

Mediation: a Culturally Well-Established Dispute Resolution Mechanism in the MENA (Middle East and North Africa) Region Gaining in Momentum

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Introduction:

1. Initially perceived as a means of relieving congestion in the courts, mediation has succeeded in gaining autonomy and greater attractiveness among users and practitioners.

Mediation is an alternative dispute resolution (ADR) method that ultimately leads to resolving the dispute outside the Courts, with the help of a third neutral (i.e. the mediator) who will actively assist the parties in crafting a settlement agreement themselves, thus putting an end to their dispute. With such a process, *"the legitimate expectation of the parties no longer necessarily resides in a legal solution whose terms most of the time elude the co-disputants [...], they no longer abandon their dispute so easily to legal specialists alone and wish to avoid the hazards inherent in any lawsuit"*.³

2. The aim of this study is to demonstrate that mediation, as a culturally well-established mechanism in the MENA region, is a cost and time efficient method of resolving

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3. Ch. JARROSSON, *"Les modes alternatifs de règlement des conflits, Présentation générale"* ("Alternative Dispute Resolution, General Presentation"), *Revue internationale de droit comparé*, Vol. 49, N°2, April-June 1997, pp. 325-345.

disputes, especially in the investment, construction and Islamic finance industries. Moreover, the entry into force of the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the "Singapore Convention on Mediation") will help promote mediation, insofar as the enforcement of the mediated settlements will be safeguarded. Furthermore, the flexibility of mediation allows it to overcome the hurdles resulting from the current pandemic situation, providing a dispute resolution tool when state justice is defaulting.

3. After briefly recalling the definition of mediation and its historical background in the MENA region (I.), as well as its legal framework in the different countries (II.), we will address the role that will be played by the Singapore Convention in promoting mediation and the different industries that will benefit from this promotion (III.). In addition, and after an overview of the mediation practice in the region (IV.), we will put forward some suggestions for promoting the use of mediation in the region (V.).

I. Mediation: outlining the mechanism and its historical background in the MENA region:

A. The role of the mediator as a defining characteristic of this alternative form of dispute resolution:

4. Mediation is *"a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute"*.⁴
5. Unlike state justice, mediation is a fast-track procedure: most cases are carried out within a fairly short period of time, ranging from a few hours to three months, and in 70% of cases, a settlement agreement is reached. The efficiency of mediation lies in the fact that the solution stems from the parties themselves, unlike litigation and arbitration in which the decision or the award is crafted by the judge or the arbitrator alone. Moreover, mediation is, in principle, a confidential procedure: debates, documents or information exchanged during the mediation should be kept secret, and parties are prohibited from producing them before a court or an arbitral tribunal.

4. Article 2.3 of the United Nations Convention on International Settlement Agreements resulting from Mediation.

6. The mediator is not empowered by the parties to settle the dispute by rendering a binding decision. His role is to facilitate the re-establishment of a dialogue between the parties by assisting them in crafting a settlement agreement.⁵

Mediation is different from conciliation insofar as in the latter mechanism, the appointed third party (i.e. the conciliator) has a more intrusive role in the resolution of the dispute, either during the discussion phase, in which he actively intervenes, or at the stage of drafting the solution; the conciliator is able to suggest a solution or declare himself in favour of one solution instead of another.

In other words, while the settlement reached through mediation is the result of the parties' mutual consent, in a conciliation process, the solution may, in certain circumstances, be imposed upon them.

7. Mediation also differs from arbitration, which can be defined as an alternative dispute resolution mechanism whereby the parties agree to submit their dispute to an arbitral tribunal composed of one or several arbitrators who shall settle the dispute definitively by rendering a binding award. It should be noted that mediation may be envisaged as a stand-alone procedure expressly provided for in a contractual provision or as the first stage of an escalation clause, i.e. a clause that combines mediation and arbitration under arb-med, med-arb and arb-med-arb protocols, which are increasingly popular.

To summarize, the difference between mediation, conciliation, and arbitration lies in the role that the parties agree to grant to the third neutral: in mediation, the mediator lacks authority to render a decision and assists the parties in the resolution of the dispute without suggesting any solution or orienting the debate. In conciliation, the conciliator also lacks authority to render a decision but has more margin to intervene in the process and, in some cases, to suggest a solution to the parties, while in arbitration, the arbitrator is granted the power to render a binding award alone (without the help of the parties).

There are different types of mediation:

- Judicial mediation vs. conventional mediation: judicial mediation is initiated by the judge, before whom the dispute is already submitted, who will suggest a mediation process to the parties, whereas conventional mediation is initiated by the parties outside a judicial procedure.

5. L. Fuller, Mediation: Its Forms and Functions, Southern California Law Review, 1971.

- Institutional mediation vs. *ad hoc* mediation: Mediation is institutional when it is supervised and managed by an institution providing for an appointment process and detailed mediation rules. Conversely, mediation is *ad hoc* when it is organized by the parties themselves.
- Compulsory mediation vs. consensual mediation: mediation is compulsory when it is a prerequisite expressly set forth by the legislator, before the referral of the dispute to a judge,⁶ and it is consensual when parties chose to resort to mediation, even though they are not compelled to do so.

