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in the Palestinian Territories**

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Creating Commercial Dispute Resolution Centers in the Palestinian Territories

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Increasingly, Alternative Dispute Resolution (ADR) programs are emerging throughout the world to meet the needs of local industries that seek efficient, clear, and timely resolution of disputes. In the process, such ADR centers are providing a model of peaceful resolution that has significance beyond the particulars of the commercial disputes they resolve. They model the possibility of conciliatory and just resolution in the wider social, cultural, and economic context in which they operate. Further it is hoped that this example might serve to create hope for new models of interaction between Palestinians and Israelis. The creation of dispute resolution capacity in the private sector contributes to buildings much needed social capital in this land of conflict.

This article aims to describe the process by which the first commercial center was formed in Palestine. It is hoped that through these descriptions one might glean a general picture of how such centers are formed, the increasing reach and universality of arbitration and mediation as providing a common language of resolution, and the contribution that such centers make to local prosperity and development.

BACKGROUND

In the late 1990's, the United States government acting through United States Agency for International Development (USAID) undertook an ambitious legal reform project to aid the fledgling Palestinian justice system. The USAID project was one of several international on-going aid projects in the region at that time.

USAID specified that its project would focus on developing pilot trial courts, aiding four law schools, engaging civil society in the promotion of justice, and creating a court annexed alternative dispute resolution program. The U.S. contractor for AID, DPK Consulting (DPK) from San Francisco, California proposed that the program also include a focus on the development of dispute resolution capacities in the commercial sector.

Consistent with its values, DPK worked with Palestinian partners to undertake a diagnostic study among various economic groups to develop a plan that responded to local needs. Consultants in the West Bank and Gaza were retained to conduct the studies. The initial assessment examined participants' knowledge of and experience with ADR.

This assessment was to serve as a foundation for developing a strategy to build a dispute resolution center in the region.

DISPUTE RESOLUTION CENTER FEASIBILITY STUDIES

An initial analysis of the feasibility of establishing two dispute resolution centers began by identifying the economic sectors that would potentially benefit from the services of such a center. DPK Consulting employed prominent attorneys, one in Gaza and the other in the West Bank to conduct these surveys. The sectors identified were banking, construction, insurance, industrial plants, private health care centers, and tourism and the hotel industry. Survey was then conducted to focus on participants' knowledge or familiarity with mediation, arbitration and other dispute resolution processes.

The results of the survey indicated extensive familiarity with mediation and arbitration. Out of 79 companies surveyed, 97% indicated familiarity with these methods of resolution. Approximately 60% of the companies interviewed used ADR services in the past. However, their impressions were mixed. Of those who used ADR services, 29% had a "good" impression, 62% had a "fair" impression, while 9% had a "poor" impression of their experience. The principal reasons for their choice of mediation or arbitration was to save time or money. Over 93% indicated their interest in seeing the establishment of a center for Palestinian commercial dispute resolution.

One interesting finding of the survey concerned the use of the traditional (tribal) methods of dispute resolution. The Palestinian community has a long-standing tradition of informal dispute resolution. Private justice was often administered through informal networks in which local leaders determined the outcome of feuds between clans or individuals. Values such as group solidarity, traditional religious principles, and norms concerning honor and shame have held a long-standing place in the informal dispute resolution system.¹ Drawing on this historic tradition, two forms of informal arbitration currently exist in the West Bank and Gaza including ad hoc and tribal arbitration. Disputing parties sometimes seek arbitration through individual arbitrators, usually lawyers from their respective firms. The traditional tribal system of arbitration supplements this system, and is relied on by most individuals seeking arbitration. Sometimes, these methods, while suitable in cases such as family law, are not necessarily compatible with the complexities inherent in commercial, corporate, and international disputes.

Of the respondents from the West Bank, 82% indicated that such approaches were satisfactory, while 55% of the respondents from Gaza indicated that they were not satisfied with the results from such traditional practices. The respondents indicated a clear preference for mediation first and arbitration second. The judicial system was seen as the last resort.

