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A COMPARATIVE LEGAL ANALYSIS OF THE ROLE OF ARBITRATION IN MARITIME DISPUTE RESOLUTION

BY

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A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Comparative Law

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ABSTRACT

The need for a suitable harmonisation of the procedural rules in maritime arbitration between the conventional system and the Islamic law model is a matter of great concern in the face of global economic meltdown. This synchronization between the two jurisdictions can be achieved when major elements of successful arbitral proceedings like equity and amiable composition are closely considered. The growing disaffection of parties for arbitration in the international commercial arbitral landscape may have a dominant effect in commercial maritime arbitration. This dissertation examines the role of arbitration in commercial maritime dispute resolution with a comparative appraisal of the conventional practice and Islamic law. The methodology adopted in this research is multidimensional. It involves both library-based research and interviews from stakeholders. The research concludes that for a party-friendly and cost-effective maritime arbitration, there is need for an all-embracing model arbitration clause in form of stepped-clauses. This will afford the parties the opportunity to explore other dispute resolution processes within the overall parasol of arbitration. The *Taḥkīm* proceedings introduced over 1,400 years ago is still relevant in the modern practice of arbitration. A well-coordinated harmonisation of the respective rules will promote international trade and secure ongoing business relationship.

ملخص البحث

إن الحاجة إلى التوفيق المناسب بين النظام التقليدي والشريعة الإسلامية المثالي للأحكام الإجرائية في التحكيم التجاري البحري لمسألة ذات اهتمام تجاه الأزمة الاقتصادية العالمية. وهذا التوفيق بين الاختصاصين الاثنين يمكن إنجازه عندما نراعي بدقة أهم عناصر الإجراءات التحكيمية الناجحة مثل الإنصاف وعقد الجلسة التحكيمية الملاينة. ان ازدياد عدم الرغبة في التحكيم من قبل الأطراف قد يحوز أغلبية التأثير في التحكيم التجاري البحري العالمي.وهذا البحث يدرس دور التحكيم في حلّ الـ اعات والخلافات التجارية البحرية من خلال التقويم المقارن بين التطبيقات التقليدية والشريعة الإسلاميةّ.والمنهج المتبع في هذا البحث متعدِّد الأبعاد ويتضمن التنقيب في طيات كتب المكتبات ومقابلات مع أصحاب الشأن في هذا الـ ـال .وتوصل البحث في الختام إلى أنه لا بد من وجود نص تحكيمي مثاليّ شامل على هيئة شروط متدرجة ومرتبة للحصول على تحكيم تجاري بحري مؤثِّر في الأسعار ومراعياً لجميع الأطراف.وهذا سيعطي الأطراف الفرصة للاستكشاف عن حلّ الخلافات والـ اعات في الدعاوى القضائية الأخرى تحت ظلّ عموم التحكيم .والإجراءات التحكيمية المقدمة منذ 1400 سنة لا تزال صالحة للتطبيق في التحكيم في الوقت الحاضر.التوفيق المنسق جيداً بين القانونين المعني تطبيقها سيرقّي التجارة العالمية ويحمي العلاقات التجارية الساعدة.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Oseni, Umar Aimhanosi

Signature …….. Date …….....

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Signature Date

In the Name of Allah, the Most Beneficent, the Most Merciful

This dissertation is dedicated to my dear parents, Prof. Dr. Zakariyau I. Oseni

(the Chief Imam & Waziri of Auchi, Edo State, Nigeria) and Mrs Reminetu Oseni.