B. The mediation heritage in the MENA region:

8. The MENA region countries share the heritage of the *Shari'a*,⁷ which is composed of the following pillars: the *Coran* (i.e. the Islamic sacred book, believed to be the word of God as dictated to the Prophet and consisting of 114 units of varying lengths, known as *Souras*); the *Sunna* (i.e. the Prophet's words and acts); the *Fiqh* (i.e. the interpretation of the *Coran* and the *Sunna* by scholars); the *Ijma* (i.e. the consensus or agreement of Islamic scholars on a specific matter); and the *Kiass* (i.e. the analogical reasoning between a situation expressly envisaged in the *Coran* and a situation not provided for therein, for which a solution was needed).
9. Alternative dispute resolution is rooted in Islamic tradition, which favours the amicable settlement of disputes through the intervention of neutral and independent third parties whose role is to help the parties to find a settlement and to reconcile.⁸ Actually, the Prophet himself had the opportunity to play this role during the reconstruction of the *Ka'ba*.
10. We can classify the MENA region countries into three categories:
 - Countries that solely apply the *Shari'a*, such as Saudi Arabia;
 - Countries that apply the *Shari'a* and a secular set of laws, the latter being of civil law inspiration (such as Algeria, Egypt, Iraq, Lebanon, Libya, Morocco, Tunisia,

6. This is notably the case in France concerning disputes with a value of less than 5,000 euros and certain neighbourhood disputes since the enactment of Law No. 2019-222 of 23 March 2019.

7. A. Jaballah, "Qu'est-ce que le droit musulman?" ("What is Muslim Law?"), *Raison présente, Figures de l'islam*, n°141, 1er trimestre 2002, pp. 33-50.

8. "If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from hers; If they both wish for peace, Allâh will cause their reconciliation. Indeed, Allâh is ever All-Knower, Well-Acquainted with all things", Sourat An-Nisa (IV:35), The Noble Coran.

and Syria) or of common law inspiration (such as Bahrein, Koweit, and Qatar); and

- Countries that apply the *Shari'a*, a secular set of laws as well as customs (such as Djibouti, Somalia, and Yemen).

11. Several countries of the MENA region provide for alternative dispute resolution mechanisms, which could be seen as a local form of mediation, such as: *Chafa'a*, *Xeer*, *Sulh*,⁹ *Musalaha*, and *Wassata*.

- *Chafa'a* (practiced in Morocco) refers to the act of intervening on behalf of a party in a dispute with the intention of finding a suitable resolution or settlement. The third party plays an authoritative role and is seen by the parties with a great deal of respect and credibility.¹⁰
- *Xeer* is the traditional Somali mechanism through which elders, known as the *Xeer Begti*, serve as mediators and help settle the disputes, taking precedent and custom into account.
- *Sulh* (which refers to the idea of peace) is a process by which both parties choose together third neutrals who will provide them with solutions to their disputes. It is often followed by *Musalaha*, which means reconciliation.
- *Wassata* derives from the word *Wassat* which means "the middle". It refers to the intervention of a third party who intervenes gratuitously in order to help the parties find an amicable solution to resolve a dispute.

12. It results from the above that mediation is rooted in the MENA region and is culturally widely embedded. Therefore, promoting mediation in this region should not, in principle, face many hurdles. That being said, the legal framework related to mediation in this region differs from one country to another, while a trend towards enacting specific mediation laws can be observed.

9. In the Kingdom of Jordan, the government officially recognizes the Sulh and Musalaha as a legally acceptable tradition of Bedouin tribes. Sulh and Musalaha are also still used by Palestinian citizens of Israel living in villages of Galilee.

10. S. Ouboulahcen, "Alternative Dispute Resolution and Mediation in Morocco, Merging Islamic and Contemporary Approaches: The Way Forward", *Search for common ground, Morocco, Synthesis Report*, 2020.

II. The current legal framework in the MENA region¹¹:

13. Some countries have adopted stand-alone mediation laws (applicable to all matters), such as Lebanon (governing court-annexed mediation)¹² and Jordan (governing conventional and court-annexed mediation).¹³

Algeria,¹⁴ Tunisia,¹⁵ and Djibouti¹⁶ have inserted court-annexed ADR (mediation or conciliation) provisions into their codes of civil procedure, while Morocco¹⁷ and Mauritania¹⁸ have also introduced conventional mediation (applicable to all matters) into their codes of civil procedure.

14. In some jurisdictions, we can find ADR provisions applicable only to specific matters, such as labour law (in countries such as Lebanon,¹⁹

11. For further details, see N. Najjar, "Chapter 24: the Arab World", in Arnold Ingen-Housz (ed), ADR in Business: Practice and Issues across Countries and Cultures II, Kluwer Law International, 2010, pp. 559-582.

