

Report Titled:

**Arbitration in Palestine Between
Legislation and Judiciary**

Published By:

Advocate

Hiba Abdulrahman Thouqan

Introduction:

The use of alternative means of dispute resolution in Palestine is becoming increasingly important under the prevailing legal situation. One should note that the Second Oslo Convention, which subjected the West Bank, has established three administrative areas namely: Area (A), area (B), and area (c).

Area (A) is under the Palestinian National Authority's full civilian and security control. Area (B) is under a joint Israeli and Palestinian civilian and security control. And finally, area (c) which is under Israeli full civilian and security control.

Given that the Palestinian Jurisdiction does not extend to include area (c), we highlight in this report the issue of arbitration in Palestine between legislation and the judiciary in all areas of Palestine from the West Bank, Gaza Strip and occupied Jerusalem.

Stemming from the belief of the importance of the topic of: "Arbitration in Palestine Between Legislation and Judiciary," through which we seek to reinforce the idea of alternative means of dispute resolution - especially in Jerusalem - and raise citizen awareness of the importance of arbitration. ACT Conflict Resolution has held its two-hour sixth online conference under its arbitration forum on this topic in cooperation with Sawasyiah Program alongside The Palestinian Ministry of Justice on Wednesday the 17th of May 2023 at 8:00 PM Jerusalem Time. Hosting its guests namely: Judge Hazem Idkidek and advocate Nabeel Izhiman, in a dialogue session arranged by advocate Hiba Thouqan with the attendance of various arbitrators and legal persons as well as interested individuals in the field of arbitration.

In the present report, we will address the following main areas:

First, the role of the Palestinian judiciary in the arbitration process:

One should note that the West Bank and Gaza Strip areas are under Palestinian jurisdiction. Therefore, these areas apply the Palestinian Arbitration Act No. 3 of the year 2000, in addition to Council of Ministers Decision No. (39) of the year 2004. Moreover, the Executive Regulation of the Arbitration Act No. 3 of the year 2000. And by referring to the legal provisions contained in these legislations, the legislature confers on the judiciary's several validities relating to the arbitral process as follows:

1- Cancellation of the arbitration agreement: As stated in article 5/6 of the Palestinian Arbitration Law, which stipulates that "the arbitration agreement may be renounced only by agreement of the parties or by decision of the competent court", the court has the power to disable the arbitration agreement at the request of one of the parties to the arbitration.

2- Suspension of litigation proceedings presented before the competent court which contain an arbitration clause or agreement: Article 7/1 of the Palestinian Arbitration Act stipulates that: "If any legal action is initiated by an arbitral party before any court against the other party in respect of an order which has been agreed to be referred to arbitration, the other party may, before entering into the basis of the proceedings, request the court to suspend such action and the court may render a decision if it is satisfied with the validity of the arbitration agreement." based on this, the court's power in ceasing the court proceedings is vested in a party's request to activate the present arbitration clause. Therefore, if the party that presents an active arbitration clause wants to stop the proceeding, that party must apply for an inadmissibility of the proceedings due to the existence of an active arbitration clause.

3- Appointment of the arbitrator: The court shall have the power to appoint the arbitrator at the request of one of the arbitral parties or the arbitral tribunal. In the event that there is a request from one of the parties or the arbitral tribunal, the court shall appoint the arbitrator from the list of arbitrators approved by the Palestinian Ministry of Justice and issue its decision of appointment within fifteen days from the date of notifying the other party of such application. The decision is not subject to appeal. The cases that allow the court to appoint the arbitrator can be seen in article 11 of the Arbitration Act as follows:

- A- If the arbitration agreement requires the dispute to be referred to a single arbitrator and the parties do not agree to name that arbitrator.
- B- If each party has the right to appoint an arbitrator for their arbitration case and has failed to do so.
- C- If the nominated arbitrator does not accept his/her appointment in the arbitration proceeding by a written notice within fifteen days from the date of his/her knowledge of his/her nomination.
- D- If an arbitrator of one of the parties of the dispute, in a multilateral arbitration case, apologizes or becomes incapable to proceed with the arbitration process, and neither the parties nor one of the parties appoint a substitute.
- E- If arbitrators have to appoint an umpire and do not agree.
- F- If the Umpire refuses or apologizes for accepting his/her mission in the arbitration case, and the arbitration agreement does not include the means of appointing an alternative umpire, and the parties do not agree to appoint that alternative.

4- Consideration of one of the arbitral parties' appeal to the decision of dismissing the appointment of an arbitrator: Article 14 of the Palestinian Arbitration Law stipulates that if a party to the dispute has a reason to request revoking and reinstating the arbitral tribunal or any of its members, That party shall apply in writing within fifteen days from the date of knowledge to the arbitral tribunal or to the arbitral institution if the arbitration is institutional.

In the event that the arbitrator-dismissal application is rejected, the applicant has the right to appeal the decision in front of the competent court within 15 days from the date of its issuance. The court's decision is not subject to appeal. By requesting a dismissal application, or appealing the dismissal in front of the competent court, the arbitral proceedings become suspended until the court determines the fate of the appeal.