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LIST OF ABBREVIATIONS

A.H.	anno Hegirae, the Islamic calendar
AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
All ER	All England Law Report
BC	Before the birth of Christ
C.E.	Common era, Christian era
Cf	compare
CIA	Chattered Institute of Arbitrators
ECJ	European Court of Justice
etc.	And so forth
I.L.R.	International Law Report
ICC	International Chamber of Commerce
IKMAL	Institut Kelauntan Malaysia
KLRCA	Kuala Lumpur Regional Centre for Arbitration
M.R.	Master of Rolls
n.	footnote
Rep.	Report
SAW	*salallahu 'alaihi wa salam,* may peace and blessings of Allah be upon him.
SWT	*subhānanau wa ta'ālā*, glory be to Allah, the Most Exalted.
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea 1982
v.	versus, against

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Alternative Dispute Resolution (ADR), in a formalized way, emerged in the twilight of the 19th century and has ever since assumed much importance in different spheres of life all over the world.[1] The dominant effect of the evolution of new processes to resolve disputes has resulted in the proposition and application of well established dispute resolution mechanisms like Negotiation, Mediation/Conciliation, Expert Determination, Early Neutral Evaluation, Mini Trial, Adjudication, Arbitration and some other hybrid processes like Med-Arb.

The general drift in the modern world is the exploration of effective dispute resolution mechanisms which are result-oriented and less rigid as opposed to the conventional court system. Arbitration has been given a positive nod in several international conventions. For instance, for the carriage of goods by sea, the Hamburg Rules 1978 provides that the parties to a contract on carriage of goods by sea can provide for an arbitration clause in the contract which allows any dispute arising from such a relationship, whether contractual or not, to be referred to arbitration.[2] In most

[1] "ADR" will be used in this research where appropriate to represent Alternative Dispute Resolution. It is important to mention that there has been much debate about the appropriateness of the term as proper alternatives to litigation. We shall not be tempted to enter the arena of controversy as regards this terminology polemics as that is outside the scope of this research. However, for a general overview on this issue, see Sir Laurence Street, "The Language of Alternative Dispute Resolution", *Austrailian Law Journal*, 66 (1992): 194. Also, see generally, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia.* 2nd ed. (Australia: LexisNexis Butterworths, 2002), at 76-81.

[2] See Article 22 of the United Nations Convention on the Carriage of Goods by Sea (UNCOGSA), popularly known as "Hamburg Rules" of 1978. Art. 22(1) provides that "…[P]arties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration".

cases, the Bill of Lading or Charterparty always contain the arbitration clause. In essence, all contracts involving carriage of goods by sea can be subjected to maritime arbitration in the event of a dispute. These include loss of cargo, charterparty disputes, ship finance, marine insurance, salvage disputes etc.

The idea of having maritime disputes heard in an arbitral tribunal is to get expert-based quality awards on matters relating to shipping. An arbitrator with experience in shipping industry and maritime trade practices has better grasp of understanding when hearing complex shipping cases than a trained lawyer. His shipping expertise would provide quality arbitral awards to the satisfaction of all the parties. Unlike litigation, where the court will decide the dispute in accordance with the applicable law, there is more freedom in the classical arbitration.

Maritime arbitration cannot operate in isolation. It is intertwined with commercial arbitration in practice.[3] Hence, recent trends in international commercial arbitration will be discussed in chapter two to give an insight into how it is being regulated, the matrixes involved in its practice in the modern world and its harmony with maritime arbitration. In discussing this, we shall make copious reference to some contentious issues facing International commercial arbitration in the modern world.

In considering arbitration as an effective tool of dispute resolution in the maritime industry, efforts have been made to bring to the fore the practice and procedure of arbitration under Islamic Law. The practice and procedure of *Tahkīm*, the Islamic law of arbitration, as evidenced in the prime sources of Islamic law and as expounded by the Muslim jurists is discussed. It is important to add that certain procedural guidelines available in the Islamic law practice of arbitration are absent in

[3] Johannes Trape, "Legal Issues in Maritime Arbitration" in *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and other Institutions*, edited by Pieter Sanders (Deventer/The Netherlands: Kluwer Law and Taxation Publishers, 1983), at 315.

the conventional arbitration. Some of these procedural guidelines include the application of equity and amiable composition as part of the arbitral process. This is worth emulating to better streamline the modern maritime arbitration to make it a result-oriented mechanism. On the other hand, it has been discovered that most of the Muslim countries across the world have arbitration laws modeled after the civil law. *Tahkim* as a means of dispute resolution has been left for the pages of *fiqh* books in most Muslim countries.