12. Law 82/2018 of 10 October 2018, which came into force in May 2019.

13. Jordan Mediation Act of 2006 reformed in 2016.

14. Articles 994 -1005 of Law No. 08-09 of 18 Safar 1429 corresponding to 25 February 2008 of the Code of Civil and Administrative Procedure (Official Gazette No. 23, 2008 introducing Book V on Alternative Dispute Resolution) which organises the judicial mediation process. See, notably, Article 994 (1): "*En toute matière le juge doit proposer aux parties la médiation à l'exception des affaires familiales et prud'homales et des affaires susceptibles de porter atteinte à l'ordre public*". ("In all matters, the judge must propose mediation to the parties, except in family and labour cases and cases likely to undermine public order".)

15. Article 45 of the Code of Civil and Commercial Procedure: "*Dès que les parties comparaissent, volontairement ou après avoir été régulièrement citées, le juge les invite à se réconcilier. S'ils acquiescent à sa demande, le juge rend un jugement (en ratifiant) la conciliation [...]*". ("As soon as the parties appear, either voluntarily or after having been duly summoned, the judge shall invite them to reconcile. If they agree, the judge shall give a judgment (by ratifying) the conciliation".)

16. Article L.343-1 to Article L.343-16 of the Code of Civil Procedure. See, notably, Article L.343-1: "*Le juge saisi d'un litige peut, après avoir recueilli l'accord des parties, désigner une tierce personne afin d'entendre les parties et de confronter leurs points de vue pour leur permettre de trouver une solution au conflit qui les oppose*". ("The judge hearing a dispute may, after obtaining the agreement of the parties, appoint a third person to hear the parties and compare their points of view in order to enable them to find a solution to their dispute".)

17. Articles 327-55 to 69-327-69 of the Code of Civil Procedure. See, notably, Article 327-55: "*Afin de prévenir ou de régler un différend, les parties peuvent convenir de la désignation d'un médiateur chargé de faciliter la conclusion d'une transaction mettant fin au différend*". ("In order to prevent or settle a dispute, the parties may agree on the appointment of a mediator to facilitate the conclusion of a settlement of the dispute".)

18. Act No. 2019-020 amending and supplementing certain provisions of the Code of Civil, Commercial and Administrative Procedures; New Article 166-12 to new Article 166-28, which provide for the conventional mediation process.

19. Labour law of 23 September 1946 as amended on 31 December 1993 and on 24 July 1996, Article 50: "[...]

Tunisia,²⁰ and Syria²¹), family law (Tunisia²² and Syria²³) and consumer law (Lebanon²⁴ and Tunisia²⁵).

It should be mentioned that Comoros, as part of the OHADA²⁶, adopted on 23 September 2017 a Uniform Act relating to mediation that came into force on 15 March 2018.

Several bilateral investment treaties²⁷ to which the MENA region countries are signatories contain dispute resolution mechanism clauses that provide for mediation.

Le président du conseil d'arbitrage tiendra, dans un délai de cinq jours à compter de la date de saisine, une réunion spéciale à laquelle il convoquera les deux parties en vue d'une conciliation. ("The Chairman of the Arbitration Board shall, within five days from the date of referral, hold a special meeting at which he shall convene both parties in view of conciliation".)

20. The Labour Code also provides for a prior amicable procedure for any dispute arising from an employment relationship. See, for instance, Article 207: *"Le conseil de Prud'hommes doit avant de statuer tenter la conciliation entre les parties en chambre de conseil."* ("Before ruling upon the matter, the Prud'hommes Board must attempt to bring about conciliation between the parties in the council's chamber".)
21. Article 208 of Labour Law N° 17/2010, concerning individual labour disputes provides that : "[...] Whenever the dispute is about a worker's dismissal or notice of dismissal, the worker or the trade union concerned may, upon request of the worker, solicit mediation by the competent directorate within ten days of being notified of the dismissal or dismissal notice [...]"; Article 211 (a) of the same law regarding collective labour disputes provides that: *"parties shall seek an amicable settlement of the dispute through collective bargaining"*. And Article 212 (a) provides that: *"[t]he competent directorate represented by the director, or by the staff member or labour affairs expert appointed by the director, shall conduct mediation between the parties to reconcile their points of view and reach a settlement of the dispute"*.
22. Article 32 of the Code of Personal Status: *"[...] Le divorce n'est prononcé qu'après que le juge de la famille ait déployé un effort dans la tentative de conciliation demeurée infructueuse [...]"*. ("Divorce is pronounced only after an effort on the part of the family judge to attempt to bring about conciliation has been unsuccessful".)
23. Article 41, §2 of the Code of Personal Status: *"The court must investigate the causes of the dispute. If it finds there is a dispute, it shall appoint an arbitrator from the wife's family and another from the husband's family - if any - to consider reconciliation. If these cannot be found, the court shall mandate the couple to elect two arbitrators. If they cannot agree, the arbitrators shall be appointed by the court"*.
24. Articles 82-96 of the Consumer Protection Act No. 659 of 4 February 2. See, notably, Article 82: *"les litiges survenant entre un consommateur et un professionnel ou une usine sont soumis à la médiation si leur valeur n'excède pas trois millions de Livres Libanaises"*. ("Disputes arising between a consumer and a professional or a factory are subject to mediation if their value does not exceed three million Lebanese pounds".)
25. Law 2006-19 amending Law 2001-65 on financial institutions introduced a new Article 31(quarter) that requires each financial institution in Tunisia to appoint one or more mediators to examine complaints submitted by the bank's customers.
26. The Organization for the Harmonization of Business Law in Africa (OHADA).
27. Should the host State breach the rights of the investor under the treaty (such as fair and equitable treatment, protection from expropriation, free transfer of means and full protection and security), the investor can bring an action before the competent authority against the host state.

