, "Will America Strike the Factories of the Most Important Company in the World to Deter China from Invading Taiwan," YouTube, <https://www.youtube.com/watch?v=o_NdiQ8_Olg> (accessed 18 August, 2022).
12. Ahmed Abu al-Wafa, Mediator in International Law, (Cairo: Dar Al-Nahda Al-Arabiya, 2001), 639.
13. International Chamber of Commerce, "About Us", <<https://iccwbo.org/about-us/>>. The ICC is the world's business organization, enabling businesses to secure peace, prosperity and opportunity for all.

14. MHM Lotfy, *Civil Liability in the Negotiation Phase: A Study in Egyptian and French Law*, (Cairo: Golden Eagle Printing 1995), 21.
15. Azad Shakour Saleh, *Investment: Ways to Attract and Settle Its Disputes*, (Cairo: Legal Books House, 2011), 91.
16. Mohammed Al-Hashemi, *The Legal System of Foreign Investment in the Sultanate of Oman*, (Oman: Al Ghasham Al Manzil, 2019), 172.
17. Ibid.
18. Ibid, 181.
19. Mohamed Abdel Meguid Ismail, *International Works Contracts, Deraya: The Impact of the New Legal Nature of These Contracts on Their Provisions*, Egyptian Law, Comparative Law, International Norms, (Cairo: unpublished, 2000), 26.
20. <https://qspace.qu.edu.qa/handle/10576/16364?show=full>.
21. Ihtesham Ullah Khan, "A Comparative Study of Community Mediation in Malaysia and Jirga System of Khyber Pakhtunkhwa in Pakistan," (Master's dissertation, International Islamic University Malaysia, 2020), 2.
22. Salah Khalifa Al Muqbali, "Peace is good... What do you know about the conciliation and reconciliation?," Atheer, <https://www.atheer.com/archives/283398/%D8%A7%D9%84%D8%B5%D9%84%D8%AD-%D8%AE%D9%8A%D8%B1-%D9%85%D8%A7%D8%B0%D8%A7-%D8%AA%D8%B9%D8%B1%D9%81-%D8%B9%D9%86-%D9%84%D8%AC%D8%A7%D9%86-%D8%A7%D9%84%D8%AA%D9%88%D9%81%D9%8A%D9%82-%D9%88/> (accessed 22 June, 2023).
23. Franck S and Joubin-Bret A, "Mandatory Mediation and Its Variations Investor-State Disputes: Prevention and Alternative to Arbitration" in the Joint Symposium on International Investment and Alliterative Dispute Resolution 2018 organised by Washington and Lee University and UNCTAD, (Texas A&M University School of Law: SSRN, December 2018), 108-113.
24. Al-Barawi, Hassan Hussein, "Convention Mediation as a Means of Resolving Intellectual Property Disputes", *Journal of Legal and Political Research*, December (2018): <https://qspace.qu.edu.qa/handle/10576/16364>, (accessed 18 February 2022).
25. Ibid.
26. Ibid.
27. Ihtesham Ullah Khan, 12
28. <https://omanarbitration.om/%d8%b5%d8%af%d9%88%d8%b1-%d9%82%d9%88%d8%a7%d8%b9%d8%af-%d8%a7%d9%84%d9%88%d8%b3%d8%a7%d8%b7%d8%a9-%d9%81%d9%8a-%d8%a7%d9%84%d8%ac%d8%b1%d9%8a%d8%af%d8%a9-%d8%a7%d9%84%d8%b1%d8%b3%d9%85%d9%8a%d8%a9/?lang=ar>.
29. Mohamed Ibrahim Moussa, *International Commercial Conciliation, and the Prevailing View on Ways to Settle International Trade Disputes*, (Alexandria: New University Publishing House, 2005), 22.
30. Foreign Investment Law No (M/1) of 1431h.
31. Egyptian Investment Law No 2017.
32. Royal Decree No 102/94, Article 8 of the repealed Foreign Capital Investment Law.
33. 'Others' meaning the government agencies of the host country.
34. Royal Decree No 50/2019 to issue the Foreign Capital Investment Act.
35. Royal Decree No 50/2019 to issue the Foreign Capital Investment Act.
36. Hasan Ridaa, "Brief Notes on the Impact of Arbitration Rules on Investment Disputes on National Legislation" (paper presentation, 24th Arbitration Conference in the Fields of Foreign Investment in GCC Countries, Salalah, 22 August 2019), <https://www.argaam.com/ar/article/articledetail/id/1309782>.