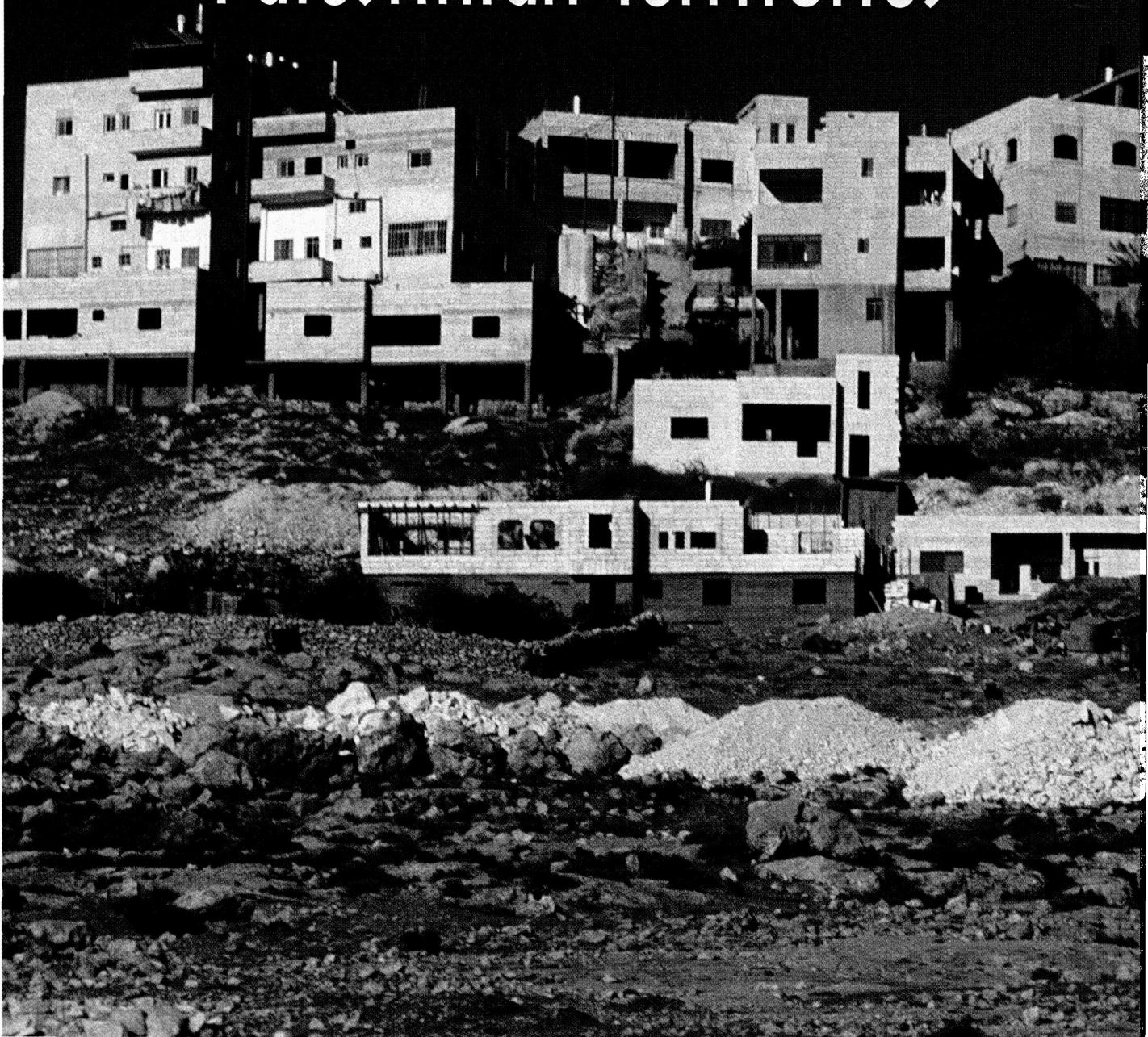


INTERNATIONAL

Creating a Commercial Dispute Resolution Center in the Palestinian Territories



BY WILLIAM E. DAVIS, LUBNA KATBEH AND SHAHLA MAGHZI-ALI

**William E. Davis is the president of DPK Consulting in San Francisco, California.
Lubna Katbeh is executive director of the Tahkeem Center in Ramallah.
Shahla Maghzi-Ali is a graduate student in the Jurisprudence and
Social Policy Program at the University of California, Berkeley.**



Index Stock Photos/Fotosearch

Increasingly, commercial alternative dispute resolution (ADR) programs are being created throughout the world to meet the needs of local industries. These ADR centers provide a model of peaceful dispute resolution for other countries, particularly when they are located in a geographic area known for political conflict. As a result, ADR centers can have significance beyond the borders of the region they are in by setting a model of peaceful resolution in both commercial and public arenas.