To name just a few, we can mention the following treaties: the Iraq Kurdistan Region Model Production Sharing Contract (2007)²⁸ and the bilateral investment treaties concluded between: Algeria and Sweden (2004);²⁹ Azerbaijan and the Syrian Arab Republic (2009);³⁰ Egypt and Switzerland (2010);³¹ Estonia and Jordan (2010);³² Egypt and Mauritius (2014);³³ and BLEU (Belgium-Luxembourg Economic Union) and Sudan (2005).³⁴

Furthermore, some multilateral agreements concluded by a great number of Arab countries provide for an amicable settlement of disputes, including through mediation, such as the "2013 Amendment to the 1980 Arab League Investment Agreement",³⁵ which came into force on 24 April 2016 (it has been ratified by Iraq, Jordan, Kuwait, Mauritania, Oman, Palestine, and Qatar) and the Arab Maghreb Union Investment Agreement concluded between Morocco, Mauritania, Tunisia, Algeria, and Libya.³⁶

This being said, in the absence of legal provisions expressly providing for mediation in some jurisdictions, and since mediation is a conventional mechanism, the parties

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28. Article 42(1)(b) states that where a dispute cannot be resolved through negotiations, any party to the dispute may seek settlement by mediation in accordance with the London Court of International Arbitration mediation procedure.
29. Article 8 § 1 provides that the parties should attempt for a maximum period of 6 months to settle disputes amicably before having recourse to arbitration.
30. Article 12: *"Any dispute between an Investor of one Contracting Party and the other Contracting Party concerning an alleged violation of one or more of the provisions of this Agreement in respect of an investment in the State territory of the latter Contracting Party shall, if possible, be settled amicably"*.
31. Article 12: *"Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as 'investment dispute') shall, without prejudice to Article 13 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation or mediation (hereinafter referred to 'procedure of amicable settlement')"*.
32. Article 9: *"If a dispute under paragraph 1 of this Article cannot be settled within six (6) months of a written notification, the dispute shall be upon the request of the investor settled as follows: [...] by conciliation or arbitration by the International Centre for Settlement of Investment Disputes (ICSID)"*.
33. Article 10: *"Disputes between a Contracting Party and an investor of the other Contracting Party relating to an investment of the latter in the territory of the former, which concern an alleged breach of this Agreement (hereinafter referred to as 'investment dispute') shall, without prejudice to Article 9 of this Agreement (Disputes between the Contracting Parties), to the extent possible, be settled through consultation, negotiation, mediation or conciliation after written notification of the alleged breach has been made"*.
34. Article 12(1): *"As far as possible, the parties shall attempt to settle the dispute by negotiation, possibly with the expert advice of a third party, or by conciliation between the Contracting Parties through diplomatic channels"*.
35. Annex: Article 1 provides for mediation; Article 2 provides for Conciliation and Article 3 provides for Arbitration.
36. Article 19 provided for conciliation and arbitration.

can always agree to resort to mediation. Their agreement will be governed by the general provisions that govern the contractual relationship.

Fully in line with the more general trend towards the development of "*justice transactionelle*", whereby the judge endeavours to strike a balance between the interests of the parties, and to complete the legal framework, the Singapore Convention, which has been described as the "missing piece" for the development of mediation in commercial disputes,³⁷ will be examined hereunder.

III. The Singapore Convention: an answer to the difficulty of enforcing mediated settlement agreements:

15. A settlement agreement reached through mediation is a contract concluded between the parties and, in the absence of a statutory framework, its enforcement can only be carried out voluntarily by the parties, failing which, further to a court or arbitral process through which the defaulting party is compelled to comply with the settlement agreement. However, such procedures require additional time and costs, rendering mediation lengthy, costly and thus unattractive.
16. In order to overcome this hurdle, and along with the enactment of harmonised international and regional legal instruments regulating mediation, the United Nations Commission on International Trade Law (referred to as UNCITRAL), pursuant to the United States' suggestion to mandate the Working Group II (named Arbitration and Conciliation/Dispute Settlement), decided to start examining the topic of enforcement of settlement agreements at its forty-eighth session in 2015.³⁸ Four years later, the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention, came to light.³⁹

The Singapore Convention is a turning point in the promotion of mediation by ensuring the enforceability of an agreement resulting from mediation and concluded in writing by the parties through a simplified and streamlined procedure. As such, a parallel can be drawn between the Singapore Convention and the Convention on the

37. Speech by PM Lee Hsien Loong at the Singapore Convention Signing Ceremony and Conference, 7 August 2019, available at <https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference>.

38. *Official Records of the General Assembly*, Seventieth Session, Supplement No. 17 (A/70/17), paras. 135-142.

