

Assessing the prospect of using *Tahkim* as a Shariah-compliant ADR for resolving construction disputes

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Abstract: Conventionally, arbitration is deemed as the most frequently used alternative dispute resolution (ADR) mechanism for settling construction related disputes. In Islam a similar approach in ADR, is known as *Tahkim*. While the practice and procedures in arbitration are well established, but not much is known about *Tahkim*. In line with the interest of the business community to seek ways to adopt Shariah-compliant practice and procedures it is considered important for the prospect on using *Tahkim* in settling construction related disputes to be assessed. This paper reports on a study to assess the prospect of using *Tahkim* as a Shariah compliant ADR for resolving construction disputes. Methodology adopted for the study combines review of literature and interviews with Shariah, legal and construction experts. The outcome of the study suggests that *Tahkim* has the potential to be used for settling construction related disputes.

Key words: Construction; Disputes; Arbitration; ADR; Islam; Shariah; *Tahkim*

1. Introduction

1.1. Construction related disputes and ADR

In the construction sector, disputes and conflicts are common and may occur in many areas in the contract, whether in pre-contract stages or post-contract stages. Abidin (2007) identified that the main causes of disputes in the construction industry are as follow: 1) defects or omission in contract document, 2) failure in accurately estimate the cost, 3) change of condition, 4) the client, and 5) the people involved.

There are many parties such as a client, contractors, and consultants that involve in a single construction contract. Thus, conflicts might occur due to disagreement among them, or may take place due to any discrepancies in the documents related to them. And if they are not well treated, it may cause dispute which can lead to bad consequences. The disputes in construction industry may implicate such results: 1) additional cost, 2) conflict displacement, 3) effect on the job, and 4) affecting the parties and their business relationship (Abdullah Habib, 2005).

These problems may arise due to untreated dispute, and to avoid these matters from occurring to the parties involved in the contract, the dispute must be resolved. An intention to seek the problem and resolve the disagreement is called as dispute resolution.

Dispute resolution can be classified into two; litigation and non-litigation. A litigation method is a judicial method that requires the disputed parties to

go to the court of law since it is a procedure that is governed by the statute. Their case will be carried out in the public and they will be represented by the lawyer and their disputation will be decided by the judge. Non-litigation method comprises of Alternative Dispute Resolution (ADR) which consists of the method of arbitration, mediation, negotiation and adjudication.

For the last 10 years, ADR has become a typical ground to resolve disputes in the construction industry since parties involved felt uncomfortable to present their case in front of the court due to its formality, cost and time consumed, as well complex procedurals which they implied as caused by the adversarial system of justice (Maidin, 2009).

Abraham (2009) describes that, fundamentally, when mentioning ADR in Malaysia; it usually refers to: 1) conciliation, 2) mediation, 3) adjudication and 4) arbitration.

Conciliation and mediation refers to the act of the parties to invite a natural third party in disputes negotiation process. However, the third party did not being conferred with any power to make an obligatory award. Furthermore, the concept of mediation is much more complex than conciliation due to the constraints of the mediator in providing such suggestion to the parties. This statement also indicates the concept of less formality in conciliation than mediation (Rashid, 2006).

Meanwhile, adjudication is a form of dispute resolution procedure that is quite similar to arbitration. Adjudication refers to a contractual procedure and the process may be executed or done during the prevalence of the contract but with limited time-scale with the adjudicator have an

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official and extensive role to acquire any relevant information before giving an award (Singh, 2002).

Arbitration is a traditional form of Alternative Dispute Resolution (ADR) and a legal technique that is used to resolve dispute outside the court where the disputed parties will refer the case to a third, neutral party, which can be a person (an arbitrator) or a group (arbitration tribunal). The decision or the award made by this arbitrator is final and binding upon parties. (Powell-Smith, 1995; Rashid, 2006)

1.2. Shariah-compliant ADR

In Arabic the term Shariah literally means ‘the path’. Shariah is usually defined as sacred Islamic

law or jurisprudence. Akram Laldin (2008) however described Shariah as:

“...it is not law in the modern sense as it contains a comprehensive set of dogmas, legal and ethical doctrines. It is basically a doctrine of duties, a code of obligations. For this reason, legal considerations and individual rights have a minor place in it while the tendency towards a religious evaluation of all the affairs of life is absolute.”

In terms of dispute resolution, other than settlement via the Shariah court system, non-litigation alternatives include *Sulh*, *Tahkīm*, *Muhtasib*, *Walī al-Mazālim* and *Fatwā of Mufti*. These are described in Table 1.

