



DEVELOPMENT OF A PROPOSED FRAMEWORK FOR  
*TAHKĪM* IN THE MALAYSIAN CONSTRUCTION  
INDUSTRY

BY

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A thesis submitted in fulfilment of the requirement for the  
degree of Master of Science (Built Environment)

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## ABSTRACT

This thesis is specifically concerned with the employment of *Tahkīm* in the Malaysian construction industry. The aim of the research is to determine the opportunities presented in employing the *Sharī'ah*-compliant Alternative Dispute Resolution (ADR) medium in the Malaysia construction industry and to develop a proper framework of referring disputes to *Tahkīm*. The existence of arbitration clause in the major forms of contract has shown that the practise is popular and well accepted. In Islam, a similar approach of resolving dispute named *Tahkīm* is available. With the emergence of Islamic banking and finance institution, and the effort of Kuala Lumpur Regional Centre for Arbitration (KLRCA) to resolve Islamic banking and financing disputes using i-Arbitration Rules; it is important for the researcher to look into this area and discover the possibility for it to be applied in the construction industry. The study was conducted in Malaysia. The secondary data has been collected through an extensive form of literature reviews and content analysis, while the primary data collection was conducted via two tiers of focused semi-structured interview involving seven (7) experts in construction, law and *Sharī'ah* for the first tier; and ten (10) professionals and contractors for the second tier. The results reveal that the proposed framework is robust, *Sharī'ah*-compliant and can be employed to be used in the Malaysian construction industry.

## ملخص البحث

هذه الأطروحة تركز على تطبيق التحكيم في صناعة البناء والتشييد الماليزية. والهدف من هذا البحث تحديد الفرص المتاحة فياستخدام الوسائل البديلة لفض المنازعات (ADR) فيصناعة البناء والتشييد في ماليزيا وتطوير الإطار الصحيح لإشارة المنازعات إلى التحكيم. إنّ وجود شرط التحكيم في شروط العقد لصناعة الإنشاءات أثبت أنه معروف ومقبول. وقد أتاح الإسلام مقارنة مماثلة لحل المنازعات المعروفة باسم "التحكيم". وبظهور المصرفية الإسلامية والمؤسسات المالية والجهود من المركز الإقليمي للتحكيم، كوالا لمبور (KLIRCA) لحل النزاعات المصرفية والتمويل الإسلامي باستخدام- i Arbitration، إنّ من الضروري للباحث النظر في هذه القضية واكتشاف الإمكانية لتطبيقها في ساحة صناعة البناء والتشييد. وقد تم إجراء البحث في ماليزيا. وذلك بجمع البيانات الثانوية من الدراسات السابقة الواسعة وتحليل المحتوى الدراسي. أما مجموعة البيانات الأساسية فقد تم حصولها عبر المستويين من المقابلة مع سبعة (٧) خبراء في مجال البناء والقانون والشرية للمستوى الأول، وعشرة (١٠) أشخاص آخرين من المحترفين والمتعاقدين للمستوى الثاني من المقابلة. وأشارت نتائج البحث إلى أن الإطار المقترح يعتبر قويا والمتوافق مع الشريعة الإسلامية ويمكن استخدامها في صناعة البناء والتشييد الماليزية.

## 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 thesis for the degree of Master of Science (Built Environment).

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## DECLARATION

I hereby declare that this thesis 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 degree at IIUM or other institutions.

MUHAMMAD ARIFFUDDIN BIN ARIFIN

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Verily, all praise is due to Allah, the Most Merciful and the Most Compassionate. May He be glorified and exalted. We seek for His assistance and we seek refuge in Him from the evil of ourselves and from the wickedness of our actions.

He who Allah guides, there will be no one that can lead him astray, and He who is led astray; there is no guide for him. I bear witness that there is no deity that has the right to be worshipped except for Allah and I bear witness that Muhammad (PBUH) is His slave and messenger. Peace be upon him and to those who have followed his divine path.

The Prophet (PBUH) has been reported to say that:

*“Whoever does not thank people (for their favors) has not thanked Allah (properly).”*  
[Musnad Ahmad]

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أهداء هذه الورقة البحثية إلى والدي

عارفين بن هارون

رقية بنت زمبور

أشكركم على تشجيعكم ودعمكم

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*Dancom Telecommunications (M) Sdn Bhd v Uniasia General  
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## LIST OF STATUTES

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Arbitration (Amendment) Act 2011 (Act A1395)

Arbitration Act 1952 (Act 93)

Mediation Act 2012 (Act 749)

Construction Industry Payment and Adjudication Act 2012 (Act 746)

Saudi Arabi Law of Arbitration Act (Royal Decree No. M/34)

Saudi Arabia Arbitration Act 1983 (Royal Decree No. M/46)

*Medjella* of Legal Provisions of the Ottoman Empire

## LIST OF ABBREVIATIONS

ADR	:	Alternative Dispute Resolution
CIArb	:	Chartered Institute of Arbitrators
CIDB	:	Construction Industry Development Board
CIPAA	:	Construction Industry Payment and Adjudication Act
CLJ	:	Current Law Journal
d.	:	Deceased
et. al.	:	And others
FGD	:	Focus Group Discussion
GDP	:	Gross Domestic Product
IEM	:	Institution of Engineer Malaysia
JKR	:	Jabatan Kerja Raya
KLRCa	:	Kuala Lumpur Regional Centre of Arbitration
KSA	:	Kingdom of Saudi Arabia
LLB	:	Legum Baccalaureus
LLB.S	:	Legum Baccalaureus (Shariah)
MLJ	:	Malayan Law Journal
PAM	:	Persatuan Akitek Malaysia (Malaysia Institute of Architect)
PWD	:	Public Works Department
SCE	:	Saudi Council of Engineers
UNCITRAL	:	United Nations Commission on International Trade Law

# CHAPTER 1

## INTRODUCTION TO RESEARCH

### 1.1. FOREWORD

This research discusses on the employment of *Sharī'ah* compliant alternative dispute resolution (ADR) in the Malaysian construction industry focusing on the proposal of framework of referring dispute to *Tahkīm*. This chapter sets off the vista of the study and sets out the tenor of its consecutive chapters by introducing the research aim and objectives with the highlights of the following:

- a) The statement of the research problem
- b) The research questions
- c) The aim and objectives of the research
- d) The scope and limitation of the research
- e) The impetus, connotation and expected outcome of the research
- f) The methodology of the research
- g) The research's structure and chapters

## **1.2. BACKGROUND TO THE RESEARCH**

Construction industry plays an important role to the Malaysian economy as a growing nation in the region of South East Asia. And this industry is the foundation of the country's economic progress with values of construction contract that worth billions in money (Kheng, 2003; Siti Nora Haryati, 2011) and therefore has contributed significant part to Malaysia economy for over 20 years.

Statistic by the Department of Statistics Malaysia shows the increment of the value of Gross Domestic Production (GDP) produced by the construction industry compared to the past. In year 2000, the gross output value of this industry indicates the amount of RM 39,872,025.00. While in 2007, it increased to RM 60,715,626.00. Table 1.1 indicates the growth of the industry in Malaysia.

**Table 1.1** Construction Sector Growths (Department of Statistics Malaysia, 2013)

<b>Year</b>	<b>Value of gross output</b>	<b>Value of intermediate Input</b>	<b>Value Added</b>	<b>Total number of person engaged during December</b>	<b>Salaries &amp; wages paid</b>	<b>Value of fixed assets owned as at end of the year</b>
	<b>RM ('000)</b>	<b>RM ('000)</b>	<b>RM ('000)</b>		<b>RM ('000)</b>	<b>RM ('000)</b>
2000	39,872,025	25,280,056	13,224,393	458,580	8,722,298	6,688,178
2002	41,755,583	27,005,984	13,394,453	455,663	9,108,167	6,152,177
2004	45,775,525	30,039,692	14,002,134	449,944	9,284,764	6,623,488
2005 <sup>B</sup>	53,960,259	34,963,423	18,996,836	551,775	10,867,665	7,486,517
2007	60,715,626	42,617,107	18,098,519	595,139	12,956,935	8,395,256
2009	70,599,755	49,364,553	21,235,202	602,694	13,966,992	9,359,441
2010 <sup>B</sup>	91,341,685	59,400,380	31,941,305	974,488	19,841,387	14,476,140

And as of 2012, the construction industry has indicated the growth of 18.1% to the national domestic gross product (GDP), the highest since 2006, with the contribution from the study performance of Civil Engineering at 27.6% and Residential at 20.8%. (Department of Statistics Malaysia, 2013)

By looking at the growth and contribution of the construction sector in Malaysia, which involved various entities from different background, it is impossible to expect that it would progress without any conflicts or disputes occurred. Koh (2005) stated:

Construction projects are increasingly complex, resulting in complex contract documents. Complex construction can likewise result in complex disputes. Dispute is inevitable in construction projects which predominantly arise from complexity and magnitude of works, multiple prime contracting parties, poorly prepared and /or executed contract documents, inadequate planning, financial issues and communication problems.

Dispute, according to the Oxford Dictionary (2012), carries the meaning of: “a disagreement or argument.” Merriam-Webster's Dictionary of Law (1996) defined dispute as: “an assertion of opposing views or claims” or; “a disagreement as to rights.”

And according to the glossary of Kuala Lumpur Regional Centre of Arbitration (KLRCA) (2012), ‘dispute’ rendered the meaning of:

“A disagreement between two or more parties that has escalated to the point of requiring some positive action or intervention in order to be resolved. A dispute often arises when an underlying complaint is contested by the organization which is alleged to have committed an abuse or whose actions have created a negative impact on the complainant.”

Cause of dispute may vary according to the environment and subject matter, which is very wide and there are various factors may influence the parties disagreeing. (Brown and Marriot, 1993) Nevertheless, dispute, generally in the context of commercial relationship, may be caused by the monetary issues (Brown and Marriot, 1993) where Green (1997) stated that: “Conflict is a natural component of long-term commercial relations.”

Fundamentally, disputes is deemed to occur due to the specific disagreement and/or one of the parties feels that his right, needs and interest is not being fulfilled by the responding party, and the latter refuse to hold any liability against it, which the parties proceed by way of claims, counter-claims, denials and so on. (Collier and Lowe, 1999; Khairuddin, 2008)

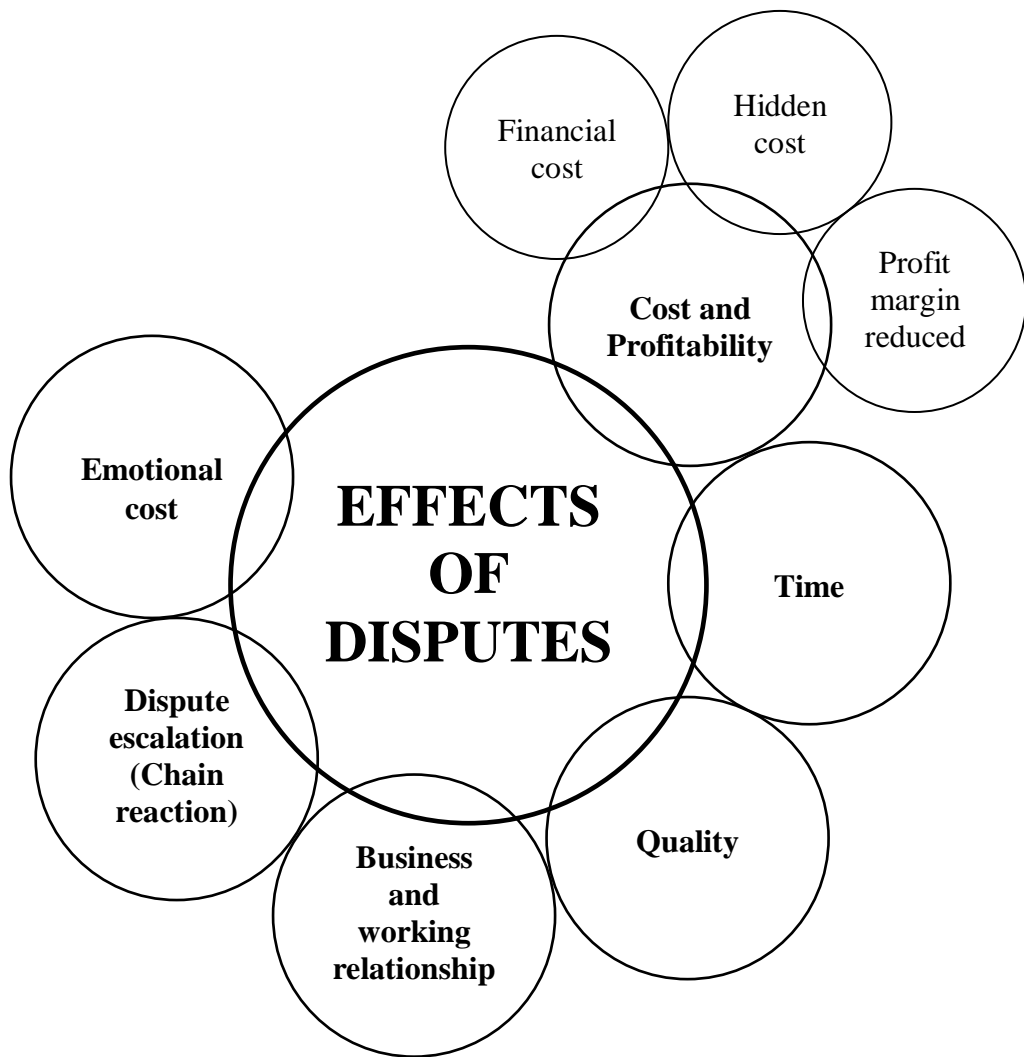
Table 1.2 lists the causes of disputes compiled by Fenn *et al.* (1997) from various literatures in order to draw attention to the causes of dispute in the construction industry.