39. UN Convention on International Settlement Agreements Resulting from Mediation available at https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf.

Recognition and Enforcement of Foreign Arbitral Awards of 1958 (referred to as the New York Convention).

17. 52 countries have signed the Singapore Convention, including three countries of the MENA region: Jordan, Qatar, and Saudi Arabia. Four countries have already ratified the Convention (Singapore, Fiji Islands, Qatar, and Saudi Arabia), which will enter into force on 12 September 2020.
18. Particular attention should be paid to the compliance of the mediated settlement agreement with the *Shar'ia* once a party seeks to enforce it in a country of the MENA region. In fact, the *Shar'ia* is perceived as a core component of public policy in these jurisdictions. It prohibits *riba* (usury), *gharar* (gambling) and, by extension, any commercial transaction in which a party's consideration is uncertain.⁴⁰
19. As such, the mediated agreement must not breach these rules, failing which its enforcement could be denied by the State's competent authority on the grounds of a violation of public policy according to Article 5(2)(a) of the Singapore Convention.
20. The entry into force of the Singapore Convention will encourage foreign investments in the region by providing investors with a flexible dispute resolution tool leading to enforceable cross-border settlement agreements. In fact, mediation has been considered as an appropriate dispute resolution mechanism in investment disputes by the International Centre for Settlement of Investment Disputes (ICSID), which has recently thought to include Mediation Rules to the proposed revised Additional Facility Rules.⁴¹
21. Another sector which will benefit from the adoption of the Singapore Convention is the construction industry. In fact, the number of construction and infrastructure projects in the MENA region has increased to such an extent that it is considered as the strongest key driver of Arab economies. However, breaches of contracts lead to long and costly proceedings initiated by main contractors or subcontractors, albeit the interest of all business actors is to resolve their disputes in a time and cost-efficient manner, while keeping in perspective future collaboration.⁴²

40. This is because one party could unexpectedly receive something of greater value than what it gave in exchange.

41. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules - Working Paper*, Vol. 3, 2 August 2018, p. 898, available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Schedule%209.pdf.

42. M. Patchett-Joyce, "Specialist Techniques for Construction Dispute Resolution: How Many Ways Can the Cat Be Skinned?", in Nassib Ziadé (ed), *BCDR International Arbitration Review*, Kluwer Law International 2017, Volume 4, Issue 1, pp. 73 - 98, see, notably, p. 73.

Typically, such contracts contain a dispute resolution clause which requires a prior attempt to amicably resolve the dispute before launching a judicial or arbitral procedure. Practically, parties often circumvent the first stage and resort directly to arbitration or litigation since both procedures result in an enforceable title (an arbitral award or a court decision).⁴³ If MENA region countries ratify the Singapore Convention, the systematic trend towards litigation and arbitration will be altered, and parties will be keener to resort to mediation.

22. Lastly, the Singapore Convention will promote the use of mediation in the Islamic finance industry in which disputes are governed by the *Shari'a* and are characterized by an inherent complexity. Such disputes, mostly relating to the interpretation and performance of the transaction, are best resolved through a procedure which will safeguard the parties' rights and safeguard the stability of the Islamic financial industry.⁴⁴ Mediation could be a suitable dispute resolution method for such disputes since it allows the parties to establish a tailor-made solution and reach a *Shari'a*-compliant settlement agreement.

IV. Mediation practice in the MENA region:

23. While confidentiality is generally considered as one of the major advantages of mediation, this prevents access to cases and statistics.
24. This being said, Egypt is one of the countries that has proactively promoted the use of mediation. More precisely, between 2004 and 2009, a reported 2,561 cases related to projects sponsored by the International Finance Corporation were mediated with a 73% settlement rate.⁴⁵ As regards cases administered by the Cairo Regional Centre for International Commercial Arbitration (CRCICA), statistics show that mediation has not been the most privileged mechanism of dispute resolution, since only a single case has been registered in 2017, and two mediation cases were registered in 2018, whereas the total number of cases filed before the CRCICA in 2018 reached 1,303 cases.⁴⁶

43. "Qatar adopts Singapore Mediation Convention", Pinsent Masons, 17 September 2019, available at <https://www.pinsentmasons.com/out-law/analysis/qatar-adopts-singapore-mediation-convention>.

44. N. Comair-Obeid, "An Overview of Islamic Financial Instruments and the Suitable Mechanism for Resolving Disputes", in Nassib Ziadé (ed), *Festschrift Ahmed Sadek El-Kosheri*, Kluwer Law International 2015, pp. 39 -52, see, notably, p. 48.

45. M. McMullen, "The Development of Egyptian Alternative Dispute Resolution", *Mediate.com*, September 2013, available at <https://www.mediate.com/articles/McMullenM2.cfm>.

46. M. McMullen, "The Development of Egyptian Alternative Dispute Resolution", *Mediate.com*, September 2013, available at <https://www.mediate.com/articles/McMullenM2.cfm>.