¹ George E. Irani and Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, Kroc Institute Occasional Paper #19:OP:2, August 2000.

Based on these results DPK proceeded to put out to bid a proposal for Palestinian firms to establish a commercial dispute resolution center. Massar Associates won the bid in 2001 and began work in 2002.

Massar conducted a follow up assessment which included interviews with 40 CEOs and general managers of companies and other private sector associations. The majority of those interviewed indicated that they viewed the development of a commercial arbitration center as a significant need. They noted that many commercial disputes have arisen in their sector, yet they lacked convenient access to such services. Ninety-five percent of those surveyed were willing to offer their support to the center.

ESTABLISHMENT OF *TAHKEEN* - CENTER FOR SETTLEMENT OF COMMERCIAL DISPUTES

Tahkeen, which in Arabic means “arbitration,” was established in 2001 as the first organization providing institutional arbitration and mediation services for the private sector in Palestine. Massar designated Ramallah and Gaza City as the locations for the two *Tahkeen* ADR centers. *Tahkeen* seeks to strengthen the institutional administration of justice and contribute to economic development by offering dispute settlement services in the region.

From the outset, *Tahkeen* sought to overcome significant obstacles. Among them was the lack of sufficient public information regarding the nature and practice of ADR. In response, *Tahkeen* engaged in extensive marketing and educational efforts to positively influence attitudes towards ADR mechanisms.

It disseminated information about ADR in a monthly newsletter. The newsletter educated both the public and potential clients about the existence of *Tahkeen*, the concepts of ADR, and provided information about laws and regulations affecting the business community. It was the first publication of its kind designed to educate the Palestinian private sector and the community in general about local, regional, and international ADR activity.

Following these outreach efforts, *Tahkeen* began to receive a steady flow of potential clients and interested individuals by phone and in person, who sought to find out more about *Tahkeen*'s services and about arbitration and mediation in general. Several law students requested information on ADR, while business persons sought model arbitration and mediation clauses to incorporate into their contracts.

LEGAL CONTEXT FOR THE PRACTICE OF ADR

Simultaneous with the establishment of the center, *Tahkeen* staff conducted extensive research regarding applicable laws and regulations that would impact the practice of ADR in the region. These laws included the following:

Palestinian Arbitration Law No. (3) of 2000

The Law of Arbitration No. (3) (“Arbitration Law”) was enacted in 2000, and established the legal framework for arbitration in Palestine. The Arbitration Law gives each disputant the opportunity to choose one arbitrator, and together the two arbitrators select a chairperson. The Arbitration Law also sets the basis for court recognition and the enforcement of arbitration decisions.

According to the Arbitration Law, parties may mutually consent to resolve a dispute through arbitration, or place a provision in a contract referring any dispute pertaining to that contract to arbitration. Furthermore, the Arbitration Law obliges the parties to present a written and signed copy of the arbitration award to be filed with the appropriate court. Arbitration awards approved by the court are enforced as court orders.

Palestinian Law on the Encouragement of Investment No. (4) of 1999

Articles 39 and 40 of the Law on Encouragement of Investment No. (4) of the 1999 “Encouragement of Investment Law” deals with the resolution of disputes arising between investors and the Palestinian National Authority (PNA), regarding the rights and obligations outlined in the investment law. Article 40 of the Encouragement of Investment Law refers investors or the PNA to “good faith negotiation, according to the regulations” whenever any one of them “believes that a dispute between them has arisen.” If the parties fail to resolve the dispute through negotiation within the period of time specified by the regulations, either party may submit the dispute to binding, independent arbitration, as provided in the regulations, or to the Palestinian courts.