**Table 1.2** Literature and the sources of disputes (Fenn, Lowe and Speck, 1997)

<b>Research</b>	<b>Sources of Disputes</b>
Bristow and Vasilopoulous (1995)	Six areas: unrealistic expectations; contract documents; communications; lack of team spirit; and changes
Conlin <i>et al.</i> (1996)	Six areas: payment; performance; delay; negligence; quality; and administration
Diekmann <i>et al.</i> (1994)	Three areas: people; process; and product
Heath <i>et al.</i> (1994)	Seven areas: contract terms; payment; variations; time; nomination; re-nomination; and information
Hewit (1991)	Six areas: change of scope; change of conditions; delay; disruption; acceleration; and termination
Kumaraswamy (1996)	Two areas: root causes; and proximate causes
Rhys Jones (1994)	10 areas: management; culture; communications; design; economics; tendering pressures; law; unrealistic expectations; contracts; and workmanship
Semple <i>et al.</i> (1994)	Four areas: acceleration; access; weather; and changes
Sykes (1996)	Two areas: misunderstandings; and unpredictability

Such causes that have been profiled as above shows that there are many grounds that can cause to dispute in the construction industry.

The occurrence of dispute may be dreadful to the construction sector key players and the industry itself. Figure 1.1 illustrates the effects of dispute in the construction industry.



**Figure 1.1** Effects of Disputes in the Construction Industry (Noraziah, 2008)

Therefore, with the nature of disputes that is vast in context of cause, subject matter, and category; and the consequences which are catastrophic to the construction sector, a docile mechanism is required to resolve the conflict. This is where dispute resolution takes its place.

Dispute resolution is a process of resolving the conflicts of disagreeing parties, with or without the third party, which may exist in form of litigation, arbitration, adjudication or other variation (Brown & Marriot, 1993).

Therefore, dispute resolution can be divided in two main ideas; which are ‘judicial dispute resolution’ and ‘extrajudicial dispute resolution’; where Conklin (2006) states that the latter as recognized method of resolving disputes outside the judicial process. This definition corresponded with the definition of alternative dispute resolution or ADR as described by Syed Khalid (2006) as the process of resolving (dispute) without going through the assessment of the court which may brings bad publicity, acrimony, and high cost and high technicality. Hence, the term ‘extrajudicial’ may be defined as an alternative to the courts or alternative dispute resolution (ADR).

Therefore, the term ‘ADR’ is used in giving description of processes outside the courts or tribunals involving – or occasionally not involving – a third party, which often related as a neutral, to assists the quarrelling party in their conflict or to determine disputation (Brown & Marriot, 1993: Sourdin, 2008). Fundamentally, when mentioning ADR in Malaysia; it usually refers to conciliation, mediation, adjudication, and arbitration. (Abraham, 2009)

Table 1.3 describes the profile of the registered cases of dispute that has been registered to the various related agencies in Malaysian construction industry that were remedied using arbitration and mediation.

**Table 1.3** Arbitration and Mediation Cases Registered With Various Agencies between 2000 and 2008 (Zulhabri, Jamalunlaili, Padzil Fadzil and Rosli, 2010)

Item	Source	Cases
1	Malaysian Mediation Centre under the auspices of the Malaysian Bar Council	Total 155 Mediation cases in which only four construction mediation cases
2	Malaysian Institute of Architect (PAM)	Total 518 construction arbitration including one case in 2008 and no mediation case so far
3	Kuala Lumpur Regional Centre of Arbitration (KLRCA)	Total 126 cases including 27 construction cases
4	Construction Industry Development Board (CIDB)	No reported case but CIDB was involved with five cases acting as a mediator for both government and private disputed projects.
5	Institution of Engineer Malaysia (IEM)	Total 15 construction arbitration cases until 2007, no registered case in 2008 and no mediation case.

Presumptively, the unregistered cases of disputes and or unreported conflicts in the industry are larger than what have been recorded by these agencies.

In the lights of Malaysian construction contract, the practice of ADR has become evident as shown in the clause 66.0 (Arbitration) in PWD 203A (Rev. 2010) of Jabatan Kerja Raya (JKR) Malaysia, clause 34.0 (Adjudication and Arbitration) and 35.0 (Mediation) in PAM Contract 2006 (With Quantities) of Persatuan Akitek Malaysia (PAM), and clause 47 (Settlement of Disputes) in CIDB Standard Form of Contract for Building Works 2000 Edition of Construction Industry Development Board (CIDB) Malaysia. PAM has extensively governed the conduct of arbitration and mediation in construction dispute resolution by introducing its own set of arbitration and mediation rules. Apart from that, the government of Malaysia enforced

the Construction Industry Payment and Adjudication Act 2012 (Act 746) in order to resolve disputes caused by payment as well as other factors.

Moreover, *Sharī'ah* has among the key movers in Malaysian construction industry; whereby there is evident that *bay' al-istisnā'* (manufacturing contract), *sukuk* (debt security or Islamic bond), *takaful*, and Islamic oriented loan are used in the construction industry. (Nik Norzrul, Mohamed Ridza & Megat Hizaini, 2003; Khairuddin, 2007; Siti Nora Haryati, 2011)

*Sharī'ah* is basically a doctrine of duties and a code of obligation, a code of life sent by Allah through Muhammad (PBUH) that associated with the interest of the world and hereafter that cover all aspects of life that includes personal, social, political, economic, and intellectual. (Mohamad Akram Laldin, 2006; Asyraf Wajdi & Nurdianawati Irwani, 2007)

*Sharī'ah*, as defined by Mohamad Akram (2006) is the Islamic teaching and set of system, work as a guidance to regulate human being actions in *ibadah* (act of worship to God) and *mu'amalat* (transactions between human being) with the purposes of *Sharī'ah* (*maqasid al-Sharī'ah*) is to secure the benefits of humans and prevent them from harm; with *Al-Quran*, *Al-Sunnah*, *Ijma'* (consensus of opinion), and *Qiyas* (analogical deduction) as the primary sources and other significance reference as secondary sources (Muhammad Hadi, Nasrudin & Mohd Nazri, 2008; Mohamad Akram, 2006).

Siti Nora Haryati (2011) has construed that *Sharī'ah* is not only for Muslims, but it is for everyone based on what has been expressed in the Quran:

*We sent thee not, but as a Mercy for all creatures. (Al-Anbiyā': 107)*

And to Muslims, the *Sharī'ah* portrays its significance as part of Islam, and necessity in their life, while abandoning it will result to losses in this world as well as hereafter.

(Siti Nora Haryati, 2011)

The nature of growth of Islamic financial system, as what has been described by Siti Nora Haryati (2011) as 'a real eye-opener' in reference to the positive attitudes of the public in recognising the application of *Sharī'ah*-compliant in business transaction has set off the *Sharī'ah* compliance dispute resolution such as *Qadha*, *Tahkim*, *Sulh* and *Muhtasib* to be employed in compromising the disputes in Islamic banking (Oseni, 2009; Hakimah, 2012).

Equivalently, in the context of *Sharī'ah*, arbitration exists in Islam and is known as *Tahkīm* (Oseni, 2009) that translates lexically as 'arbitration' (Baalbaki, 1999; Samir, 2006; Syed Khalid. 2006) and interpreted as; to inaugurate between two disputed parties with a judgement that governs on both of them (Samir, 2006).

### **1.3. STATEMENT OF RESEARCH PROBLEM**

Veraciously, a lot of money has been spent and invested in the construction industry, and with every possible ground that can cause to dispute, as well as the severe harm that disputes might inflict to the nature of the construction industry, where does the *Sharī'ah*-compliant ADR, with the highlight on *Tahkīm*, fits into the mechanism of resolving the construction disputes in this country. Seeing Malaysia, as a country that exercising dual-systems; that has the *Sharī'ah* court in her legal system, there is still no known dispute being resolved using *Tahkīm* inside the construction industry.

Therefore, it is essential to investigate whether the disputes can be determined using *Tahkīm* and to explore the prospect of employing such procedure in the Malaysian construction industry. The prospect of applying *Tahkīm* is vast, as being the alternative to the conventional ADR. However, the *modus operandi* for *Tahkīm* is yet to be discovered and made available. Considering the emergence of the practice of *Sharī'ah*-compliant ADR in the field of Islamic finance especially with the materialization of i-Arbitration Rules by KLRCA to resolve Islamic banking and finance disputes, it is necessary to look into this matter and to have a proper instrument in implementing it.

#### **1.4. RESEARCH QUESTIONS**

This study attempts to examine the prospect of employing *Sharī'ah*-compliant arbitration, known as *Tahkīm* to the Malaysian construction environment by specifically addressing these questions:

- 1) What are the current mechanisms of arbitration employed in Malaysian construction industry?
- 2) What is *Tahkīm* and its procedures as a tool in *Sharī'ah*-compliant ADR?
- 3) What are the opportunities presented to apply *Tahkīm* in the Malaysian construction industry?
- 4) What will be the appropriate framework in doing so?

## **1.5. AIM AND OBJECTIVES OF THE RESEARCH**

The aim of the research is to determine the opportunities presented in employing the *Sharī'ah*-compliant Alternative Dispute Resolution (ADR) medium in the Malaysia construction industry and to develop a proper framework for reference of disputes to *Tahkīm* and its processes. And to achieve such aim, these are the objectives of the study;

- 1) To identify the process and procedures of arbitration.
- 2) To define *Tahkīm* and to identify the procedures involved.
- 3) To appraise *Tahkīm* in terms of its opportunities in the Malaysian construction industry.
- 4) To develop and validate a framework for the process of reference of disputes to *Tahkīm* in the Malaysian construction industry.

## **1.6. SCOPE AND LIMITATIONS**

The scope of the study is arbitration as practised in the Malaysian construction industry. It is acknowledged that there are many methods in ADR; however the one that is commonly applied is arbitration. And this coincides with the topic that speaks about *Tahkīm*; that carries the literal meaning of arbitration.

The study is limited to these documents, PWD 203A (Rev. 1/2010), PAM Contract 2006 (With Quantities) and CIDB Standard Form of Contract for Building Works 2000 Edition.

The setting point will be on the method of referring dispute to arbitration that is largely used in the industry, particularly in construction contract of PWD 203A (Rev.

1/2010), PAM Contract 2006 (With Quantities) and CIDB Standard Form of Contract for Building Works 2000 Edition; the most extensively used documents in the industry. And as the practice of arbitration and in Malaysian construction industry is governed by the Arbitration Act 2005 and Arbitration (Amendment) Act 2011, a comparison on the concept of *Tahkīm* in *Sharī'ah* will be made to identify the opportunities of applying *Tahkīm* in Malaysian construction industry. Apart from that, the concepts related to *Tahkīm*, or Islamic arbitration that has been practised in Malaysia will be identified to examine whether *Tahkīm* is a viable in Malaysian construction industry.

#### **1.7. IMPETUS AND EXPECTED OUTCOME OF THE RESEARCH**

Construction industry in Malaysia is among the significant contributor to the Malaysia fiscal policy. Considering the existence of the disputes recorded or unrecorded by the related bodies in this sector, the consequences and the prolonged aftermath, thus the disputes that may arise in the construction industry are considered vital to be mitigated, and to be resolute in the occasion of its occurrence.

Therefore, it is expedient to measure whether *Sharī'ah* can fill in the void. Moreover, the emergence of Islamic finance and banking and its involvement with the construction industry has ignited the question whether the dispute that occurs during the construction progress funded under such scheme need to be resolved by the method recognised in Islam; to ensure that the dispute resolution also following the needs of *Sharī'ah*.