25. In Jordan, 372 disputes were submitted to mediation in 2007, while in 2008, the number of mediated cases doubled, reaching a total of 873 disputes resolved through mediation.⁴⁷
26. In Algeria, according to some unofficial statistics, up until the end of 2009, 1,550 court-connected mediators had been appointed in pending cases, of which more than 1,520 have been successfully resolved.⁴⁸
27. More recently, Philippe-Edern Klein, the President of the French Chamber of Commerce and Industry (FCCIM) in Morocco, reported that 75% of the cases handled by the FCCIM Business Mediation Centre in 2018 were resolved by amicable settlements.⁴⁹ Further to this, other studies have shown that the Moroccan Centre for Banking Mediation handled more than 1,200 cases of bank/customer disputes in 2018, which indicates a growth rate of 50% compared to 2017, while 82% of these cases resulted in a successful settlement agreement.⁵⁰
28. Finally, Jehad Kazim, head of legal services at the Dubai Chamber of Commerce and Industry, reported that *"the DCCI received 127 mediation cases valued at Dh18 million [i.e. USD 4,900,000] in the first quarter of 2018, an increase of 48.4 per cent, whereas 1,829 mediation cases valued at Dh52 million [i.e. USD 14,150,000] were received in total between 2015 and 2017, averaging around 600 cases a year"*.⁵¹
29. To further illustrate the mediation practice in the region, we will hereunder detail a few cases.
30. In the *SODIC* case (2013), the dispute arose out of a contract concluded between Egypt and SODIC Real Estate Company, the object of which was the allocation of a land plot in the New Cairo area, conferred by the Egyptian government to a SODIC

47. N. Najjar, "Chapter 24: The Arab World", in Arnold Ingen-Housz (ed), *ADR in Business: Practice and Issues across Countries and Cultures II*, Kluwer Law International 2010, pp. 559-582.

48. N. Najjar, "Chapter 24: The Arab World", in Arnold Ingen-Housz (ed), *ADR in Business: Practice and Issues across Countries and Cultures II*, Kluwer Law International 2010, pp. 559-582, see, notably, p. 563.

49. *"Médiation: Le Maroc a réalisé des avancées probantes"* ("Mediation: Morocco has made significant progress"), *Finances News*, 20 April 2018, available at <https://fnh.ma/article/alaune/mediation-le-maroc-a-realise-des-avancees-probantes>.

50. S. El Hanafi, *"Médiation bancaire: 1.200 dossiers traités en 2018"* ("Banking mediation: 1,200 cases handled in 2018"), *Le Boursier*, 23 May 2019, available at : <https://www.leboursier.ma/Actus/4724/2019/05/23/Mediation-bancaire-1.200-dossiers-traites-en-2018.html>.

51. W. Abbas, "Dubai's construction sector drives up commercial disputes in Q1", *Khaleej Times*, 1 May 2018, available at: <https://www.khaleejtimes.com/business/economy/dubais-construction-sector-drives-up-commercial-disputes-in-q1>.

subsidiary, called "the Sixth of October for Development and Real Estate Projects."⁵² More specifically, the dispute related to a decision taken by the Real Estate Committee for Urban Communities, a State commission, to cancel the allocation of the land plot despite the full price for it having already been paid. The Egyptian government decided to initiate mediation, as a first step, before resorting to arbitration. An amicable settlement was reached and the parties resumed the project.

Another dispute that has been resolved through mediation, without subsequent recourse to arbitration, is the *Al-Futtaim* case.⁵³ In this case, the United Arab Emirates company *Al-Futtaim* concluded a contract with the Egyptian government to govern investments in the Fifth-Compound Area in Cairo. However, some contractual breaches occurred, and the Egyptian Government imposed fines on the investor, in accordance with the contractual provisions. The parties decided to resort to mediation which led to a settlement between the Emirati investor and the Egyptian government. The parties agreed that the investor had to pay a fixed amount to the Egyptian government in exchange for the resumption of the contract.

31. The *Captain Osama Al-Sharif* cases relate to three disputes arising out of three investment contracts concluded between Captain Osama Al-Shari, a Jordanian investor, and the Egyptian State. The three contracts related to the development of the Ain Sokhna Harbor project, the storage of petroleum products and its circulation in the Terminal of Sab. Due to alleged breaches by the Egyptian administrative authorities, the investor initiated three ICSID investment arbitrations against Egypt.
32. The arbitration was brought on the basis of the violation of the 1996 bilateral investment treaty for the promotion and protection of investments between Egypt and Jordan. The investor requested that the arbitral tribunal order the Egyptian State to pay a total compensation of approximately 4 billion Egyptian pounds (USD 252,500,000). Upon the initiative of the Egyptian mediation committees, the parties decided to attempt to resolve their disputes through mediation, which led to a successful settlement. The parties notably agreed to establish a new timetable for the implementation of the projects while the investor agreed to pay the State the amounts it owed in exchange for the use of the land. Pursuant to the conclusion of the settlement agreement, the three ICSID arbitration proceedings ended in May and June 2015, in accordance with the provisions of Article 43, paragraph (1) of the ICSID Convention Arbitration Rules.⁵⁴

52. See H. M. Gamaleddine, "Mediation as a Mechanism for Resolving Disputes in Egypt with a Focus on Investment Disputes", *International Journal of Arab Arbitration*, 2016, Volume 8, Issue 2, pp. 23-36.