This article describes the process of forming the first commercial ADR center in the Palestinian Territories. This experience creates hope for new models of interaction between Palestinians and Israelis. There is a great need for ADR mechanisms in this region so that the private sector can contribute to building much-needed social and economic capital in the region.

The creation of an ADR center in this region of conflict demonstrates the reach and universality of ADR and its capacity to provide a common language for the resolution of disputes and contribute to local prosperity and development.

Background

In the late 1990s, the U.S. government, acting through the U.S. Agency for International Development (USAID) undertook an ambitious legal reform project to aid the fledgling justice system in the Palestinian Territories. This project—one of several ongoing international aid projects in the region at that time—was intended to focus on developing pilot trial courts, aiding four law schools, engaging civil society in the promotion of justice, and creating a court-annexed ADR program. San Francisco-based DPK Consulting (DPK) was the contractor selected for the project. DPK proposed that the program include an ADR capacity in the commercial sector.

Feasibility Studies

The first step in a project of this type is to develop a plan that responds to local needs. To prepare a plan, DPK retained Palestinian attorneys from the West Bank and Gaza to conduct a feasibility study. An important goal of the study was to identify the economic sectors that would potentially benefit from an ADR center and then assess the sectors' knowledge of and experience with ADR. This assessment would help develop a strategy for building an ADR center with two offices in the region.

The consultants determined that the banking, construction, insurance, manufacturing, health care, tourism and hotel industries would most benefit from having an ADR center, and that many in these industries were familiar with ADR. Out of 79 companies surveyed, 97% indicated familiarity with arbitration and mediation. Approximately 60% of the companies interviewed acknowledged using ADR services in the past, but their overall impressions were mixed: 29% had a "good" impression, 62% had a "fair" impression, while 9% had a "poor" impression of their ADR experience. The consultants learned that the principle reason these companies chose to use mediation or arbitration was to save time or money. Despite the varied experiences with ADR, a large majority (over 93%) expressed interest in the establishment of a commercial ADR center in the region.

One interesting finding concerned the history of what could be called tribal arbitration. The Palestinian community has a long-standing tradition of inviting well-respected local leaders, or *Makbaeir*, to resolve feuds between clans and individuals. The values underlying this system are group solidarity, traditional religious principles, and norms concerning honor and shame.¹

In addition to tribal arbitration, *ad hoc* arbitration, with a local attorney or engineer serving as the arbitrator, has been used by some commercial parties in the West Bank and Gaza. However, tribal arbitration is used by most individuals, even those in the business community within the region.

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

Tribal and *ad hoc* methods of arbitration, while suitable for social and family disputes, are not ideal for complex commercial and international disputes. Accordingly, DPK invited bids from Palestinian firms to establish an ADR 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 a diverse array of Palestinian companies and associations. The majority of those interviewed said the development of a commercial ADR center was a significant need. They noted that there were many commercial disputes in their sector, but there was no professional commercial ADR service available. Ninety-five percent of those surveyed were willing to offer their support to an ADR center. Such a center could augment the administration of justice and contribute to economic development by offering arbitration and mediation services to the private sector in the region.

Establishing the ADR Center

Massar designated Ramallah and Gaza City as the locations for the offices of an ADR center called *Tabkeem*. In Arabic, *tabkeem* means "arbitration." The first *Tabkeem* Center office was opened in Ramallah in 2002, the next in Gaza City. The Minister of the National Economy, as well as the Mission Director of USAID and representatives of the business and legal communities attended the opening ceremony of the Center.

After the Ramallah and Gaza City offices opened, the *Tabkeem* Center faced some significant obstacles. One was the lack of public information regarding the nature and practice of ADR. To address this problem, the *Tabkeem* Center engaged in extensive marketing and educational efforts to positively influence attitudes towards ADR. It created and disseminated a monthly newsletter to the public and potential clients to educate them about the existence of the Center offices, the concept of ADR, and the laws and regulations affecting the busi-

ness community. It was the first publication of its kind in the region.

Following these outreach efforts, in late 2003, both *Tabkeem* Center offices began to receive a steady flow of inquiries from potential business clients and individuals who sought information about their services and ADR generally. Several law students requested information about ADR, and business people asked for model arbitration and mediation clauses to incorporate into contracts.

Legal Context for the Practice of ADR

The staff of the *Tabkeem* Center conducted extensive research into the applicable laws, court precedent and regulations that could impact the practice of ADR in the region. These laws included the Palestinian Arbitration Law No. 3 of 2000, the Palestinian Law on the Encouragement of Investment No. 1 of 1998, *Al Mejalla* (the Ottoman Civil Code), Village Administration Law No. 5 (1954) in the West Bank, and Village Administration Law No. 23 (1936) in the Gaza Strip, as well as the Chamber of Commerce and Industry Law and Professional Association laws.