In the lights of obeying Allah and fulfilling the right and obligation towards Allah, His Messenger, and other fellow human being, it is important to utilise the knowledge in shedding the light between what is permitted (*Halal*) and what is prohibited (*Haram*),

“That which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus he who avoids doubtful matters clears himself in regard to his religion and his honour, but he who falls into doubtful matters falls into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein. Truly every king has a sanctuary, and truly Allah's sanctuary is His prohibitions. Truly in the body there is a morsel of flesh which, if it be whole, all the body is whole and which, if it be diseased, all of it is diseased. Truly it is the heart.” (Extracted from Forty Hadīth of Al-Nawawi, Hadīth number 6 as reported by Al-Bukhari and Muslim)

This *hadith* has imperative meaning on the needs to avoid what is prohibited in the *Sharī'ah* as well as the doubtful matters. As the Muslims daily life and actions are presided over by what is *Halal* and *Haram*, it is vital to respond to the question that arises, whether the ADR in the Islamic point of view – or *Sharī'ah* Compliant ADR – can be adapted in the world of today and what are the infrastructures that need to be identified as well as the opportunities presented in order to employ *Tahkīm*.

The expected outcomes are as follows:

- 1) Establishment of the mechanism and practice of arbitration
- 2) Establishment of the evidence and the practice of *Tahkīm*

- 3) Identification of opportunities to practice *Tahkīm* in the construction industry
- 4) To propose a workable framework on the practice and procedure of *Tahkīm* for the construction industry

## 1.8. RESEARCH METHODOLOGY

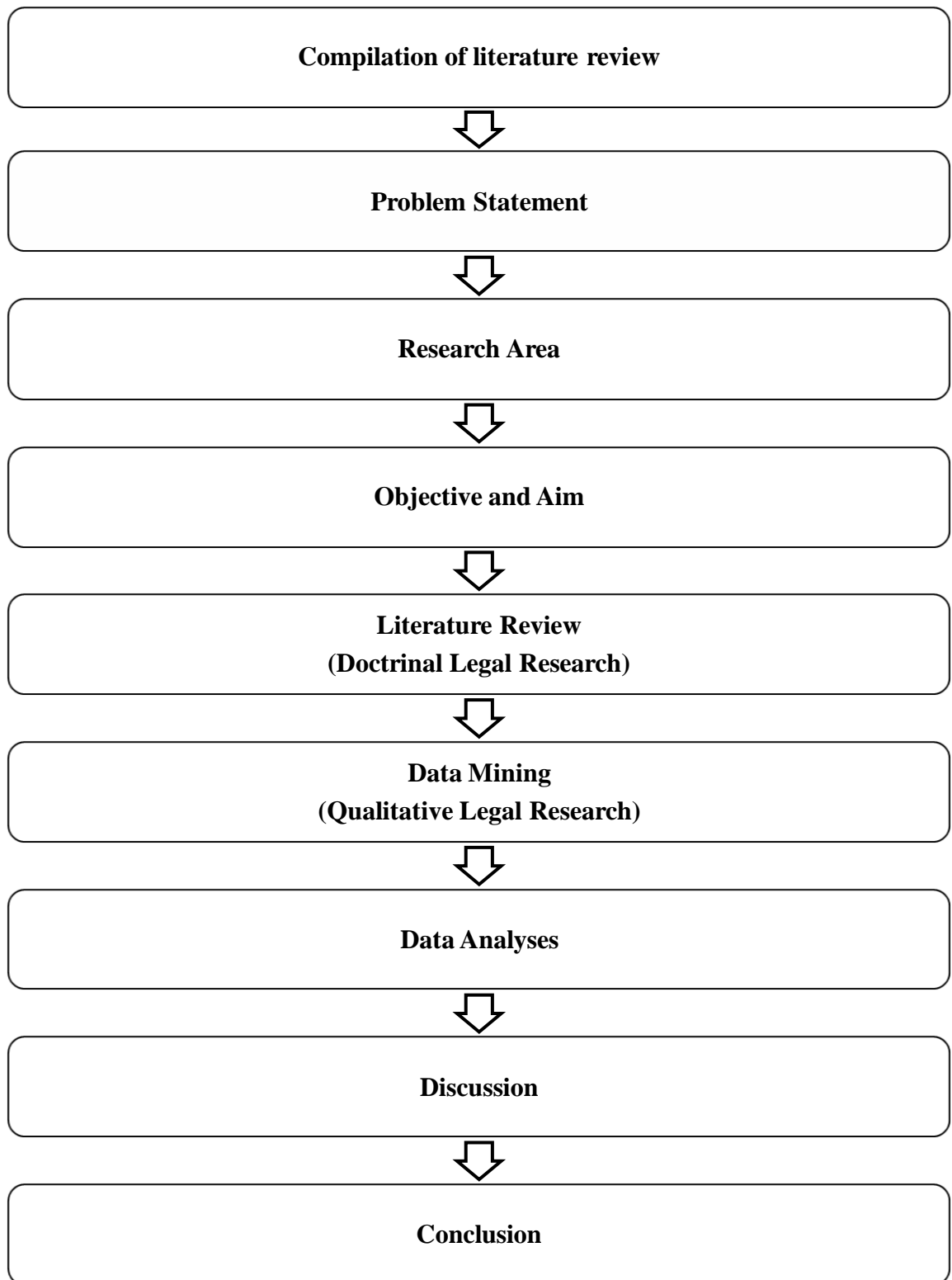
This research is devised to adopt the doctrinal legal research and the qualitative legal research. The doctrinal legal research is a traditional, library-based methodology which is pragmatic in order to present the layout to the theme of the research i.e. to scrutinise the conceptual framework of ADR, specifically on arbitration, as well as on the *Sharī'ah*-based *Tahkīm*. The research will be based on the primary resources of the legal study, which will include the relevant legislation, case law, *fatawa* (legal opinions), as well as the Quran and Sunnah (Prophetic Tradition). The secondary sources will be from the journal articles, case commentaries, and encyclopaedias, which are relevant to the study. In gathering the pertinent data for the primary and secondary material for the doctrinal legal research, the following tools will be employed: LexisNexis, CLJ Law, MLJ, ProQuest, Emerald, *Al-Maktabah Al-Shāmilah*<sup>1</sup>. The finding tools was based to focus on the legal database to examine the collection of legislation, case law of arbitration inside and outside the construction industry, journal articles on arbitration and *Tahkīm* in the modern world. The classical resources based on the *Kutūb Al-Turāth* (traditional books) will also be examined to indicate the legal framework of *Tahkīm* according Islamic jurisprudence.

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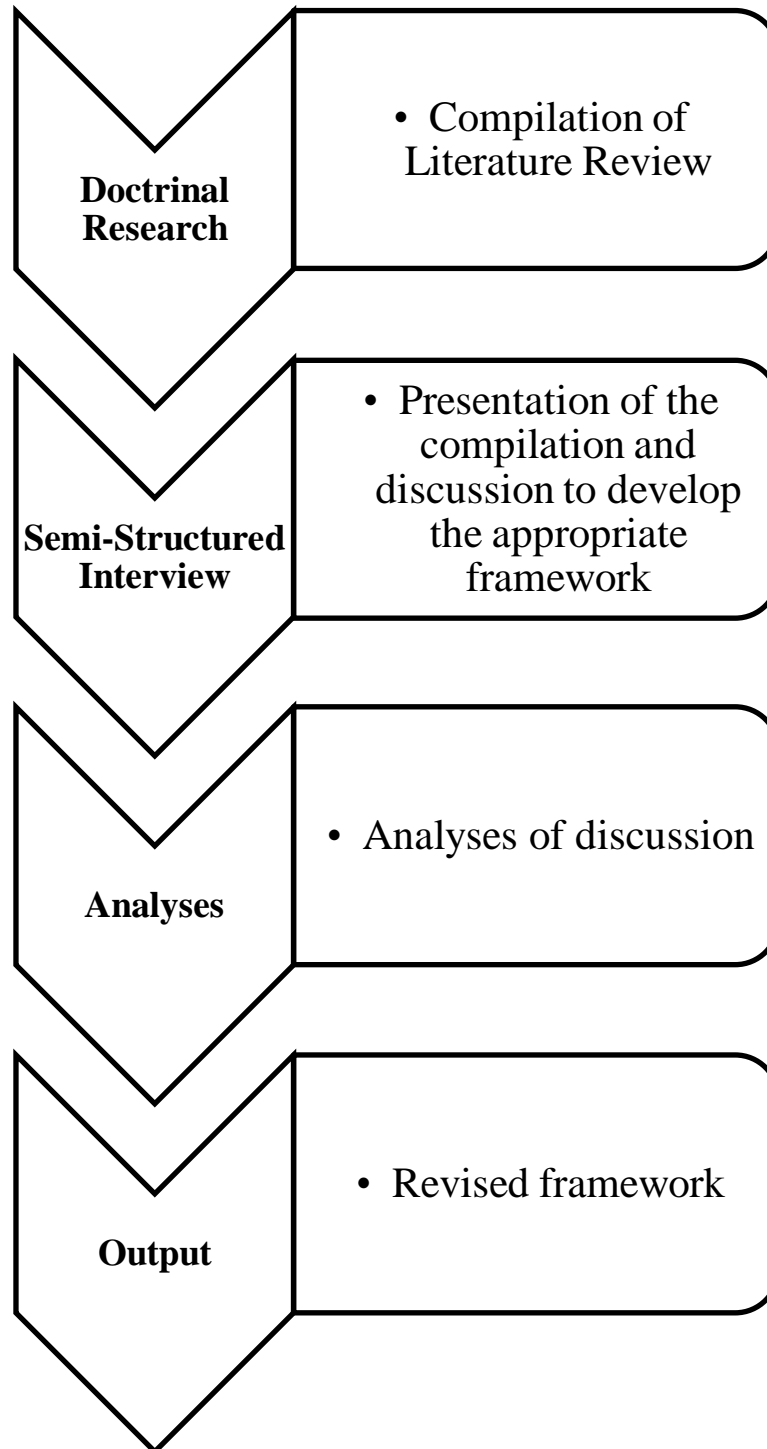
<sup>1</sup> *Al-Maktabah Al-Shāmilah* is a computer application (software) which contains comprehensive library resources of hundreds of classical references on Islamic jurisprudence in Arabic language.

Subsequent to the doctrinal legal research, the qualitative legal research – a fieldwork approach – will be conducted. Based on the doctrinal legal research compiled, a focused semi-structured interview is to be conducted with the experts in this subject from various backgrounds; consisting of legal and ADR experts, experts in *Sharī'ah*, and experts in construction to validate the experimental framework proposed.

Figure 1.3 shows the methodology flow for this research and Figure 1.4 describes the processes explained above, of the detailed data collection, analyses and development that will be adopted.



**Figure 1.2** Methodology Flowcharts



**Figure 1.3** Detailed Data Collection and Development Methodology Flowcharts

## 1.9. THE STRUCTURE OF THE THESIS

This research shall consist of seven (7) chapters.

**Chapter One**, this chapter, introduces the research. It highlights the background of the study, problem statement, aim and objectives of the study and provided an overview over the methodology adopted in the study.

**Chapter Two** presents the practice of Alternative Dispute Resolution (ADR) specifically of arbitration in larger scale, before discourse specifically on the practice of arbitration in the construction industry. It will encompass the definition, the position of ADR in Malaysian construction contract, the framework and mechanism that was used in order to identify the processes, procedures, and conditions. The findings will then be assessed to discover the area of opportunities that can be utilised in order to employ *Sharī'ah*-modelled ADR and the most appropriate mechanism to the industry.

**Chapter Three** presents the concept of *Sharī'ah*, its etymology, sources, goals, as well as the components that construct the fundamental values of *Sharī'ah*. This chapter will construe the essence of *Sharī'ah* based on the interpretation of the scholars in the classical literatures as well as in the contemporary literatures. This is significance as it will introduce further to the understanding of the model of *Sharī'ah*, Subsequently, this chapter will introduce the reader to *Sharī'ah*-compliant ADR. After the fundamental of *Sharī'ah* has been laid out, its importance and the relation of *Sharī'ah* as the compromiser in disputes to the human beings in general, and to the Muslims in particular will be construed.

**Chapter Four** presents *Tahkim* (*Shari'ah*-modelled arbitration) in specific and will concern on the understanding of *Tahkim*. It will discuss the definition, and the basis of *Shari'ah* in explaining what is arbitration in Islam, the *hedaya* on *Tahkim*, the characteristics and values, and the conceptual framework. This chapter will include the findings of the basis embedded in Quran and *Sunnah*, and various opinions from scholars from the past and recent and different schools of thought in order to elaborate the understanding and support the argument. This chapter will establish the opportunities of employing *Tahkim* in the construction industry.

**Chapter Five** describes the detail of the methodology devised for this research.

**Chapter Six** discusses on the data analyses, and presentation of research findings.

**Chapter Seven**, or the final chapter, presents the conclusion of the study as well as the possible research area related to the topic.