Table 1: Summary of Shariah-compliant ADR (Arifin et al., 2015)

Types of ADR in Islam	Equivalent	Characteristic
<i>Sulh</i>	Mediation	Derived from the word ṢA-LA-HA which means to be good, right, proper, in order, righteous, suitable or appropriate. Lexically, it means peace, conciliation, reconciliation, settlement, compromise, peace-making and conclusion of peace. The word <i>Sulh</i> used in Quran simply brings the meaning of mediation, conciliation and compromise. The word <i>Sulh</i> has been mentioned in the Quran in <i>surah</i> al-Hujurāt: 10, al-Nisa':114 and 128. Concept of <i>Sulh</i> can be generalised in all case and that it is not exclusive for marital dispute.
<i>Tahkīm</i>	Arbitration	Derived from root word of HA-KA-MA which means to judge or to arbitrate Derived from the concept of ‘ <i>adl</i> or justice Would appear similar to the concept of conventional arbitration where both hold the core intention to resolute dispute between the parties Ruling of <i>Tahkīm</i> is stated in <i>al-Nisā'</i> verse 35 and 65 In <i>Sunan Abi Dawūd</i> , the Prophet is amazed with what Hani bin Yazid has done to arbitrate the disputed among his people
<i>Muhtasib</i>	Ombudsman	The function of <i>hisbah</i> as the superintendent to the account record Early function of <i>hisbah</i> is primarily related to oversee the market affairs, the maintenance of the mosque, as well as the municipal affairs.
<i>Walī al-Mazālim</i>	Chancery or special tribunals	A fusion between judge and ombudsman – appointed by the ruler to hear and give judgment on sensitive cases that involves people in the society, handling public cases
<i>Fatwā of Muftī</i>	Expert determination	The disputed parties recourse to an impartial-neutral third party with knowledge to end their dispute – which in this case a mufti The nature of fatwa as advisory and “non-binding evaluative opinion”

1.3. Structure of the paper

This paper reports on an exploratory study on assessing the prospect of using *Tahkīm* as a Shariah compliant alternative to Arbitration in settling construction related disputes.

The paper is structured as follows; Part 1 provides an Introduction to the paper whereby the concepts of construction dispute, ADR and Shariah-compliant ADR were discussed. Part 2 and Part 3 describes the methodology used in the study and the results thereof, respectively. And finally Part 4 presents a brief discussion and conclusions of the paper.

2. Methodology

The methodology used for the study comprised extensive reviews of literature and secondary data collection and a series of semi-structured interviews with Shariah and construction experts. Understanding of the *Tahkīm* and its practice and procedures were established through the former approach. It includes analysing the Holy Quran and its translation, *hadīth* (prophetic traditions) derived from various books, exegeses and commentaries, books on *fiqh* (Islamic jurisprudence), lexicons, and statutes. Assessing the prospect of using *Tahkīm* as a Shariah-compliant alternative in resolving construction related disputes was achieved through the interviews.

3. Results

From the literature review, a rich set of data was collected. The results are as presented in Tables 2 and 3. Table 3 provides an overview of the meaning and application of the concept of *Tahkim* and Table 3 provides a comparison between *Tahkim* and

Arbitration. In making the comparison, Malaysia's Arbitration Act 2005 (revised 2011) has been used as basis.

**Table 2: An overview of *Tahkim*
Review on the origin of *Tahkim***

Affirmative Evidence	In the Quran the ruling of arbitration is stated in chapter number 4, verse 6 and 35.
	A prophetic narration recorded by Hani ibn Yazid as reported in Sunan Abi Dawud that the Prophet astonished by the action of Hani to reconcile the disputes of his people.
	The event where Sa'ad ibn Mu'az has been appointed as arbitrator by the Prophet (PBUH) to decide upon the Jews of Quraiza which have violated the treaty signed.
Historical Event	The Prophet reconciles the tribes' disputation regarding the <i>Hajar al-Aswad</i> (Black Stone).
	<i>Majlis Tahkim</i> between Ali bin Abi Talib and Muawiyah bin Abi Sufyan to resolve the political dispute between them.

Table 3: Comparison between conventional arbitration and *Tahkim*

AREA	CONVENTIONAL ARBITRATION	TAHKIM
Arbitration Agreement	Accommodated in the Section 9 (1) of Arbitration Act 2005 (Rev. 2011). May be included in the arbitration clause in commercial contract for the future disputes to be entered into arbitration.	Arbitration agreement may only be constituted after the dispute has arisen.
Criteria and appointment of arbitrator	Chapter 3 of the Arbitration Act 2005 discussed on the composition of arbitrator. Qualification of the arbitrator is not mentioned in the Act.	Criteria of the <i>Hakam</i> is similar to what has been outlined in the subject of <i>Qada'</i> . (Saleh, 2006) Shariah strictly outlines the qualifications of the arbitrator.
Procedural rules	The conduct of the arbitration process is highlighted in Chapter 5 of the Arbitration Act 2005 and serves as the ground of the arbitration procedures in Malaysia. Based on equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.	No strict provisions. Shariah allows the parties to mould the procedures as they wanted to. Promoting the concept of <i>'adl</i> or justice that the parties shall adhere. There is a "safety valve" under the Shariah that allows concept of <i>Sulh</i> (two conciliators from each party to reconcile the dispute) to be adapted in the procedure.
Place and time of arbitration session	Included under the provision of the Section 22 and Section 23 of the Act. The parties to decide where are the seats of arbitration and when it will commence.	No provisions in Shariah that suggest any strict term regarding the time and place of arbitral hearings. Flexible.
Number of arbitrators	Flexible, however, if the tribunal has to decide, <u>single arbitrator</u> shall be appointed for domestic and three arbitrators for international arbitration.	From the affirmative evidences of Quran and <i>Sunnah</i> as well as the consensus of the Companions, the ideal number of arbitrator to conduct the case is either a <u>single</u> or two arbitrators.
Substantive law	Malaysian Law for the conduct of domestic arbitration, and any law agreed by the parties for the international dispute.	Substantive law is mandatorily the Shariah.
Rules of evidence	<u>Statement of claim and defence</u> by the party and the submission of the <u>relevant documents</u> to the arbitrator.	<u>Statement of claim and defence</u> as well as the oath and denial by the parties. Oral evidence and <u>written documents</u> .
Nature of award	The award is <u>final and binding</u> according to the Section 36 of the Arbitration Act 2005. The award shall be <u>in writing</u> .	Majority of jurist in Islam agreed that the award of <i>Tahkim</i> by the <i>Hakam</i> is <u>final and binding</u> . It is sufficient to make the award in verbal, however it is not forbidden to describe the <u>award in writing</u> in form of <i>sijill</i> (register).