Palestinian Arbitration Law

The Palestinian Arbitration Law, enacted in 2000, established the legal framework for arbitration in the Palestinian Territories. Under this law, disputants may mutually consent to resolve a dispute in arbitration, or place a provision in a contract referring any dispute pertaining to that contract to arbitration. In addition, each disputant has the opportunity to choose one arbitrator, and together the two party-chosen

arbitrators select the third arbitrator, who is the chair of the tribunal.

The Palestinian Arbitration Law also provides for court recognition and enforcement of arbitration decisions. These provisions are based on the legal principles embodied in the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International

According to the Palestinian 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.

Commercial Arbitration, the 1976 UNCITRAL Arbitration Rules, as well as relevant Arab and international arbitration laws.

The parties must file a signed copy of the arbitration award to be ratified by the appropriate court. Arbitration awards approved by the court are enforced as court orders.

Staff members of the *Tabkeem* Center continue to examine ways of streamlining the arbitration process, and have published several articles in regional journals on improving the law.

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

Articles 39 and 40 of the Palestinian Law on Encouragement of Investment, enacted in 1999, deal with the resolution of disputes between investors and the Palestinian National Authority (PNA) regarding the rights and obligations outlined in the investment law. Article 40 calls for "good faith negotiation" when an investor or the PNA "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 law, either party may submit the dispute to binding, independent arbitration or to the Palestinian courts. Staff of the *Tabkeem* Center continue to research the relationship between this law and international conventions such as the Washington Convention and its interaction with such bodies as the International Center for the Settlement of Investment Disputes.

Al Mejalla (The Ottoman Civil Code)

Enacted in the 18th century, *Al Mejalla* is the Ottoman Civil Code. It contains the general body of law that parties refer to in the absence of

Palestinian law governing the disputed matter. *Al Mejalla* deals with arbitration in Articles 1841-1851.

Other Laws in the West Bank and Gaza

The Palestinian Arbitration Law repealed all contradictory provisions in other laws.² For this reason, to the extent not in conflict with this law, the Jordanian Arbitration Law of 1952 is effective in the West Bank, as is the Mandatory Law of 1929 enacted in the Gaza Strip.

In addition, Village Administration Law No. 5 applies in the West Bank, and Village Administration Law No. 23 applies in the Gaza Strip; both provide for disputes between residents of the same village, or among residents of different villages, to be resolved through mediation or arbitration. Decisions reached by the arbitration panel have the same effect as court orders.

Coordination with Regional and International Centers

In order to obtain practical information and develop expertise in case management and administration, the *Tabkeem* Center collaborated with regional and international centers throughout the Arab world and elsewhere. They established solid and fruitful ties with the Cairo Regional Center for International Commercial Arbitration, the Lebanese Center for Arbitration, and the Gulf Cooperation Council Commercial Arbitration Center. These relationships were significant in mentoring the center in areas pertaining to arbitration procedure, administration and case management.

The collaboration between the *Tabkeem* Center and neighboring centers, including sever-



A Takheem training session.

Courtesy of the Tabkeem Center

al centers in Israel, provided much needed space for the resolution of complex business disputes. In a letter to the *Tabkeem* Center, a staff member of an Israeli mediation center noted that “[a]nother potential positive aspect of such cooperation is that there is no better way to model cooperation despite cultural differences to disputing parties.”

The *Tabkeem* Center also contacted the UNCITRAL and international ADR centers in Europe, such as the International Chamber of Commerce (ICC), the London International Court of Arbitration, the Swiss Chamber of Commercial Mediation, as well as the Danish Institute of Arbitration to establish collaborative ties. One of the *Tabkeem* Center’s in-house lawyers visited the Danish Institute and was warmly received. Last September Lubna Katbeh, executive director of the *Tabkeem* Center, participated in the first International Symposium on Strengthening Mediation and Arbitration Centers organized by the World Trade Organization (WTO), the International Trade Centre (ITC), and the United Nations Conference on Trade and Development (UNCTAD). In March of 2005, the legal secretariat of the *Tabkeem* Center attended a training course at the Cairo Arbitration Center.

The *Tabkeem* Center has adopted case management techniques that accord with international best practices. In addition, it has put together a fee structure from approaches taken by other established institutions like the ICC, and the International Centre for Dispute Resolution (ICDR, a division of the American Arbitration Association (AAA)). At present, it has a two-tiered fee schedule for international and domestic disputes. However, when it began operating, the *Tabkeem* Center provided *pro bono* services as it developed skills and expertise.

Rules of Procedure

The *Tabkeem* Center’s rules of procedure were created through a collaborative process to comply with the Palestinian Law of Arbitration of 2000. The rules are based on international standards, primarily the UNCITRAL Model Rules of Arbitration and the ICC Rules of Arbitration. The procedures used by other centers, such as the Cairo Regional Center, the ICDR, 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 may be viewed in Arabic on the *Tabkeem* Center’s Web site at www.Tabkeem.com. An English version of the Web site is currently under construction.