## CHAPTER 2

# ARBITRATION IN MITIGATING DISPUTES IN MALAYSIAN CONSTRUCTION INDUSTRY

### 2.1. INTRODUCTION

Alternative dispute resolution or ADR is a known process in resolving dispute. There are many methods in ADR and arbitration is one of its mechanisms. Arbitration has been recognised by the law, as well as the parties in, or outside the contract to resolve conflicts and to resolve any dispute outside the court. The establishment of arbitration tribunal, associations and chambers all around the world, as well as the practise has made arbitration to achieve *de facto* standard in determining disputation in contract although the agreements have no prior arbitration clause.

This chapter will explain the practice of the conventional arbitration in the Malaysian construction industry by explaining the background of dispute in the construction industry. Subsequently, the concept and meaning of arbitration from different perspective will be examined in order to provide general knowledge of this subject. Thereafter, the history of arbitration, in general and in context of Malaysia, is analysed to establish the concept of arbitration and its mechanism.

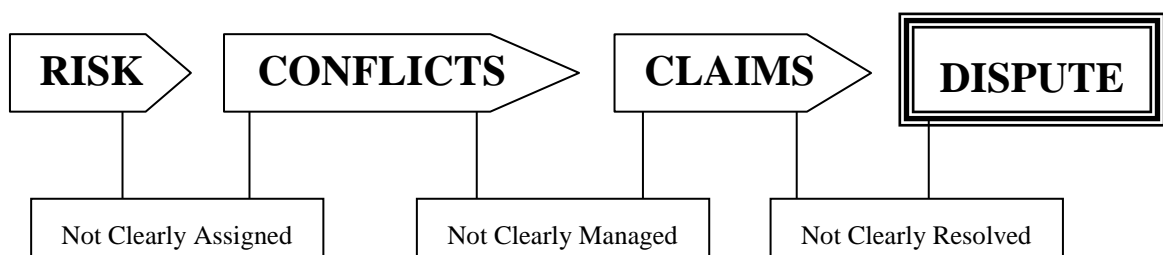
And accordingly, the concept of arbitration in Malaysia construction industry will be defined and examined and in reference to the Malaysian Arbitration Act 2005 and Arbitration (Amendment) Act 2011, which will be scrutinised to identify the *modi operandi* of arbitration in this country.

The procedure of referring the dispute to arbitration inside the forms of contract in Malaysian construction industry will also be examined. This chapter then discusses on the other concepts of ADR applied in the Malaysian construction industry including mediation and adjudication before concluding the chapter with the explanation on the rationale of the chapter.

## 2.2. BACKGROUND OF THE DISPUTES IN THE CONSTRUCTION INDUSTRY

Conflict indicates “a difference that prevents agreement: disagreement between ideas, feelings, etc.” And dispute carries the meaning of “a disagreement or argument” and “an assertion of opposing views or claims”. (Merriam-Webster’s Dictionary of Law, 1996; Oxford Dictionary, 2012; Merriam-Webster Online: Dictionary and Thesaurus, 2014)

Although both might appear as similar, conflict and dispute carries two different notions. Conflict exists where there is incompatibility of interest; pandemic, which if it is not managed can cause dispute to arise. Dispute however, related to justiciable issues and requires resolution. (Fenn et. al., 1997)



**Figure 2.1:** Risk-Conflict-Claim-Dispute Continuum Model (Acharya and Lee, 2006)

In the context of the Malaysian construction industry, disputes and conflicts are common and may occur in many areas in the contract, whether in pre-contract stages or post-contract stages. Asniah (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. Khairuddin (2008) in referring to Siti Nora Haryati highlighted that the disputes in the construction industry are usually occurred because of these five factors which are: 1) lack of coordination and communication, 2) variation in quantity, quality and performance, 3) complexity, 4) economic factors, and 5) misinterpretation in implementation of the contract. As such, disputes can arise in several of ways. According to Noraziah (2008), disputes in the construction industry may be found in the form of financial, legal, or in any form which is crucial and needs attention from the important people in the industry.

However, those are not the only causes of dispute. Mitkus & Mitkus (2004), in corresponding to the Table 1.2 by Fenn et. al., have presented a more extensive collection of literature that discussed the sources of dispute in the construction industry.

<b>Research</b>	<b>Sources of dispute</b>	
Blake Dawson Waldron (2006)	1. Changes of conditions 2. Interpretation 3. Workplace conditions 4. Communications	5. Law 6. Access to construction site 7. Access to materials
Cheung & Yiu (2006)	1. Management 2. Communication	3. People 4. Contract documents
Yiu & Cheung (2007)	1. Delay 2. Unrealistic expectations	

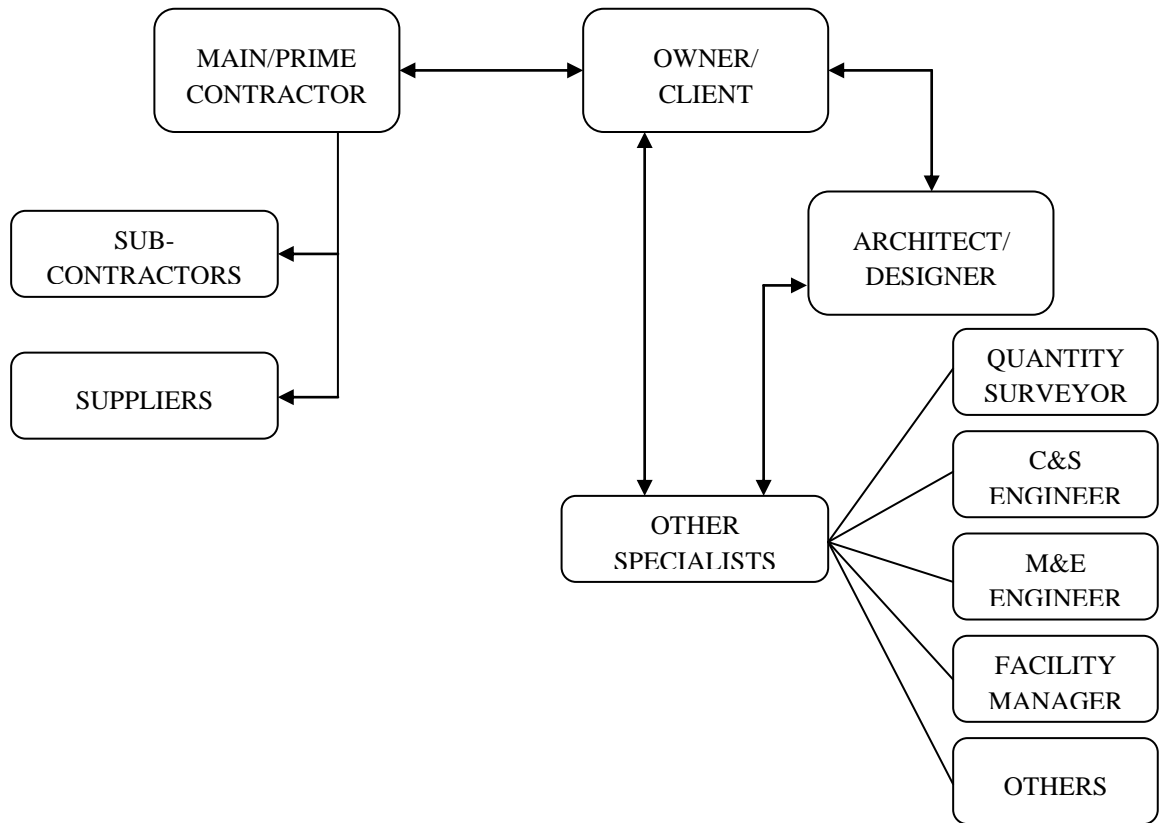
Killian (2003)	1. Change Orders 2. Pre-Award Design	3. Pre-Construction 4. Quality Assurance
Mitropoulos & Howell (2001)	1. Uncertainty 2. Contractual problems 3. Opportunistic behaviour	
Kumaraswamy (1997)	1. Changes of conditions 2. Changes of scope 3. Design 4. Unpredictability 5. Contract documents	6. Management 7. Delay 8. Communications 9. Unrealistic expectations
Colin et al. (1996)	1. Payment 2. Performance 3. Delay	4. Negligence 5. Quality 6. Administration
Sykes (1996)	1. Misunderstanding 2. Unpredictability	
Bristow & Vasilopoulos (1995)	1. Unrealistic expectations 2. Contract documents 3. Communications	4. Lack of team spirit 5. Changes
Diekmann et al. (1994)	1. People 2. Process 3. Product	
Heath et al. (1994)	1. Change of scope 2. Change in conditions 3. Delay	4. Distribution 5. Acceleration 6. Termination
Rhys-Jones (1994)	1. Management 2. Culture 3. Communication 4. Design 5. Economics	6. Tendering pressures 7. Law 8. Unrealistic expectations 9. Contracts 10. Workmanship
Sample et al. (1994)	1. Acceleration 2. Access	3. Whether 4. Changes
Watts & Scrivener (1992)	1. Change 2. Law 3. Delay	
Hawitt (1991)	1. Change of scope 2. Change of condition 3. Acceleration	4. Delay 5. Disruption 6. Termination

**Table 2.1:** Literature on the Sources of Disputes (Mitkus & Mitkus, 2014)

Besides that, the numbers of parties involved in a construction project e.g. the client, consultants and the contractor would also contribute to the occasions of dispute in the construction industry. According to Hellard (1997), traditionally, the contractual relationships between the parties in the construction project are as follow: 1) The relationship of the owner to the designer, 2) The relationship of the designer to another design specialist(s), 3) The relationship of the owner to the prime contractor, 4) The relationship of the prime contractor to its subcontractors and, 5) The relationship of the prime contractor to suppliers.

And in the light of the current construction contractual method practised, there is a direct relationship between the owner to the other specialists or the consultants.

Apart from that, the non-contractual relationships might as well exist between the parties in the construction project, for example there is a relationship between the consultants and the contractors.



**Figure 2.2** Contractual Relationships in the Construction Project

The various phase in a construction project may also contributes to the disputes in the construction industry. Mainly there are four (4) phases in a construction project: 1) Planning phase, 2) Design phase, 3) Construction phase and, 4) Close-out phase. (Cushman, 2001)

The complexity of the construction project and the level of intricacy of the relationship are the contributing factors of conflict and dispute between the parties inside the construction project. Disputes and conflicts inside the construction industry need to be mitigated and resolved to avoid any drawback to the construction project as what has been shown in the Figure 1.1.

### **2.3. DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION (ADR)**

Syed Khalid (2006) writes that it is believed that alternative dispute resolution or ADR is a denomination by the corporate world to suggest the process of resolving without going through the assessment of the court 'which may bring bad publicity, acrimony, high cost and high technicality'.

Ainul Jaria (2009) has stated that some people describe alternative disputes resolution as 'appropriate dispute resolution'. In conjunction to this, Sourdin (2008) writes that the word "assisted", "additional", "affirmative" and "appropriate" has been used as the acronym for ADR.

The term 'ADR' used in giving description of processes within or outside the courts or tribunals involving a third party, which often related as a neutral, to assist the quarrelling party in their conflict or to determine disputation. (Sourdin, 2008)

Another means in defining ADR is through the assessment of its characteristics. Ainul Jaria (2009) describes there are three typical characteristics of ADR, which are: flexibility and information, equity, and direct participation and communication between disputants.

The subject of flexibility highlights that the processes are less formal compared to litigation and equity emphasise on the equality of the cases instead of a uniform traits of justice procedure as applied in litigation, thus, removed negative perception towards the unfair treatment. In ADR, the parties moulds their own procedures to resolve the disputes and mostly require them to engage into dialogues, which results to a better communication and 'lasting and solid resolution'. (Ainul Jaria, 2009)

#### **2.4. MECHANISMS IN ALTERNATIVE DISPUTES RESOLUTION (ADR)**

As the term of ‘alternative disputes resolution’ or ADR has been identified as the ‘alternative to litigation’ in the previous subtopic, it is important to know that ADR may exist in few different subdivisions, or in various processes.

Abraham (2009) describes that, fundamentally, when mentioning ADR in Malaysia; it usually refers to:

- i. Conciliation
- ii. Mediation
- iii. Adjudication
- iv. 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. (Syed Khalid, 2006)

Ainul Jaria (2009) described that mediation is a method of alternative disputes resolution that requires involvement of an impartial third party as mediator to facilitate the communication and the negotiation, and to assist them to obtain a voluntary, harmony decision.

By going deep into the concept of mediation in the Malaysia’s earlier practice, it is defined as the means of determining disputes by the ‘*Penghulu*’ or the chieftains where he acted as a middleman to the disputants, to preside over the dispute. This same view is clutched by other cultures and diverse religions in this country. (Abraham, 2009)

The concept of conciliation and mediation is generally defined as similar, Syed Khalid (2006) however, described that although the terms conciliation and mediation are ‘interchangeable and synonymous’ there is a ‘fine line’ to distinct the two approaches, presumably that the role of the conciliator is far more pro-active compared to the mediator, which is to some extent, may suggest to the parties the best way to settle their cases which is beyond the capacity of the mediator.

Thus, it may be implied that 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.