The limitations of arbitration as a tool for dispute resolution in maritime law are found in criminal cases. Arbitration can only be useful in civil, commercial and contracted disputes in the maritime industry. Hence, this research focuses on the commercial maritime disputes. Furthermore, arbitration as a private-initiative in the dispute resolution framework is presumed to be inexpensive, quick and simple especially when it is enmeshed with other apposite hybrid processes.[4]

Maritime arbitration as a formal process evolved in the 20th century in its modern form, and has given many practitioners a lot of concerns as regards the appropriateness of arbitration in maritime commercial disputes particularly those that relate to the lost and care of cargo. Though maritime arbitration has been practiced since time immemorial, the metamorphosis of the arbitral procedures particularly in its international landscape into a rigid procedure like litigation has called for an urgent appraisal of the actual role of arbitration in tackling maritime disputes.

There is need to consider some of these contentious issues in maritime arbitration to gradually douse the growing disaffection of many practitioners against arbitration. This leads to our hypothesis that if the principles of equity and amiable

[4] The reason why most merchants embraced arbitration was as a result of its simplicity, quickness and the little cost involved. As it will be discussed in chapter two, these were some of the features of the classical form of arbitration. Times have actually changed, and the modern arbitration may be described as virtual litigation.

composition are injected into the international maritime arbitral landscape as copiously found in *Tahkīm*, the maritime arbitration industry will be more productive in handling commercial disputes. This has been applied in different forms about four hundred years ago during the golden era of Islam. This research extends the study to maritime mediation which was applied in form of *Ṣulḥ* (Amicable Resolution) in the Islamic legal history.[5] So, a formidable hybrid of these procedural rules will produce an effective dispute resolution mechanism. There is an urgent need to re-evolve these procedural niceties to create a more viable system of maritime arbitration which will be result-oriented. This harmonization of laws is needed in a world which is gradually shrinking into a global village with the crystallization of maritime trade and the unprecedented technological advancement.[6]

1.2 STATEMENT OF PROBLEM

The recourse to arbitration in maritime dispute resolution was as a result of the excessive costs and time-consuming nature of litigation. After the practice of formal arbitration by notable international arbitral institutions for some decades, it is expedient at this point in time to do a reappraisal of the pros and cons of the procedure by finding appropriate solutions to the following questions with a kind of hybrid procedure.

1. With the growing disaffection against arbitration in the international arbitral landscape, how can it be regarded as an objective means of dispute

[5] See Aseel Al-Ramahi, "*Sulh*: A Crucial Part of Islamic Arbitration", *LSE Law, Society and Economy Working Papers*, 12/2008, at www.lse.ac.uk/collections/law/wps/wps.htm (accessed 30 October, 2008).

[6] For the Malaysian perspective of maritime arbitration, see Vikneswaran Shunmugam, "Maritime Arbitration in Malaysian Perspectives", [2005] 2 *MLJ* l.

resolution to ensure equity, fairness and justice? Will maritime mediation replace arbitration?

2. How is maritime arbitration different from the normal arbitral proceedings and how does the fast-track maritime arbitration works?
3. Can the maritime disputes be resolved under the *Tahkīm* procedure in Islamic jurisprudence with the application of equity and amiable composition as part of the arbitral procedure?

1.3 HYPOTHESIS

With the exponential increase in transnational trade and the proportionate upsurge in maritime disputes, there is need for a model of arbitration clause that will minimize the polemics caused by interim measures in maritime arbitration to ensure quantitative-efficiency and qualitative-justice in the arbitral procedure. Also, equity and amiable composition should be the guiding principles in the maritime arbitration to free it from unnecessary rigidities introduced lately. It is expedient, as a matter of necessity, to save maritime arbitration from some objectionable practices at the international arbitral landscape in order for it to favorably remain an attractive dispute resolution process, at least, in the sight of merchants and ship-owners.