Code of Ethics

The *Tabkeem* Center also developed a Code of Ethics for neutrals based primarily on the Code of Ethics for Arbitrators in Commercial Disputes, prepared by committees from the AAA and the American Bar Association,³ supplemented by additional input from the Cairo Center. The *Tabkeem* Center’s Code of Ethics aims to maintain the neutrality and reliability of *Tabkeem* center services.

The *Tabkeem* Center also developed a Code of Ethics for Employees, based in part on the AAA Code of Ethics for Employees.⁴ This code addresses issues related to employment at the center in order to maintain a high standard of integrity, impartiality, confidentiality and financial transparency.

Selection and Training of Neutrals

To educate the public and the business community about ADR, the *Tabkeem* Center set up a training unit to offer legal training to the private sector. To ensure that its neutrals were competent, it also developed arbitration and mediation training programs and manuals. Skilled neutrals were invited to assist in the training programs by sharing their experiences.

In developing the pool of neutrals, management of the *Tabkeem* Center studied the criteria used by the AAA, from which they derived their own criteria for selecting arbitrators and mediators. These criteria included: professional expertise, academic training and skill in conducting arbitration or mediation, impartiality, integrity within the community, adherence to arbitration and mediation rules of procedure and codes of ethics, and an on-going commitment to receive necessary training in arbitration and/or mediation.

Tabkeem’s pool of neutrals included seasoned arbitrators and mediators, as well as neutrals who were new to ADR but had undergone basic training and practice. 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, discussions, mock arbitrations and mediation sessions. Following the training sessions, more than 60 individuals met the qualification requirements to serve as neutrals.

Building a Client Base

The *Tabkeem* Center faces the challenge of building a client base so that it can become self-sufficient. DPK counseled the Center to consider following the footsteps of the Center for Public Resources (now called the CPR Institute for Dispute Resolution) by creating covenants with

large corporations to use ADR in order to promote the use of arbitration clauses in transactions involving these corporations.

The *Tabkeem* Center held some forums where private sector leaders met to discuss their concerns and identify how to improve their businesses. In addition, these leaders discussed their dispute resolution experiences. The forums helped the *Tabkeem* Center establish contacts with potential users of its services. For example, it scheduled a series of informal discussions with interested business representatives from the West Bank/ Gaza region, but the continued violence in the region has made it difficult to travel to attend meetings.

Experience to Date

Since its inception, the *Tabkeem* Center has handled several domestic and international arbitrations and mediations. The Center 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 the Ministry of National Economy have also approved the registration of the *Tabkeem* Center, which joined the International Federation for Commercial Arbitration Institutions (IFCAI) in the spring of 2003. Membership in the IFCAI will significantly enhance recognition of the *Tabkeem* Center by the international arbitration community, facilitating partnerships with other ADR institutions around the globe, and encouraging referrals from IFCAI of international disputes involving Palestinian parties.¹ In January 2004, the *Tabkeem* Center became a member of the Arab Federation of Arbitration Institutions.

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

Sayel Al Jundi, chairman of the USM, who signed the cooperation agreement on behalf of

the union, said, "Simple contract disputes are very common in our industry. Our cooperation agreement with *Tabkeem* 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 of DPK stated: "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. *Tabkeem's* arbitration and mediation services present a sophisticated dispute resolution mechanism for the Palestinian private sector, judiciary and local community."

Recently, the *Tabkeem* Center has been providing ADR training to the engineering and banking sector. It also gave a course on commercial arbitration to the National Institute of Public Administration.

Although a challenging enterprise punctuated by frequent interruptions, launching the ADR initiative in the Palestinian Territories was successful due to the dogged determination of the *Tabkeem* staff, the ongoing support from DPK and the willingness of USAID to continue funding the Center. This initiative laid the foundation for a future in which Palestinian commercial

enterprises can find a suitable forum to resolve their conflicts at the local, regional and international levels. ■

Launching an ADR center in the Palestinian Territories laid the foundation for a future in which businesses in the region can find a suitable forum to resolve their conflicts, at the local, regional and international levels.

ENDNOTES

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

² Article 57 of Arbitration Law No. 3 of 2000.

³ The Code was originally prepared in 1977 by a joint committee consisting of two special committees, one from the AAA and another from the American Bar Association. The Code was revised in 2003 (effective March 2004) by an ABA Task Force and special committee of the AAA. The revised Code can be viewed on the AAA Web site at www.adr.org.

⁴ The AAA Code of Ethics for Employees can also be viewed on the AAA Web site.

⁵ USAID Web site is at <http://www.usaid.gov/>.