Meanwhile, Siti Nora Haryati (2005) in reference to Singh reveals that adjudication is ‘a form of dispute resolution procedure that is quite similar to arbitration’. Thus, this has brought into question in what forms or approaches that the similarities fill in.

Singh states that 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 official and extensive role to acquire any relevant information before giving an award. (Siti Nora Haryati, 2005)

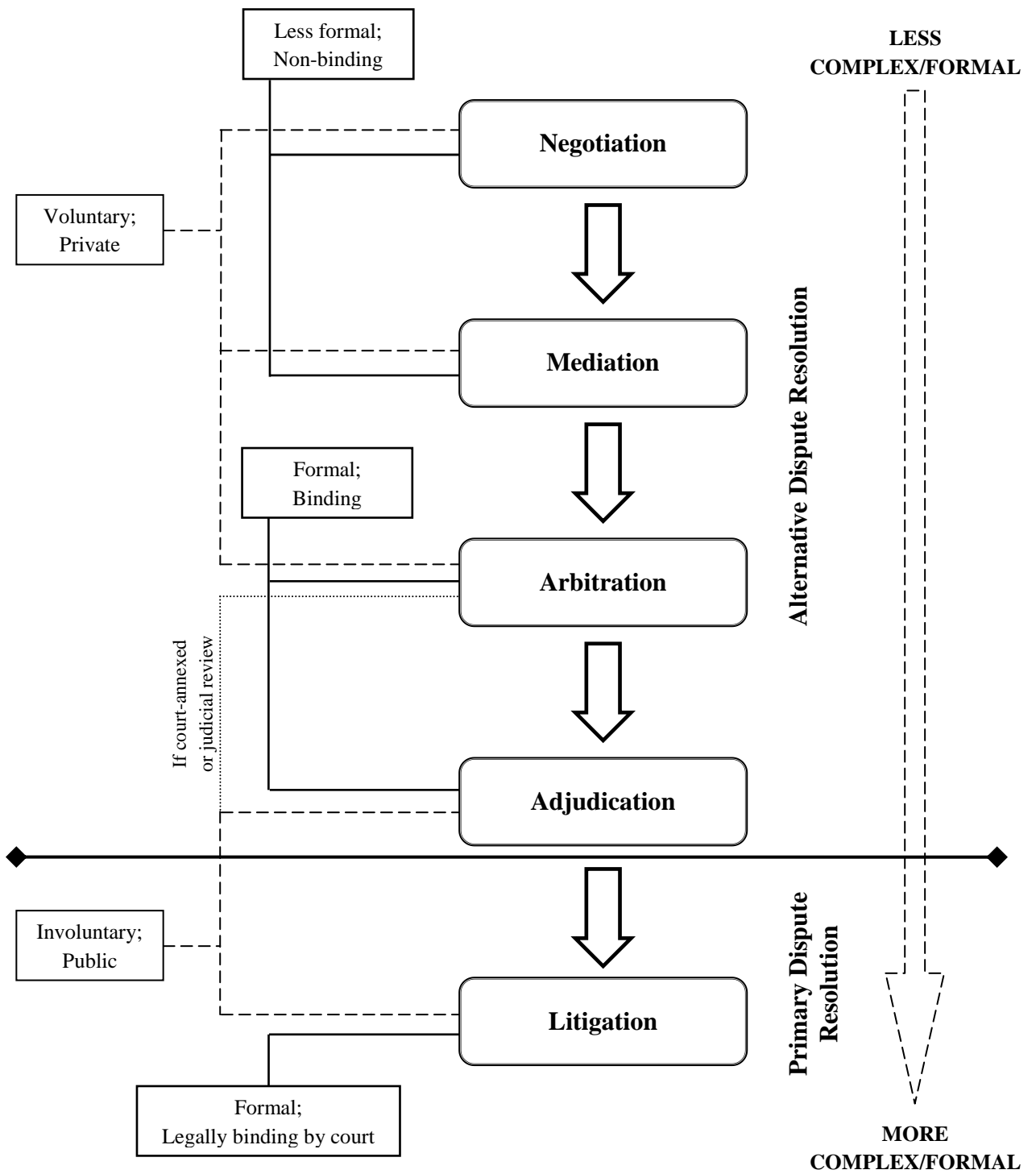
Table 2.1 portrays the summary of the criteria of the dispute resolution approaches with the primary focus is on the conciliation/mediation and adjudication.

<i>Characteristic</i>	<i>Adjudication</i>	<i>Arbitration</i>	<i>Mediation</i>	<i>Negotiation</i>
<i>Voluntary/Involuntary</i>	Involuntary	Voluntary	Voluntary	Voluntary
<i>Binding/Non-binding</i>	Binding; subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract; sometimes agreement embodied in court decree	If agreement, enforceable as contract
<i>Third Party</i>	Implored, third-party neutral decision maker, generally with no specialised expertise in dispute subject	Party selected third-party decision maker, often with specialised subject expertise	Party -selected outside facilitator	No third-party facilitator
<i>Degree of formality</i>	Formalised and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
<i>Nature of proceeding</i>	Opportunity to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
<i>Outcome</i>	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion/ sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
<i>Private/Public</i>	Public	Private, unless judicial review sought	Private	Private

**Table 2.2** Summary of characteristic of ADR processes (Goldberg *et al.*, 2007)

According to the Table 2.1, arbitration may be described as a process of resolving dispute that is more complex compared to mediation, yet it is less complex than adjudication and litigation, involving a third party outside the court. The major difference between arbitration and adjudication is that arbitration is much more complex.

Figure 2.4 represents the level or hierarchy of the approaches in ADR based on the complexity and formality based on the interpretation from the Table 2.1.



**Figure 2.3** Levels of complexity of systems in alternative dispute resolution based on the appraisal table by Goldberg *et al.* (2007)

## **2.5. DEFINITION OF ARBITRATION**

There is no specific definition of arbitration that may be referred to as the ultimate meaning in regards of the perspective of law. Binder (2000) wrote that there is question arose pertaining to this issue: "Is it is not in the interest of a law at least to define closely its subject-matter?"

Under English law, the necessity to define the meaning of arbitration has not deemed to become an issue. Thus, the experts defined arbitration by emphasising on the practice and procedure because the issue of definition is a subsidiary compared to the purpose of arbitration. (Oseni, 2009)

On the contrary, it is essential to indicate and describe the meaning of arbitration, at least, at the fundamental aspect, in aiding those who did not posses any knowledge or perspective of the arbitration procedures. (Oseni, 2009)

In the laymen perspective, arbitration may be mentioned as the process of conciliation between two disputed parties outside the courts. Teoh (1992) confirmed this by stating that it is a process of settling disputes 'without the litigation in the courts'.

Syed Khalid (2006) in referring to Gill states that arbitration may be defined as:

The reference of a dispute or difference between not less than two persons for determination after hearing both sides in judicial manner by another person or person, other than the court or competent jurisdiction. Commonly the reference is two arbitrators, one appointed by each side, and there will then usually be the additional provision that in the event of the two arbitrators failing to agree, the ultimate decision will be taken by an umpire.

As such, in Malaysia, the Arbitration Act 2005 (Act 646), as well as the previous act of 1952 (Act 93), did not emphasise the definition of the arbitration. Thus, various definition of arbitration presented and expressed according to the knowledge of the author. Syed Khalid (2006) describes that the definition by Gill ‘is a good definition and may be adopted for the defining purpose’.

It has come into question whether arbitration comes within ADR or not. Thus, if it is taken into account that the term “alternative” in ADR refers to the alternatives to litigation, then it may be construed that arbitration is ADR as in light that arbitration stands different from litigation in the aspects such as; the arbitrator is appointed and paid by the disputed parties and where the litigation proceeding are conducted according to statutory law, the arbitration may be conducted with the rules chosen by the parties. (Syed Khalid, 2006)

## **2.6. HISTORY OF ARBITRATION**

The history of arbitration and the beginning is not obviously recorded in any of the law books. However, it may be described that the arbitration is ‘as old as the human society itself’ or could be like ‘tracing the history of human existence on earth’, (Syed Khalid, 2006; Oseni, 2009)

Syed Khalid (2006) states the saying by a well known English legal historian, Sir William Holdsworth, which reads as:

The practice of arbitration...comes...naturally to primitive bodies of law;  
and after courts have been established by the state and a recourse to  
them has become the natural method of settling disputes, the practice

continues because the parties to a dispute want to settle them with less formality and expense than is involved in a recourse to the court.

In regard to this subject, Oseni (2009) writes that: “Lord Mustill rightly believes that commercial arbitration must have been in existence since the dawn of trade and commerce in human history.”

Thus, it may be believed that the arbitration exist when two persons encountered disputation and refer to a natural, unbiased third person to resolute on their quarrel.

However, the way arbitration developed and applied geographically varies. Arbitration in Greek for example, is believed to originate from to the Athenian democracy which rooted to the success of the early arbitration conducted by the famous Solon, the law maker, to resolute the crisis between the debtor peasant and the creditor landowner which occurred in the early sixth century. Prior to that, the arbitration agreements between the mainland of Greece, Asia Minor and the island of Aegean and Ionian gave appeared on the epigraphic remnants in the fifth century. (King Jr & LeForestier, 1994)

And arbitration in England began to be practised during the time of Dark Ages as it exhibit characteristic of ‘to reconcile rather than to judge’ as what is exemplified by the medieval institution of ‘loveday’ which happened to become an alternative to litigation thus disputants who looking for substitutes of litigation began to use arbitration. In the Saxon or Old English, arbitration is referred to the term of ‘loveday’ or ‘Love-Day’ which refers to the ‘quietness and tranquillity that should follow the ending of the disputation’. The characteristic of ‘loveday’ arbitration, although that it imitates litigation, it is still a conciliatory process that displays the attribute to the

characteristic of adjudicative process. However, by the end of 17<sup>th</sup> century, the term of ‘loveday’ has fallen together with its institutions and not used anymore with the last legal reference dated in 1694. (Hurt, 1995)

## **2.7. ARBITRATION IN MALAYSIA**

In Malaysia, prior to the Malaysian Conventional Act 2005, the arbitration is laid based on the root of common law as in England. The use of Arbitration Act 1952 and its amendment in 1972, which is inspired and a carbon copy of English Arbitration Act 1950. This however has changed recently, when the Ministry decided to replace the bedrock of arbitration landscape in Malaysia from English Law to the UNCITRAL Model Law as its root of procedural and application.

UNCITRAL or United Nations Commission on International Trade Law is the ‘core legal body of the United Nations system in the field of international trade law’. The arrangement made by Ministry to adapt rules of arbitration inspired by this Model Law is believed to be predisposed by the fact that the requirement on the standardization of the law in arbitration procedures and ‘the specific needs of international commercial arbitration practice’. (Rajoo & Davidson, 2007)

Arbitration in Malaysia is believed to commence with the application of the Arbitration Ordinance XIII 1809, which is the first arbitration ordinance made obligatory to the Straits Settlement comprises of Malacca, Penang and Singapore. Thus this ordinance was governed and followed the Indian precedents. Later, it was replaced by Arbitration Ordinance 1890 in Penang and Malacca before the

enforcement of the Arbitration Ordinance 1950 (No 12 1950) which was imposed on all the states of the Federation of Malaya. (Rajoo & Davidson, 2007)

However, it was not until 1972 where the Sarawak Ordinance No 5 of 1982, the exact copy of English 1950 Act, extended to all over Malaysia which resulted for it to be known as Arbitration Act 1952 (Act 93). (Rajoo & Davidson, 2007)

In 2006, the Malaysian Arbitration Act 2005 (Act 646) was introduced thus shifting the paradigm in Malaysian arbitration to a new level. This act incorporated the Model Law of UNCITRAL as its core and in the same time embodied many of the features of English Arbitration Act 1996, and integrated several unique provisions tailored to domestic circumstances. (Rajoo & Davidson, 2007; Kanagasabai & Lam, 2009)

## **2.8. SIGNIFICANT ELEMENTS IN MALAYSIA ARBITRATION ACT 2005 AND ARBITRATION (AMENDMENT) ACT 2011**

Malaysian law has accommodated the Malaysia Arbitration Act 2005 (nombor act) which was published in the Gazette on December 31, 2005. This has brought a new perspective to the Malaysian arbitration laws which describes by Kanagasabai & Lam (2009) as 'in relative hibernation' for the past 50 years. And in 2011, the amendment act that corresponds to this act has been gazetted by the government of Malaysia

This new Act incorporates numbers of features of UNCITRAL Model Law (Model Law). In conjunction to this, Rajoo & Davidson (2006) states that 'the government has clearly opted for a single Act based on the (UNCITRAL) Model Law'.