53. See H. M. Gamaleddine, *op. cit.*

54. ICSID No. ARB/3/13, ICSID No. ARB/4/13 and ICSID No. ARB/5/13.

33. On another note, the establishment of new mediation centres and the enactment of mediation rules by pre-existing centres is a clear indicator of the increasing success of mediation in the MENA region. More precisely, several mediation centres were established years ago such as: the Mediation and Arbitration Centre of the Casablanca Chamber of Commerce, Industry and Services and the Rabat International Mediation and Arbitration Centre, both created in 2001; the Libyan Mediation and Arbitration Centre, created in 2004; and the Centre for Amicable Settlement of Disputes in Dubai and the Bahrain Chamber for Dispute Resolution, both created in 2009.
34. Some previously established ADR centres have recently included mediation in their dispute resolution services, such as the Qatar International Court and Dispute Resolution Centre, which started providing mediation services in partnership with the Centre for Effective Dispute Resolution in 2010; the Lebanese Arbitration and Mediation Center in 2012; the Cairo Regional Center for International Commercial Arbitration in 2013; and the Court of Arbitration and Mediation of the Comoros Chamber of Commerce, Industry and Agriculture of the Comoros Archipelago in 2018.
35. More recently, new mediation centres have been established, which demonstrates the growing demand (and therefore success) of mediation, such as the Independent Jordanian Mediation Centre, the Casablanca International Mediation and Arbitration Centre, the Dubai International Financial Centre-London Court of International Arbitration Centre, and the Saudi Center for Commercial Arbitration, all established in 2016, as well as the International Centre for Mediation and Arbitration of Mauritania and the Tunis International Centre for Arbitration Mediation and Dispute Resolution, both in 2018.

In 2019, the Abu Dhabi Global Market Court (ADGM) announced the launch of its court-annexed mediation service for ADGM entities and parties before ADGM courts as of July 2019, and the Oman Commercial Arbitration Centre (also established in July 2019) will soon offer mediation services as indicated by a member of the centre's Board of Directors during the launching ceremony.

36. In the same vein, new mediation rules have been adopted in 2019, which is an indicator of the increasing demand for a legal framework regulating mediation. Such examples include the 2019 Mediation Rules of the Qatar International Center for Conciliation and Arbitration,⁵⁵ the 2019 Mediation Rules of the Dubai Multi

55. Qatar International Court, Mediation Rules, Version 1, March 2020, available at https://www.qicdrc.gov.qa/sites/default/files/s3/wysiwyg/mediation_booklet_english.pdf.

Commodities Centre Disputes Centre,⁵⁶ the 2019 Mediation Rules of the Bahrain Chamber for Dispute Resolution,⁵⁷ and the Mediation Rules of the Moroccan Centre of Banking Mediation.⁵⁸

Particular attention should be drawn to the role played by the Mediation and Arbitration Centre at the Franco-Arab Chamber of Commerce (FACC), which was created in 1970 by the League of Arab States in collaboration with a former Minister of General Charles de Gaulle. The FACC decided to introduce mediation as an alternative means of settling disputes by creating a new Mediation and Arbitration Centre on 9 June 2008, which adopted its Mediation Rules in 2019.⁵⁹

V. Promoting mediation in the MENA region:

37. As demonstrated above, the MENA region is experiencing a growing trend towards mediation and, as such, several initiatives could be implemented in order to increase this trend.
38. For instance, countries that have not yet established a legal framework regulating mediation should consider enacting new laws related to domestic and cross-border mediation, on one hand, and to conventional and court-annexed mediation, on the other hand. Furthermore, countries in the MENA region should envisage becoming signatories of international treaties and conventions pertaining to mediation, especially the Singapore Convention.
39. As regards the mediation centres that are flourishing in the region, some are yet to elaborate a set of detailed mediation rules that meet international standards.
40. Public awareness campaigns, workshops, and trainings for lawyers, judges, and future mediators ought to be organized more often, notably by mediation centres and universities. Considering that the majority of the countries in the MENA region apply the *Shari'a* (each to a certain extent), the promotion of mediation could also stress the compatibility of mediation with the *Shari'a*.

56. DMCC Disputes Centre Mediation Rules, Version 3, February 2019, available at

https://www.dmcc.ae/application/files/5115/5228/8436/DMCC_Disputes_Centre_Mediation_Rules_2019.pdf.

57. Bahrain Chamber for Dispute Resolution (BCDR) Mediation Rules, 2019, available at <https://www.bcdr-aaa.org/fr/le-reglement-de-mediation-2019/>.

58. Centre Marocain de Médiation Bancaire (CMMB), Mediation Rules of the CMBB, available at: <https://cmmb.ma/en/mediation/reglement-de-mediation-du-cmmb/>.

59. Mediation and Arbitration Centre of the Franco-Arab Chamber of Commerce, Mediation and Arbitration Rules, available at <https://ccfranco-arabe.fr/wp-content/uploads/2019/12/LE-R%C3%88GLEMENT.pdf>.