5- Using the court's opinion during the consideration of the dispute:

the Palestinian legislation granted the arbitral tribunal the right to avail itself of the Court's opinion on any legal issue arising during the consideration of the dispute on the basis of article 17 of the Palestinian Arbitration Act. Advocate Hazem indicated that the court's opinion can not be binary to the arbitral tribunal and it is merely an advisory opinion. However, Article 86 of the implemented regulations states the situations in which the arbitral tribunal can refer to the competent court as follows:

1. Initiating legal proceedings against those who fail to attend.
2. Taking legal action against a witness who refrains from swearing or testifying.
3. Ordering the parties of the dispute to deposit a sum of money to cover the arbitration expenses if the parties or any of them do not pay that amount ordered by the arbitral tribunal.
4. Issuing a commission rogatory in the case of hearing of a witness who resides outside the Court's jurisdiction and was unable to appear before it.
5. Ordering the presence of a witness to appear before the arbitral tribunal on the date specified in the application, in the case that the witness has refused to appear before the arbitral tribunal at the arbitral tribunal's invitation.
6. Appointing an arbitrator or an umpire from the Ministry's list of approved arbitrators, in the circumstances provided by the law.
7. Ordering the publication of the award or part of it thereof in the circumstances provided by the law.

6- Giving additional time for the termination of arbitral proceedings other than agreed upon: a party may resort to the competent court for the purpose of ordering an additional deadline for arbitral proceedings or a party may apply to the court for termination of arbitral proceedings on the basis of article 38/2 of the Palestinian Arbitration Act.

7- Appealing against the award: After the arbitral tribunal has concluded the award, one of the parties shall have recourse of the arbitral tribunal's decision to the competent court within thirty days starting from the second day on which the award was rendered relevant if the Arbitration process was active in the physical presence of the parties. Therefore, there are exclusive cases mentioned in article 43 of the Palestinian Arbitration Act in which the appeal is not taken into consideration:

1. If an arbitral party is incompetent or incomplete in accordance with the law governing its eligibility unless it is properly legally represented.
2. If the arbitral tribunal or one of its members is subject to incompatibility before the award is rendered.
3. Violation of public order in Palestine.
4. If the arbitration agreement is nullified before its expiration or expired at the date mentioned in the agreement.
5. Misconduct by the arbitral tribunal or contravention of the parties' agreement to apply legal rules to the subject matter of the dispute or to derogate from the arbitration agreement or its subject matter
6. If the Arbitral award is nullified, or its proceedings were null thus affecting the award itself.
7. If the award is obtained by fraud or deception unless the award has been executed prior to the discovery of fraud or deception.

Ratification of the award and its executive formulation: In the event that the arbitral tribunal's decision is not appealed within the prescribed period, one of the parties has the right to apply to the competent court for ratification of the award and to give it the executive form. The court's decision is final and is executed in the same way as the court's decisions are executed on the basis of article 45 of the Palestinian Arbitration Act.

Judge Hazem indicates that the appeal judgement of the competent court, which is appealed through cassation, is being examined and there is a tendency to convene a plenary body of the Court of Cassation to determine the cassability of the appeal, and the file will be presented to the Supreme Court until it is definitively decided during 2023.

Second: Mechanism for conflict resolution in occupied Jerusalem

Advocate Nabil Izhiman addresses several points, including that the means for Jerusalemites to resolve disputes between them and to avoid recourse to the law applicable in occupied Jerusalem are the use of traditional means such as relative-intervention and the tribal dimension, in addition to resorting to arbitration, as Jerusalemites' awareness of recourse to that means is increasing especially in view of the departure from formal justice in Jerusalem. Advocate Nabil notes that the parties' most arbitral disputes were commercial disputes.

He also refers to an important point and an existing advantage that was introduced in the applicable law in occupied Jerusalem and other than the situation in the West Bank and Gaza Strip, namely the issue of appeal or challenge to judgements, which was called a special appeal so that the parties could agree that the arbitral award should be subject to appeal to another arbitral tribunal before recourse to the formal judiciary in the arbitrators' decision.

He also points that an appeal against an award would be deferred and would not impede the execution of the award unless the court's decision to freeze the execution of the award was the same, since some legislation does not include provisions in the Arbitration Act on the matter and the courts intervened with judicial legislation to maintain arbitration as an effective means of resolving disputes, especially in view of the huge duration of litigation and the purpose of expeditious arbitration in disputes.

Both Professor Hazem and Professor Nabil emphasize the problem of areas that are outside the control of the executive authority, whether in the West Bank or in the occupied Jerusalem areas. It is difficult to use the Enforcement Service of the jurisdiction in force in each region for the purposes of enforcing the judgement and the arbitration decision, and the political situation that exists has created a kind of zone outside the effective control of the procedure and enforcement service.

At the end of this report, it must be stressed that the solution of the problems in the legislation in force is linked to the amendment of the laws in force. The judiciary is restricted by the legislation, and the judicial reality cannot be separated from the legislative reality, especially in Palestine, in the light of the political situation and the agreements imposed on the zoning of the West Bank. The solutions that we can highlight are, therefore, to strengthen citizens' confidence in resorting to alternative means of resolving disputes and to work towards the establishment of specialized arbitration centers to hear all disputes in which arbitration may take place, especially in the occupied areas of Jerusalem, and to develop the capacity of arbitrators so that the decisions handed down are without any of the reasons for invalidity that may be invoked by one party before the competent court and to enter into a long-term cycle of litigation proceedings under the legislation in force.

Event Highlight



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