Prior to this, there are debates on what model should the new arbitration act referred to. Malaysian Bar Council advised a single enactment based on Model Law with additional provisions for domestic arbitrations while Malaysian Institute of Arbitrator proposed of enactments of two different acts; English Act 1996 for domestic arbitrations and the Model Law for international arbitrations purpose. (Rajoo & Davidson, 2006)

Imposition of this new Act by the government of Malaysia that came into force on 15<sup>th</sup> March 2006 fixed that all the new arbitration proceedings on and after the dates are deemed to adhere to this Act, thus the old Act (1952 Arbitration Act) will only applied on the arbitration that has commenced before the date. (Rajoo & Davidson, 2006)

This has brought into effects to the bodies and associations that encourage and embed the provisions of arbitration in their contract documents including those in the construction industries such as PWD and PAM.

Thus, the application on the conducts and the procedurals will be deemed to what are prescribed in this Act which will be the used in identifying the fundamentals in conduct of arbitration in Malaysia.

The arbitration elements chosen to be discussed are based on the significance to the whole arbitration process and that the elements bear the similar principle alike to the Sharī'ah-compliant arbitration.

### **2.8.1. Arbitration agreement**

‘Chapter 2’ of the ‘Part II’ of this Act discuss specifically on the arbitration agreement.

In Section 9 (1), the arbitration agreement is defined as:

...an agreement by the (disputed) parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether (it is) contractual or not.

Section 9 (2) of the Act reads as:

An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

Rajoo (2009) cited that the court in the *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233 explained the scope of this section as:

The term 'arbitration agreement' has assumed a much more wider meaning to include an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

Thus, this section indicates that the agreement may exist in a separate agreement, that includes the 'ad hoc' agreement. And this agreement may be composed of two or more documents including the 'opt-in' and 'opt-out' agreement that which related to the Part III of the Act. 'Opt-in' or 'opting in' may refer to the decision of the parties to submit their case to the national Courts on the certain issues, than to leave the dispute for arbitral tribunal to decide. While 'opt-out' or 'opting out' may refer to the circumstances where a 'party of potential domestic arbitration' which to be liberated from the national Courts intervention and refer only to the arbitral tribunal. Thus, this options must be made at the drafting stage of the contract and to be incorporated as the arbitration agreement. (Rajoo & Davidson, 2007; Kanagasabai & Lam, 2009)

While section 9 (3) and (4) writes on the provision of the arbitration agreement which shall be in writing and the necessity for it to be in writing if it is included in a document signed by the parties; or, in letters, telex, facsimile or other means of communication that provide records of the agreement; or, in occasion of exchange of the claim and defence statement.

Section 9 (5) of the Act writes that:

A reference in an agreement to a document containing an arbitration shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of agreement.

Thus, this section alludes to the documents of contract that includes arbitration as one of the provisions. As such, it is related to the PWD and PAM standard form of contract that incorporate clause on arbitration in the agreement.

### **2.8.2. Appointment of arbitrator**

The ‘Chapter 3’ of ‘Part II’ discuss on the composition of the arbitrator. According to Rajoo & Davidson (2007), in general, this chapter is related to article 10 of the Model Law and the two-tier system of Model Law which ‘granting parties to general freedom to stipulate the rules’ thus followed by a default rules that only applied when the parties fail to make such requirement.

Section 12 discuss on the numbers of arbitrator allowed in the proceeding. Section 12 (1) of the Act writes on the provisions that the parties are at liberty to determine the numbers of arbitrator. As such, the section 12 (2) illustrate that in the event that the parties fail to determine the numbers of arbitrator, they are deemed to comply to the

decision by the arbitration tribunal which will decide three arbitrators in the case of international arbitration, and single arbitrator in the case of domestic arbitration.

Thus, Section 13(1) allowed the arbitrator to be of any nationality, except if it otherwise agreed and stated by the parties, and the parties are at liberty to incorporate any procedure in appointing the arbitrator (Section 13 (2) of the Act). Section 13 (3), (4), (5) (6), (7), (8), and (9) presides the processes on how the parties should deal with in the event of the numbers of arbitrator failed to be concluded by the parties.

### **2.8.3. Procedural rules and conduct of the proceeding**

‘Chapter 5’ of ‘Part II’ of the Act relates to the conduct of arbitral proceedings. The Section 20 of the Act reveal the necessity for the parties to be treated equally and been given fair and reasonable opportunity to present their case.

As such, the subsection (1) of Section 21 states that the parties are at liberty to agree on the procedures to be adhered by the tribunal in conducting the proceeding. And in the event of failure to agree to this subsection, the arbitral tribunal may decide to adapt the procedure in manner indicated as appropriate (subsection (2) of Section 21).

And if the power to determine the procedures have been delegated to the arbitral tribunal, subsection (3) indicates that it will include the authority to; determine the admissibility, relevance, materiality and influence of the evidence; to draw on its own knowledge and proficiency; order the provision of further particulars in the statement of claim or defence; order the giving of security for costs; to fix and amend the time limits in the arbitral proceedings; to order on the discovery and production of documents that is ‘within the power or possession of a party’; to order the answer on

the interrogation; to order on any evidence be given in oath or affirmation; and to make such order seems appropriate by the tribunal.

#### **2.8.4. Place and time of arbitration**

In conjunction to this subject, the Section 22 of the Act, described on the 'seat of arbitration', which interpreted in 'Part I' as 'place where the arbitration is based'. Thus, this section ratify on the rights of the parties to agree on the seat of arbitration. While subsection (2) explains that in the event that the parties fail to agree, it shall be determined by the arbitral tribunal at any place, considering the circumstances of the case and the convenience of the parties.

And Section 23 emphasised on the commencement date of the arbitration proceedings which is deemed to commence on the agreement of both parties. Thus, in the event that the parties fail to agree, it shall be reckoned to commence on the date where the written request for such dispute to be referred to arbitration is received by the respondent.

Rajoo (2009) in his article mentions that the court identified 'issue of extension of time for commencing arbitration process' based on the case *Dancom Telecommunications (M) Sdn Bhd v Uniasia General Insurance Bhd* [2008] 5 CLJ 551. The court has reemphasised on the doctrine of 'freedom of contract' which resorted the limitation period in the case to be reduced from six years to twelve months. Thus, this such doctrine may also be applied in other cases of dispute.

#### **2.8.5. Substantive law of arbitration**

Section 30 in 'Chapter 6' of 'Part II' emphasises on the law applicable to the substance of disputes. On which subsection (1) highlights that the substantive law of

Malaysia applicable in respect of domestic arbitrations, whereas subsection (2) emphasises on the substantive law that should be applied in respect of international arbitration should be the law agreed by the parties.

Thus, subsection (4) reads on the power of the arbitral tribunal to apply the 'law determined by the conflict of law rules' in the event that the parties fail to agree on that as described in subsection (2). And subsection (5) discuss on the necessity of arbitral tribunal to decide, in all cases, in accordance of the agreement taking into account the usages of the trade applicable to the transaction.

#### **2.8.6. Rules of evidence**

As the nature of the substantive law is based on Malaysian Law for domestic arbitration, rules of evidence in Malaysian arbitration according to the Act will be read based on this Law.

Thus, Section 25 of the act highlights on the statement of claim and defence that is to be adhere by the parties in order to resolute their disputation. Through subsection (1), within the frame of time agreed, the claimants shall state the facts supporting his claim and the points at issue as well as stating the relief or remedy sought. Withstanding to this matter, the respondent may, in respect of particulars outlined in this subsection, state his defence, unless the parties have otherwise agreed to other required elements.

And subsection (2) reads the parties may submit with their statement any document considered relevant; or to add any reference to the documents or other evidence and subsection (3) highlights that the parties may amend or supplement the claim or defence during the course of proceedings, unless it is considered inappropriate by the tribunal.

Section 26 through subsection (1) states that unless it is agreed by the parties, the arbitral tribunal may decide on whether to hold the oral hearings or it shall be conducted in the basis of examining documents and materials. And, unless it is agreed by the parties that no hearings should be held, the tribunal possess authority to hold oral hearings at an appropriate stage with prior notice of the hearing and any other meetings given to the parties (subsection (2) and (3) of the Act.

### **2.8.7. Nature of award**

Section 36 of the Act reads that the award of the arbitration is final and binding, thus the subsection (1) reads:

An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

And in subsection (2) it reads that the arbitral tribunal ‘shall not vary, amend, correct, review, add to or revoke’ the award produced unless to the measures provided in the Section 35 of the Act which is in consideration of ‘correction and interpretation of the award.

## **2.9. ARBITRATION IN MALAYSIA CONSTRUCTION INDUSTRY**

### **2.9.1. General and the differences from the ‘other’ commercial arbitration**

Arbitration in the construction area is being emphasised as one of the conducts of the commercial arbitration. American Arbitration Association (AAA) in their website

stated the construction arbitration as one of the branch of commercial arbitration practice.

Thus, it has come into questions are there any differences that stand between the construction and commercial arbitration, and on what basis.

Fundamentally, there are differences spotted between construction contract and other commercial contract and in association to this matter, there will be differences between the construction arbitration and commercial arbitration. (Jenkins & Stebbings, 2006)

First, the differences may arise on the basis that the construction disputes are technically complex which demanded intensive investigation in the process. Second, construction disputes require rapid decision in order to allow the work to progress. Third, the construction projects involve many parties, thus the disputations occurred will also affect the parties. As such, construction industry, which sometimes relates to international interest, may root to cultural and juridical involvement (Jenkins & Stebbings, 2006)

At the international level, FIDIC or International Federation of Consulting Engineers form of contract embedded the necessity to arbitrate if the disputes unable to be settled amicably as a final resolution. This is emphasised in the clause of 20.6 of 1999 FIDIC Conditions of Contract, which relates to if the either party not accepting the Dispute Adjudication Board (DAB) decision and issued a notice stating the dissatisfaction, then the dispute shall be resolute through arbitration which incorporates that the arbitration shall be referred to the Arbitration Rules of the International Chamber of

Commerce in Paris with no restriction that any other rules from different arbitration can be included in the Particular Conditions. (Totterdill, 2001)

Thus, in Malaysia construction industry, arbitration is mentioned as a provision in the standard form of contract. Currently, there are three major standard forms of contract for construction work in Malaysia that incorporate the provision for arbitration; Public Works Department Form 203A (Rev. 2010) for public construction works, Persatuan Akitek Malaysia Contract 2006 for private construction works as well as CIDB Standard Form of Contract for Building Works 2000 Edition. In addition, in the case of PAM, the provision for adjudication and mediation is also incorporated; and CIDB also provided a provision for mediation.

### **2.9.2. PWD 203A (Rev. 2010)**

In PWD Form 203A (Rev. 2010), provision of arbitration is mentioned in clause of 66.0. The clause emphasises on the conduct of arbitration to be applied should there are disputations arise between the government and the contractor regardless of it is in or out of connection with the contract. This clause is deemed to be governed by the Malaysian Arbitration Act 2005 and the laws of Malaysia as described in clause 66.10 and 66.11.

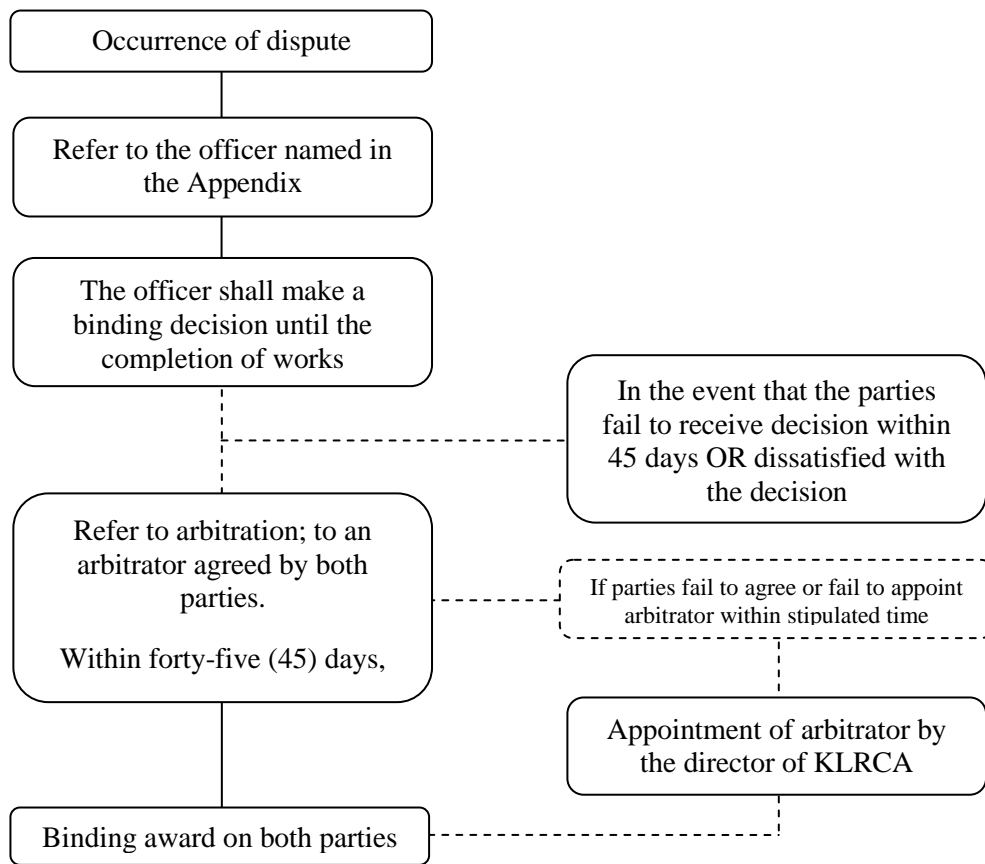
Clause of 66.1 and 66.2 writes on the initial procedure in the event of a dispute happened where the parties in the contract shall refer to the officer named in the appendix for a decision, thus he will make a binding decision until the completion of the works, in writing.