Al Mejalla (The Ottoman Civil Code)

Al Mejalla is the Ottoman Civil Code enacted in the eighteenth century. In the absence of Palestinian Civil Law, the Ottoman Civil Code represents the general body of law that parties refer to in the absence of a specific law governing the disputed matter. *Al Mejalla* deals with arbitration in its final articles: 1841-1851. The current Arbitration Law of 2000 did not repeal other regulations regarding arbitration, but only repealed sections that “contradict...its provisions.”² The Jordanian Arbitration Law of 1952, also effective in the West Bank, and the Mandatory Law of 1929, enacted in the Gaza Strip, also govern arbitration except where they contradict the new law.

Village Administration Law No. 5 of 1954 in the West Bank and Law No. 23 of 1936 in the Gaza Strip

The Village Administration Law of 1954 in the West Bank and Law No. 23 of 1936 in the Gaza Strip provide for the resolution of disputes that arise between residents of the same village, or among residents of different villages through mediation or arbitration. Decisions reached by the arbitration panel have the same effect as court orders.

² Article (57) of the Arbitration Law No. (3) of 2000

COORDINATION WITH REGIONAL AND INTERNATIONAL CENTERS

Collaboration between *Tahkeen* and regional and international centers was particularly helpful in acquiring practical information and developing expertise in administration and case management.

Tahkeen established solid and fruitful ties with regional and international ADR centers. Within the Arab World, *Tahkeen* worked with the Cairo Regional Center for International Commercial Arbitration, the Lebanese Center for Arbitration, and the Gulf Cooperation Council Commercial Arbitration Center. These relations were significant in mentoring the center in areas pertaining to arbitration procedure, administration and case management.

International ADR centers were also contacted for consultation and to initiate cooperation. *Tahkeen* communicated with the International Chamber of Commerce (ICC), the International Court of Arbitration, UNCITRAL, the Swiss Chamber of Commercial Mediation, as well as the Danish Institute of Arbitration. One of *Tahkeen's* in-house lawyers visited the Danish Institute and was warmly received. Both centers agreed to maintain cooperation and share information considered to be of mutual interest.

Case management techniques were developed according to international best practices. These techniques were designed to ensure proper procedural handling at all levels and among the concerned parties. Similarly, the fee structure utilized by *Tahkeen* was adopted from the ICC, AAA, and other commercial ADR centers. However, at the outset, the representatives from *Tahkeen* were reluctant to charge fees in the first cases because of their sense of inadequacy. Now, they are charging fees.

Beyond the development of administrative and ADR capacity, international collaboration also facilitated cooperative ties between neighboring countries. In a letter to Ms. Lubna Katbeh, Executive Director of *Tahkeen*, an Israeli Mediation Center commented, "Another potential positive aspect of such cooperation is that there is no better way to model cooperation despite cultural differences to disputing parties."

RULES OF PROCEDURE

Collaboration was also particularly helpful in developing *Tahkeen's* Rules of procedure. The rules were based on regional and international standards and formed in compliance with the Palestinian Law of Arbitration No. (3) of 2000. The rules were mainly derived from the United Nations Commission for International Trade Law Model Rules of Procedure and the International Chamber of Commerce Rules of Procedure. The procedures used by other regional centers such as the Cairo Regional Center for International Commercial Arbitration, the American Arbitration Association (AAA), the Beirut Chamber of Commerce, the Industry Arbitration Center, and the Gulf Center in Bahrain were also studied and contributed to the final set of rules. The rules maybe seen on *Tahkeen's* web site at: www.tahkeen.com

CODE OF ETHICS

Research on the code of ethics proceeded along similar lines as the development of the rules of procedure. However, in writing the code of ethics, *Tahkeen* based its draft primarily on AAA's code supplemented by additional input from the Cairo Center. The code aims to maintain the neutrality and reliability of *Tahkeens* services.

In addition to the neutrals, all administrative and legal employees in the center are bound by similar ethical standards and rules. The employee code of ethics addresses a number of issues related to employment at the center, such as maintaining a high standard of integrity, impartiality, confidentiality, and financial transparency.