In order for the participants in the maritime industry to successfully navigate the contemporary maritime landscape with best practices and cutting-edge procedures in the resolution of disputes, ad-hoc or institutional mediation may be introduced which expectedly will preserve the good-will of the parties, save time, allow for efficient and more cost-friendly procedures than arbitration and litigation. This is similar to the Med-Arb procedure and amiable composition available under the *Tahkīm* procedure. If the necessary reforms in the substantive and procedural laws are

not made, maritime mediation may gradually supplant arbitration and formally take its place.

In all, *Tahkīm* has been successfully used to solve maritime disputes over one thousand four hundred years ago based on the principles of *Tahkīm* which, as a matter of procedural rule, applied equity and amiable composition. Thus, there may be need to borrow a leaf from some of these niceties available in *Tahkīm* and apply them in modern maritime arbitration to reincarnate the maritime arbitration landscape into problem-solving, result-oriented and solution-giving process.

1.4 SIGNIFICANCE OF THE STUDY

This study sets out on a legal voyage to consider the importance of maritime arbitration and the need to improve the arbitral procedure to better serve its purpose as an independent process of dispute resolution. Specifically, this research is being carried out to evaluate the success rate of maritime arbitration in the modern world and to unravel new procedural rules through a comparative legal analysis with emphasis on the Islamic law of arbitration known as *Tahkīm.*

This research will introduce areas of reforms in the international maritime arbitral landscape to improve access to justice. This can be achieved by approving the use of equity and amiable composition in maritime arbitration. To crown it all, a model arbitration clause will be proposed for maritime transactions which will allow the incorporation of other result-oriented dispute resolution processes that can conveniently be employed in arbitration. It is believed that if these proposals are adopted, the international maritime arbitral landscape will be the cynosure of all eyes in the dispute resolution world. Therefore, the research seeks to achieve the following aims and objectives:

1. To evaluate the role of arbitration in commercial maritime disputes with emphasis on those related to carriage of goods by sea.
2. To evaluate the efficiency of maritime arbitration particularly with the new trends of popular disaffection against arbitration.
3. To probe into new procedural ways of resolving maritime disputes through the comparative legal analysis of arbitration as a process of dispute resolution.
4. To propose a mechanism where maritime arbitration will be reincarnated into a problem-solving, result-oriented, and solution-giving process.
5. To develop a model arbitration clause for maritime transactions which will allows the incorporation of other result-oriented dispute resolution processes that can conveniently be employed in arbitration.

1.5 LITERATURE REVIEW

The growing need to settle disputes in a more friendly manner, without the usual technicalities and legal bottlenecks brought about the search for an independent means of dispute resolution. As a matter of fact, a certain category of disputes are better resolved by some processes, depending on the circumstances and nature of each case. Though from the very beginning, commercial maritime disputes particularly those that involve care of cargo were settled through the application of *lex mercatoria* (the general maritime law) in an arbitration form; litigation later became the dominant dispute resolution process by the 18th century.

There is no doubt in the fact that the history of the maritime industry is dotted with huge successes and inevitable disputes.[7] After facing difficult times in the hands of litigation, the new trend that emerged in the 20th century was a gradual return to the basis through the evolution and standardization of the international maritime arbitration landscape. In essence, arbitration has turn to become a cheap and popular method of resolving maritime disputes since, from its flourishing history, it is a party-driven process which fundamentally caters for the interests and stipulations of the parties. The arbitration clause in the contract is regarded as the paramount clause which stipulates the modus operandi of the process with provisions relating to the choice of forum, the applicable arbitral procedures, the composition of the arbitral tribunal and the remedies available to either of the parties.[8]

However, it is important to clearly make a distinction between international commercial arbitration and maritime arbitration. Moonchul Chang[9] made a distinction between commercial arbitration and maritime arbitration. Maritime arbitration is a form of specialized commercial arbitration.[10] Because of the special nature and uniqueness of maritime commercial disputes and the age-long practice of merchants who traded on the high seas, the field of maritime arbitration was developed in its modern form. According to Moonchul, "maritime arbitration has often utilized highly unified maritime codes and usages, unique procedural rules, and distinctive arbitration institutions".[11] This distinction between commercial and maritime arbitration seems