Yet, if the parties fail to receive a decision within forty-five (45) days after the request was made, or dissatisfied with the decision held by the officer, they may refer to an

arbitrator they consented within the period of forty-five days. However, in the event that they fail to agree on the arbitrator, the parties may resort to the decision made by the director of Kuala Lumpur Regional Arbitration on the appointment of the arbitrator, thus the process should be heard at the KLRCA and it shall be conducted using the rules exercised by KLRCA as stated in the clause 66.3 of PWD 203A.

Clause 66.4 writes that the arbitration should be initiated only after the completion of works by the contractor except on the dispute occurred on the basis of 'Events and Consequences of Default by the Contractor' (clause 51.0). As in clause 66.8, the awards of the arbitrator should be final and binding upon the parties involved.

Figure 2.5 illustrate the processes of referring the disputes to arbitration in PWD 203A form of contract.



**Figure 2.4** Process of referring to arbitration in PWD 203A (Rev. 2010)

### 2.9.3. PAM Contract 2006 (With Quantities)

In PAM Contract 2006 (With Quantities), the provision of dispute settlement begins with the provision of adjudication under the clause 34.1 to 34.4. Adjudication shall be a precedent condition to arbitration if the dispute that arises is under the clause 30.4 (set-off by employer). The adjudication process shall incorporate the use of PAM Adjudication Rules as stated in the clause 34.3.

Apart from that, clause 35.0 of this contract speaks about the conduct of mediation. Any dispute may be referred to mediation in spite of the existence of arbitration clause

in this contract. The conduct of mediation shall be initiated in accordance to the PAM Mediation Rules.

The conduct of arbitration is stated in the clause of 34.5 to clause 34.11. Clause 34.5 specifically discusses on the types of dispute that may be referred to the arbitration. The clause provides five types of referable disputes which arise in connection to the contract; or, any matter which that the contract did not mention; or, the action of the architect to withhold any certificate which the contractor is entitled to; or, the breach of right of the parties pertaining to the clause of ‘determination of contractor’s employment by the employer’ (clause 25.0), ‘determination of own employment by the contractor’ (clause 26.0), ‘outbreak of hostilities’ (clause 31.0) and ‘war damage’ (clause 32.0); or, any unreasonable action by the employer or the contractor to withhold any consent or agreement.

Thus, any party may, in written notice, informing another for such disputes to be referred to an arbitrator agreed by the both parties. In the event that the parties fail to agree after twenty-one days after such notice is served, the party that initiates the claim may apply to the President of Pertubuhan Akitek Malaysia (PAM) to appoint an arbitrator. Such details are included in the clause 34.6.

The arbitrator then shall commence the arbitration procedures, and according to clause 34.7, it shall adhere to the provision of Arbitration Act 2005 and PAM Arbitration Rules.

Under the clause 34.8, elaborate on the authorities and powers of the arbitrator during conducting the proceedings.

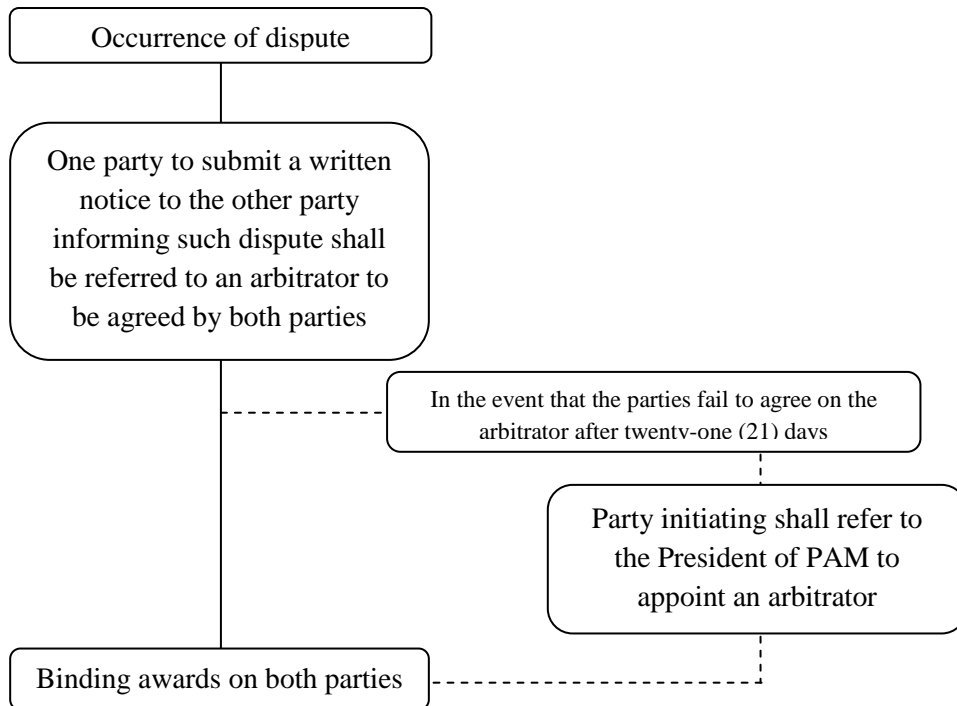
Clause 34.10 writes that the proceeding will commence only after the practical completion by the contractor, unless there are written agreement between the parties, or after the determination of the contractor, or the abandonment of works by the contractor. In addition, the clause allows proceeding to commence before such incidents, such as, on the question whether the instruction issued is empowered by the condition of contract; or any disputes that relates to ‘outbreak of hostilities’ (clause 31.0) and ‘war damage’ (clause 32.0); or whether the certificate has been improperly withheld; or the payment entitled to the contractor is improperly withheld.

And clause 34.11 recognised the nature of the award by the arbitrator as final and binding on the parties.

In conjunction to these matters, the arbitration clause in PAM should be enforced with the use of PAM Arbitration Rules 2010 as guideline onto the parties without denying the enforcement of Arbitration Act 2005.

Hence, arbitration in construction agreement, internationally and domestically, can be classified as a statutory arbitration in view of the fact that it is derived from the clause of the agreement, which is made prior to the work.

Figure 2.6 illustrates the processes of referring the disputes to arbitration according to PAM form of contract.



**Figure 2.5** Process of referring to arbitration in PAM Contract 2006 (With Quantities)

#### **2.9.4. Arbitration in CIDB Standard Form of Contract for Building Works 2000 Edition**

In the CIDB Standard Form of Contract for Building Works 2000 Edition, mediation is a condition precedent to arbitration as per clause 47.2; where any dispute must be referred to mediation and will be initiated based on the CIDB Mediation Rules.

The provision of arbitration is mentioned in clause 47.3 of Clause 47.3(a) corresponds with clause 47.2(c), that the conduct of arbitration may only commence within the fourteen (14) days after the termination of mediation, where the Employer or the Contractor shall produce a notice of his intention to refer the dispute to arbitration to the other party and submit a copy to the Superintending Officer (SO). The parties may agree upon the arbitrator, or if the parties fail to agree within the fourteen (14) days

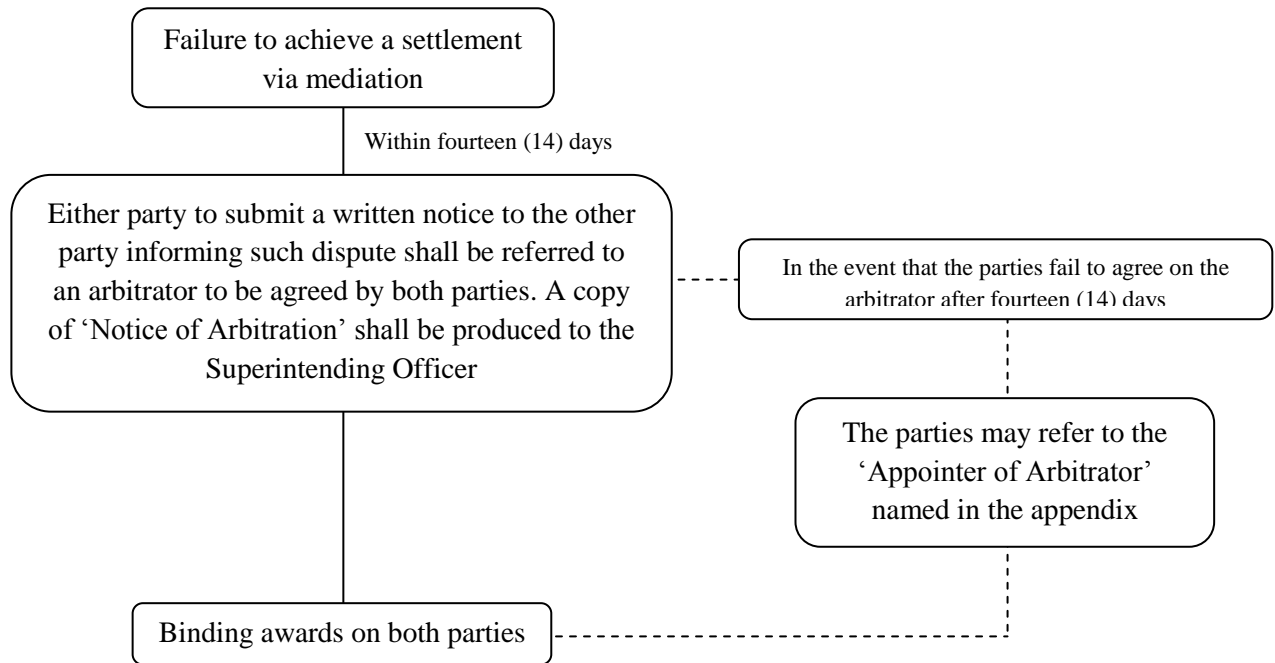
after the notice has been produced, the parties may refer to the ‘Appointer of Arbitrator’ named in the appendix.

Clause 47.3(b) states that the arbitration proceedings shall not start until the practical completion of the work or determination of work, unless the parties have granted their consent for such in writing. However, the exception is given under these occasions: whether the issue of an instruction is empowered by the contract; whether the payment has been improperly withheld; whether the payment made is not in accordance to the contract, and; whether either party has delayed or withheld consent without an appropriate reason.

Clause 47.3(d) and (e) discuss about the power of the arbitrator in conducting the arbitration and his power to determine the amount of cost to be paid by the party.

Clause 47.3(f) states that the award of the arbitrator shall be final and binding upon the parties.

Figure 2.7 illustrate how the process of referring to arbitration according to CIDB standard form of contract.



**Figure 2.6** Process of referring to arbitration in of CIDB Standard Form of Contract for Building Works 2000 Edition

### 2.9.5. Comparison of the arbitration clause between the three standard forms of contract

Table 2.2 refers to the comparison of the arbitration clause between the three standard forms of contract used in Malaysia.

On the basis of the three forms of contract, a comparative assessment is now being done. The outcomes of the comparative assessment are as follows:

- 1) It appears that all three forms emphasised on arbitration. Perhaps, this is due to the fact that in Malaysia the Arbitration Act 2005 and Arbitration

(Amendment) Act 2011 are already in existence, that they have a benchmark to follow.

- 2) The main difference is that in the case of PWD, it does not have its own internal system and rely on the KLRCA and the rules provided by the entity; whereas in the case of PAM, it is supported by its own internal system where the entity has its in-house mediation and arbitration rules. The CIDB although it has its own rules for mediation, it however does not state clearly on what rules shall be used in its arbitration process.
- 3) Apart from that the PAM has imposed adjudication as precedent condition to arbitration for a certain disputes as stated in the clause 30.4. And CIDB has made mediation as mandatory and as condition that precedes arbitration.