SELECTION AND TRAINING OF NEUTRALS

In seeking to educate the public and business community about ADR mechanisms, *Tahkeen* set up a training unit to offer legal training to the private sector, in addition to training its pool of neutrals. It developed arbitration and mediation training manuals which it used during its sessions. Skilled neutrals were invited to assist in the training program by sharing their experiences.

In developing its pool of neutrals, *Tahkeen* studied the criteria used by the AAA. Based on this study, *Tahkeen* derived a number of criteria for selecting its arbitrators and mediators. These criteria included: professional expertise and skill in conducting arbitration or mediation, impartiality, integrity within the community, adherence to arbitration and mediation rules of procedure and code of ethics, and an on-going commitment to receiving necessary training in arbitration or mediation.

Tahkeen's pool of neutrals included seasoned arbitrators and mediators, as well as neutrals who were new to ADR but underwent significant training. Among those who received training were lawyers, former judges, business persons, private sector specialists, engineers, architects, information technology specialists, accountants and auditors. The initial training workshops consisted of lectures, discussion, and mock arbitration and mediation sessions. In excess of 60 people have been trained.

BUILDING A CLIENT BASE

Tahkeen faces the major challenge of building a client base in order to become self-sufficient. DPK counseled that *Tahkeen* consider an approach pursued by Center for Public Resources in the early 1980's with the creation of 'covenants' between businesses. This strategy successfully created a national consensus on the value of pursuing ADR by incorporating ADR clauses in contracts between large U.S. corporations.

Tahkeen responded by creating the "forum" where private sector leaders meet to discuss their concerns and identify how to improve their businesses. In addition, they

discuss dispute resolution experiences. The forum was also designed to be setting for the discussion of legal and regulatory issues that may require modification. The forum also served as an excellent way to establish contacts with potential users of the services of the center. The forum met several times but the continued violence and difficulty in travel made it increasingly difficult to meet.

EXPERIENCE TO DATE

Since its inception, *Tahkeen's* arbitrators have handled four disputes and three mediations. It continues to receive cases through referrals and contacts. It is now registered with the Palestinian Ministry of Interior as a non-profit organization. The Palestinian Ministry of Justice and Ministry of National Economy have also approved the registration of *Tahkeen*. The center became a member of the International Federation for Commercial Arbitration Institutions (IFCAI) in the spring of 2003. Membership in the IFCAI will significantly enhance recognition of *Tahkeen* by the international arbitration community, facilitating the establishment of partnerships with similar institutions throughout the globe. It will also provide a benefit to the Palestinian business community through its ability to refer potential disputes between a Palestinian and internationally-based company to the IFCAI for arbitration.³ Most recently it became a member of the Arab Federation of Arbitration Institutions in January, 2004.

In January of 2004, *Tahkeen*, signed a cooperation agreement with the Palestinian Union of Stone and Marble (USM) in Bethlehem. This agreement marks the first successful result in a series of efforts to negotiate formal arrangements for services with the major Palestinian trade unions and professional associations.

Sayel Al Jundi, USM Chairman, signed the *Tahkeen* agreement on behalf of the union's member companies. "Simple contract disputes are very common in our industry. Our cooperation agreement with *Tahkeen* will help USM member companies and their clients bring cases to quick settlement in a neutral environment. The faster commercial disputes can be resolved, the better it is for a company's bottom line."

The ADR program continues to work to strengthen the Palestinian judicial system. Randy Ackerman, DPK's Chief of Party, states, "Establishing ADR centers in the West Bank and Gaza eases the caseload of an overburdened court system, and provides the Palestinian people with improved legal services. *Tahkeen's* arbitration and mediation services present a sophisticated dispute resolution mechanism for the Palestinian private sector, judiciary and local community."

The past three years with the complete interruption of commercial activity have been a most difficult time to launch such an initiative. Nevertheless, the dogged determination of the staff at *Tahkeen* and the willingness of USAID to continue funding such an initiative have laid the foundation for a future where Palestinian commercial enterprises can find a suitable forum to resolve their conflicts.

³ USAID Website <http://www.usaid.gov/>