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[7] Buffy D. Lord, "Dispute Resolution on the High Seas: Aspects of Maritime Arbitration", *Ocean & Coastal L.J.* 8 (2002): 71.
[8] Ibid.
[9] Moonchul Chang, *The Autonomy of International Commercial and Maritime Arbitration: International, Canadian and Far Eastern Perspectives*, (Seoul: International Legal Studies, Korea University, 1989), at 17.
[10] Ibid.
[11] Ibid. It is important to add that having said that, many legal systems across the world do not separate maritime arbitration from commercial arbitration. The "commerce" element in commercial arbitration is often extended to include maritime disputes.

to be superficial, as it is mostly used for convenience sake as stated by Frederic R. Sanborn in his book.[12] In actual fact, they are often confused together especially when the dispute involves commercial transactions on the high seas. It is apt to state that to a large extent, this view is correct but when both terms are strictly construed in the light of the nature of the disputes and the procedures involved, maritime arbitration would not necessary fall within the scope of commercial arbitration. Maritime arbitration is distinct as it only involves the practice and procedure of arbitrating disputes involving transactions on the high seas whether commercial or non-commercial. From time immemorial, the maritime industry had had its own unique dispute resolution mechanism.[13]

In a research article by Buffy Lord,[14] the significance and the uncommon roles of maritime arbitration in the international arbitral landscape was examined through a case law analysis on specific procedural issues as it is practiced in the United States of America. If the arbitration clause is well framed, it is possible to subject primary interim measures like the attachment of vessel to the jurisdiction of the arbitral tribunal and not the courts. The clause can effectively broaden the powers of the tribunal through express stipulations to reduce the level of court intervention.[15] This supports our hypothesis that it is necessary to drastically delocalize maritime arbitration and save the procedure from the claws of fierce domestic legislations that confer powers on local courts to unnecessarily intermeddle with the powers of the arbitral tribunal. Notwithstanding this, it is acknowledged that the minimal court intervention may be necessary in some marginal cases. Syed Khalid Rashid agrees

[12] Frederic R. Sanborn, *The Origins of the Early English Maritime and Commercial Law*, (New York and London, The Century Co., 1930), at 125.
[13] Moonchul Chang, n. 9 at 18.
[14] Buffy D. Lord, n. 7 at 72 – 73.
[15] Moonchul Chang, n. 9 at 72.

with this hypothesis where he submitted that majority of the countries across the world fail to fully utilize the diagnostic test as provided in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration to identify the "malignant localization" from the "benign judicial regulation".[16] Hence, the jurisdiction of the courts should be confined to areas of enforcement of awards and benign steps to facilitate the arbitral proceedings.[17]

In a recent research, Syed Khalid Rashid,[18] proposed that there is need to explore other cheaper and less rigid alternative means of dispute resolution with the mounting problems confronting arbitration in the modern world. He argued that a party to an arbitration agreement should be allowed to apply for a stay of arbitration to try other result-oriented processes like mediation, mini trial or expert determination.[19] After considering the growing disaffection against arbitration and how its procedure has become worse than even litigation, he proposed that in order to provide an avenue for voluntary settlement of disputes through the use of arbitration, there is need for what he referred to as "stay of arbitration" which is in a way likened to stay of action in legal proceedings. So, where a stay of arbitration is granted, it is after the exhaustion of other stipulated dispute resolution processes without success that the parties can return to arbitration.[20] This may not be automatic in all cases of maritime arbitration due to the nature and complexities involved in maritime transactions. If the parties to a maritime transaction intend to explore other dispute resolution mechanisms before finally going for arbitration, then it is expedient to conclude on

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[16] Syed Khalid Rashid, "Some Contentious Issues in International Commercial Arbitration", *IIUM Law Journal* (2005) 13: 148.
[17] *Id* at 162.
[18] Syed Khalid Rashid, "How 'Stay of Arbitration' Could Bring About Quicker and Cheaper Settlement of Commercial Disputes", *The Law Review,* (2008): 265 – 272.
[19] Ibid at 265.
[20] *Id* at 271- 272.