The underlined areas indicate the similarities shared between conventional arbitration and *Tahkim*.

Table 2 and Table 3 have been presented to five (5) experts to be verified. The composition of the

experts and their expertise has been tabulated in Table 4.

In the interviews with the experts four (4) key questions were asked. Question 1 focused on the comparison between the procedurals in conventional arbitration as outlined in Malaysia

Arbitration Act 2005 (rev. 2011) and as practised in *Tahkim*.

Table 4: Areas of expertise of interviewees

Expert	Law	Shariah	Construction
1	X		X
2	X	X	
3		X	
4	X	X	
5	X		X

Question 2 concerned with the attributes of the conventional arbitration and *Tahkim*, on whether they share the same virtues in its application and implementation. Question 3 highlighted on the sufficiency and the appropriateness of the affirmative evidences provided in the literature review, and Question 4 focused on the issue whether it is suitable for *Tahkim* to be implemented in the construction industry. Table 5 exhibits the result obtained via the primary data collection.

Table 5: Result of primary data collection

Question 1			
	Agree	Disagree	
Expert 1	X		
Expert 2	X		
Expert 3	X		
Expert 4	X		
Expert 5	X		
Total and Percentage	5	100%	
Question 2			
	Similar	Dissimilar	
Expert 1	X		
Expert 2	X		
Expert 3	X		
Expert 4	X		
Expert 5	X		
Total and Percentage	5	100%	
Question 3			
	Apt	Inapt	
Expert 1	X		
Expert 2	X		
Expert 3	X		
Expert 4	X		
Expert 5	X		
Total and Percentage	5	100%	
Question 4			
	Possible	Impossible	
Expert 1	X		
Expert 2	X		
Expert 3	X		
Expert 4	X		
Expert 5	X		
Total and Percentage	5	100%	

4. Conclusion

The outcome from the study demonstrates that *Tahkim* and conventional arbitration are comparable. Consequently, it may be concluded that there are prospects for *Tahkim* to be applied in the construction industry.

References

Abdullah Habib, S. N. H. (2005). Procedures And Processes Of Statutory Adjudication: Recommendations for the Proposed Construction Industry Payment and Adjudication Bill. Quantity Surveying Undergraduate Dissertation, International Islamic University Malaysia.

Abidin, A. (2007). The Profile of Construction Disputes. Master Dissertation, Faculty of Built Environment.

Abraham, C. (2009). Alternative Dispute Resolution In Malaysia. ASEAN Law Association [Online]. Available: http://www.aseanlawassociation.org/9GAdocs/w4_Malaysia.pdf.

Akram Laldin, M. (2008). Introduction to Shariah and Islamic jurisprudence, Kuala Lumpur, CERT Publications.

Arifin, M.A.B., Rashid, K.B.A., Sarkawi, A.B.A. and Hasan, S.F.B. (2015). Proposed Framework for Tahkim in the Construction Industry. Advanced Science Letters, 21(6), pp.1999-2002. DOI: <http://dx.doi.org/10.1166/asl.2015.6184>

Maidin, A. J. (2009). Using Alternative Dispute Resolution For Managing Disputes In Joint Venture Construction Projects In Malaysia. In: Khairuddin, A. R., Kobasyashi, K., Omoto, T., Preece, C. N. & Sharina Fariyah, H., eds. Collaborative Efforts in International Construction Management, Kuala Lumpur. International Islamic University Malaysia & Scholar Mind Publishing, 67-78.

Powell-Smith, V. (1995). Aspects of Arbitration: Common Law & Shari'a Compared, Ampang Jaya, Central law Book Corporation Sdn Bhd.

Rashid, S. K. (2006). Alternative Dispute Resolution in Malaysia, Kuala Lumpur, Kuliyyah of Laws, International Islamic University Malaysia.

Saleh, S. (2006). Commercial Arbitration In Arab Middle East. Portland: Hart Publishing.

Singh, H., (2002). Engineering and Construction Contracts Management: Law and Principles. Singapore. LexisNexis.