41. Different initiatives have already been launched in order to promote mediation among judges, practitioners, and international stakeholders. By way of illustration, Egypt sought the assistance of private institutions, such as the Centre for Effective Dispute Resolution based in the United Kingdom, in order to carry out Egypt-based educational programs and trainings addressed mainly to lawyers, as well as conferences, workshops, and public awareness campaigns.⁶⁰ Egyptian public entities, such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the International Finance Corporation, the Egyptian Ministry of Justice, and the Ministry of Investment, also contributed to these initiatives.⁶¹
42. In parallel, the Beirut Bar Association, together with the Lebanese Chamber of Commercial Mediation Center and other private Lebanese mediation centres, have been consistently organizing seminars, conferences and trainings⁶² in order to foster a better public understanding of the benefits of mediation. Mediation training also has been implemented in bar school for lawyers.⁶³
43. This awareness is all the more important in the context of a public health crisis such as the COVID-19 pandemic, which will undoubtedly paralyze judicial bodies, lengthen legal proceedings, and hinder physical hearings and witness examination. Mediation is flexible enough to respond to the challenges of such a pandemic, especially through online mediation. More precisely, the mediator can mitigate the current difficulties due to safety considerations and travel restrictions by encouraging the parties to use electronic means of communication, if needed, and by proceeding with virtual meetings and negotiations, which could ensure an expeditious and cost-effective procedure in the parties' interest.
44. Furthermore, and as suggested by an author⁶⁴, mediation could be regulated by international standards. In fact, and insofar as the legal framework related to mediation is not harmonized, it could be useful to establish international norms, such as through the International Organisation for Standardisation (ISO)⁶⁵, which could help

60. M. McMullen, "The Development of Egyptian Alternative Dispute Resolution", September 2013, available at <https://www.mediate.com/articles/McMullenM2.cfm>.

61. M. McMullen, "The Development of Egyptian Alternative Dispute Resolution", September 2013, available at <https://www.mediate.com/articles/McMullenM2.cfm>.

62. See, e.g., initiatives through the Professional Mediation Centre (CPM) in Beirut and Tripoli.

63. R. Abi Lahoud, "A Perspective On Mediation In The Middle East", Kluwer Mediation Blog, 10 July 2015, available on <http://mediationblog.kluwerarbitration.com/2015/07/10/a-perspective-on-mediation-in-the-middle-east/>.

64. D. Richard, "Digitalisation of construction in France: a path to develop and improve mediation", *Horizons du droit*, Bulletin n°15, Mai 2020, pp.35-38.

65. The International Organization for Standardization or ISO is an international non-governmental organization made up of national standards bodies; it develops and publishes a wide range of standards, for a vast range of products, materials, and processes.

mediation to become recognized and to be applied more uniformly. This initiative would provide recommendations to manage the mediation process and create a dynamic for each phase.

45. The same author suggested the creation of a database to collect information from previous mediation cases (while complying with the confidentiality requirement), such as the subject mediated, the process itself (its duration, the number of parties, their profile, etc.), the success rate, and the cost of mediation.

Conclusion:

46. Several countries in the MENA region already provide for alternative dispute resolution mechanisms that could be seen as a local form of mediation stemming from the *Shar'ia*. That being said, the mediation legal framework in the region is not uniform, insofar as some countries have adopted stand-alone mediation laws or inserted a few provisions into their codes of civil procedure (applicable to all matters), whereas other countries only provide for mediation in specific matters and others still have not enacted any law in this respect.
47. While the confidentiality of the mediation process limits access to cases and statistics, figures clearly show that large-scale disputes are settled more and more through mediation, and numerous mediation centres are being established in almost every jurisdiction.
48. Moreover, the entry into force of the Singapore Convention on 12 September 2020, the aim of which is to safeguard the enforceability of an agreement resulting from mediation, will most likely boost the use of mediation in resolving foreign-investments disputes, construction disputes, and disputes related to Islamic finance.
49. On another note, several initiatives could be taken to promote mediation in the MENA region, such as the enactment of modern mediation laws and institutional rules, the regulation of mediation through international standards, the organization of public awareness campaigns, workshops, and trainings for lawyers, judges, and future mediators and the compilation of a database of previous mediation cases.
50. The COVID-19 pandemic is also a parameter that will drive economic actors to resort even more to mediation to resolve their cross-borders disputes: in fact, their primary objective is to resume business and continue their contractual relationships; they will therefore concentrate their resources to this end. Practically, parties, whether before state judges or arbitrators, will most likely rely on the "*force majeure*" argument in

order to justify payment or delivery defaults and will not be able to predict the outcome of their dispute insofar as - unlike in a mediation process - they do not take part in crafting the solution. Mediation, as a non-adversarial and cost-efficient tool through which parties can customize the solution, would therefore be the most appropriate dispute resolution mechanism.

51. For all the above reasons, mediation should be promoted in the MENA region. Countries in this region should provide users with a pro-mediation legal framework, professionally-trained mediators, ADR centres, and, most of all, safeguard the enforcement of mediated settlements.