**Table 2.3** Comparison of the arbitration clause inside PWD 203A (Rev. 2010), PAM 2006 (With Quantities) and CIDB Standard Form of Contract for Building Works 2000 Edition

<b>FORM OF CONTRACT</b>	<b>PWD 203A (Rev. 2010)</b>	<b>PAM 2006 (With Quantities)</b>	<b>CIDB Form of Contract 2000</b>
<b>Context of Dispute</b>	Client-Contractor Disputes	Client-Contractor Disputes	Client-Contractor Disputes
<b>Appointment of Arbitrator by the parties</b>	Within 45 days after i) the failure of SO to arrive to a decision, or ii) dissatisfaction of the parties with the decision from SO	Within 21 days after the written notice submitted	Within 14 days after the submission of "Notice of Arbitration"
<b>Responsible person to appoint the Arbitrator in case that the parties fail to agree</b>	Director of KLRCA	President of PAM	Director of KLRCA or the "Appointer of Arbitrator" named in the appendix
<b>Commencement of Arbitration</b>	Shall commence after practical completion or determination of abandonment of work, unless the parties have agreed with written consent	Shall commence after practical completion or determination or abandonment of work, unless there is a written agreement between the parties; except for the four conditions stated in the clause 34.10	Unless the parties has agreed with written consent, it shall commence after the "Date of Practical Completion"; except for the four conditions stated in the clause 47.3(b)
<b>Preceding Condition</b>	Nil	Adjudication (only for the disputes referred under the clause 30.4)	Mediation as per clause 47.2(d)
<b>Governing Act</b>	- Arbitration Act 2005 - Arbitration (Amendment) Act 2011	- Arbitration Act 2005 - Arbitration (Amendment) Act 2011	- Arbitration Act 2005 - Arbitration (Amendment) Act 2011
<b>Rules Used</b>	KLRCA Arbitration Rules	PAM Arbitration Rules	Not stated in the clause

## **2.10. IMPLEMENTATIONS OF ADR BESIDES ARBITRATION IN MALAYSIAN CONSTRUCTION INDUSTRY**

### **2.10.1. Mediation Act 2012 (Act 749)**

Application of mediation to resolve dispute has become widely used in Malaysia and has been long embraced by the legal practitioner – with several professional institution as a mean of dispute resolution. The Mediation Act 2012 received its Royal Assent on 18<sup>th</sup> June 2012 and came into force on 22<sup>nd</sup> of June of the same year.

This act was introduced to create “uniformity” in the conduct of mediation (Nora, 2013) as can be seen in the act itself, where the content focused on how the mediation should be conducted, which include the commencement of mediation, appointment of mediator and his role, mediation process as well as conclusion of mediation. Apart from that, the confidentiality of mediation and the liability of mediator have also been outlined in the award to ensure the secrecy of the mediation, and to protect the liability of mediator.

### **2.10.2. Construction Industry Payment and Adjudication Act 2012 (Act 746)**

Construction Industry Payment and Adjudication Act or CIPAA is the new act introduced to Malaysian construction sector in 2012. CIPAA received its Royal Assent on 22<sup>nd</sup> of June 2012 and came into force on the 15<sup>th</sup> of April 2014.

This act was introduced with three (3) purposes which are: to facilitate regular and timely payment; to provide a mechanism for speedy dispute resolution through adjudication, and to provide remedies for the recovery of payment in the construction industry.

### **2.10.3. Construction Court**

In October 2012, Malaysian news portal, The Edge ([www.theedgemaalaysia.com](http://www.theedgemaalaysia.com)) reported that the proposal for the construction court will be submitted by CIDB by the end of that year. It's Chief Executive Officer, Dato' Sri Ir. Dr. Judin Abdul Karim, asserted that the establishment of the court “will help overcome complex and technical disputes within the sector”.

And on 13<sup>th</sup> January 2013, The Star Online ([www.thestar.com.my](http://www.thestar.com.my)) reported that the Chief Justice of the Federal Court has announced a specialised construction court will be set up in Kuala Lumpur and Shah Alam.

### **2.11. CONCLUSION**

This chapter has established the mechanisms and practice of ADR focusing on arbitration in general and in Malaysian construction industry.

The chapter has addressed the concept of arbitration by determining the definition of arbitration and examining the history of arbitration. And in order to establish the concept of arbitration in Malaysia, the Arbitration Act 2005 together with Arbitration (Amendment) Act 2011 have been scrutinised and the areas inside the documents has been identified to become the basis of comparison with the process of *Tahkīm* in *Sharī'ah*.

And then the process of arbitration inside the Malaysian construction industry focusing on the process of referring the dispute to arbitration inside the PWD 203A (Rev. 2010), PAM

Contract 2006 (With Quantities) and the CIDB Standard Form of Contract for Building Works 2000 Edition has also been reviewed and compared.

Apart from that, the implementations ADR besides arbitration inside the Malaysian construction industry have been appraised and presented.

## CHAPTER 3

### *SHARĪ'AH AND SHARĪ'AH-COMPLIANT ADR*

#### 3.1. INTRODUCTION

*Sharī'ah* is a word that has always been related to Islam. Some have largely interpret it as the law of Islam, while others have a deeper perspective that it is not just a law but also a moral code. And the word *Sharī'ah* has deemed to be a subject of controversy especially in the European and American countries for the past few decades.

Basically, *Sharī'ah* is the Islamic law, which incorporates all the features of Islam based on the Quran and Sunnah. And these two can be considered is the strictest source of *Sharī'ah* while the scholars have disputes against whether another two source – *Ijmā'* (consensus amongst scholars), *Qiyas* (analogical deduction) and *ijtihad* (interpretation) – can be included as the main source. However it is must be understood that *Sharī'ah* stands different from *Fīqh* or Islamic Jurisprudence.

Based on the understanding that *Sharī'ah* is the Islamic law, it is important that this subject must be investigated further to establish a good foundation of what is *Sharī'ah* and what constitutes *Sharī'ah* and its relevancy and relation with *Sharī'ah*-compliant concept.

Therefore, this chapter will discuss about *Sharī'ah*, its etymology and definition, sources and objectives as mentioned in the Quranic text and Prophetic tradition. And then this chapter will proceed with the overview on the sources of *Sharī'ah* and later

discuss about the concept of *Sharī'ah*-compliant and its relation to the construction industry and the significance of *Sharī'ah*-compliant to the industry and perspective of *Sharī'ah*-compliant in ADR and construction industry.

### 3.2. *SHARĪ'AH*: ETYMOLOGY AND DEFINITION

The *Sharī'ah* or الشريعة rooted from the word of Sha-Raa-‘Aaa or شَرَعَ. Lane (1863) in his lexicon introduced a few meanings related to this word, among them are; “act of one coming to water to drink”, “act of one to enter into an affair”, and “act of one to make something apparent, or to manifest” and he has highlighted a phrase of شرع الله لنا كذا which rendered as “God (Allah) made apparent, manifest, or plain, to us, such a thing”. And *Al-Sharī'ah*, as what has been defined by the dictionary of Al-Mawrid mean قانون or *Qānun*, translated as canon law, or code. (Baalbaki, 1995)

The scholars denotes that the word *Sharī'ah* as an archaic Arabic word denoting “pathway to be followed” (Abdal-Haqq, 2006) or “path to the water hole” (Weiss, 2006). And Weiss (2006) states that the latter definition comes from the fact that the path to water is the whole way of life in an arid desert environment.

And Trumbull (2006) said that *Sharī'ah* may be literally defined as ‘the path or the way’ and equivalently, in the sense of religion it is the path of God, created for men to follow.

Ibn Manzur (d. 1311) (2012), the famous lexicographer in his notable works *Lisān Al-'Arb* (The Arab Tongue) construed the words of الشريعة والشريعة (*Al-Sharī'ah* and *Al-Shir'ah*) as: “What is legislated by Allah in the religion, and what is decreed such as

act of fast, pray, pilgrimage and endowment, as well as other act of loyalty, as a whole.” Corresponding to this, Ibn Manzur interpreted the word as “the religion”.

Ibn Taimiyyah (d. 1328) (2006) in explaining the meaning of Sunnah and *Sharī'ah* said; “(It is) what has been shown by the Prophet and what has been legitimised by him. And by this, it can be explained that every of his norm (or action), and his law is from the ‘*aqidah* (faith), and they are from ‘*amal* (act of worship), and it can be reflected by both of the statement alone.” And he added: “And the actualisation of the *Sharī'ah* is what sent by Allah through Muhammad (PBUH) that associated with the interest of the world and hereafter. And by this, everything that infringed the law of it is invalid. And whatever is parallel to it is righteousness.”

According to Asyraf Wajdi & Nurdianawati Irwani (2007) who cited from Sardar; the *Sharī'ah* is defined as a system of ethics and values that cover all aspects of life that includes personal, social, political, economic, and intellectual. And that its unchanging bearings as well as its major means of adjusting to change cannot be separated from the basics of Islam i.e. in its beliefs, values and objectives.

And in emphasising the meaning of this word, Mohamad Akram Laldin (2006) described *Sharī'ah* 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 the spectrum of Muslim legal systems in this 21<sup>st</sup> century – and agreeing with term coined by the later scholar, it is appropriate to infer that *Sharī'ah* is more than a Muslim code of law, and that it is also a divine culture and comprehensive routine that deemed to be a character of a living Muslim in their activities.

### **3.3. SUBSTANTIAL EVIDENCE OF SHARĪ'AH**

#### **3.3.1. *Sharī'ah* according to the Quran and in the Tradition of the Prophet and the Caliphates**

*To thee We sent the Scripture in truth, confirming the scripture that came before it, and guarding it in safety: so judge between them by what Allah hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have we prescribed a law and an open way. If Allah had so willed, He would have made you a single people, but (His plan is) to test you in what He hath given you: so strive as in a race in all virtues. The goal of you all is to Allah; it is He that will show you the truth of the matters in which ye dispute. (Al-Mā'idah: 48)*

Al-Sa'di (d. 1956) (2002) stated that the *Shir'ah* brings the meaning of paths, and *Minhajā* brings the meaning of the tradition of the Prophet (*Al-Sunnah*), and he conversed that: “And these codes (*Sharā'i*: plurals of *Sharī'ah*) ... change, depending on the change of time and situations.”

Ibn Kathir (d. 1373) (2004) stated that *Shir'ah* rendered the meaning of ‘clear path’, as what has been recorded from Ibn Abbas. And *Sharī'ah* also means; a matter that

incepted the other matters (related to it), and that *Sharī'ah* is something that incepted among those to the water. Al-Baidhawi (d. 1286) in relation to this has said that: *Sharī'ah* is a path to water, and similarly that the religion is a path to eternal life.”

The concept of *Sharī'ah* during the era of the Prophet and the Guided Caliphates (*Khulafā' Al-Rāsyidīn*) is visualised by the fact that the companions and the Muslims of that period, strictly followed the examples shown in the Quran and Sunnah. Corresponding to this pragmatic proposition, the *hadīth* of the Prophet may express such environment suggested:

“The people of my generation are the best, then those who follow them, and then those who follow the latter. After that there will come some people whose witness will go ahead of their oaths, and their oaths will go ahead of their witness.” (Al-Bukhari, translated by M. Muhsin Khan)

Al-Nawawi (d. 1278) (2010) in explaining this *hadīth* said that the phrase “the people of my generation are the best” means; “... the utmost exemplar, among the people of *Muhājirīn* and *Ansār*, and those who walked on their path. These are the favoured nation, and this is what is intended by this *hadīth*.” Conversely, it is debated on what that the term of ‘generation’ refers to. Al-Qadi ‘Iyadh said that it may as well refer to the companions of the Prophet and their descendants; limited to the first three generation.

Thus, it may well be construed that such commendation to the first three generation or the *Salaf Al-Ummah*, from the Prophet himself, is evidently pointed to the fact that the Companions of the Prophet are those who follow the path (*Sharī'ah*) and that they are the best exemplar in their action in this matter.

### 3.3.2. Sources of *Sharī'ah*

Quran is the ultimate source of *Sharī'ah*. It stood as the first source of *Sharī'ah*. Mohammad Hashim Kamali (2006) described that the Quran, to the consensus of the *ulama al-ummah* (scholars of Islam), is the testimony of the prophecy of Muhammad S.A.W., the absolute commanding guide to all Muslims as well as first foundation of *Sharī'ah*, which some of the scholars have agreed to the extent that it is the ultimate source and other sources are only explanation to the Quran.

*Al-Sunnah Al-Nabawiyyah* (the customs of the Prophet) is usually referred as the 'words, actions and silent assertions of the Prophet S.A.W.'. Listed as the second source of the *Sharī'ah*, the scholars agreed that the *sahīh* (authentic) Sunnah is the revelation by Allah and not just the explanation to the Quran. Ibn Taimiyyah (d. 1328) (2006) in explaining the meaning of Sunnah describes that;

“(It is) what has been shown by the Prophet and what has been legitimised by him. And by this, it can be explained that every of his norm (or action), and his law is from the *aqeedah* (faith), and they are from *amal* (act of worship), and it can be reflected by both of the statement alone.”

Al-Munajjid (2009) in his *Fatwā* (legal opinion) states that the Sunnah is “one of the two parts of divine revelation that were revealed to the Prophet S.A.W and the other part of the revelation is the Holy Quran.”

This *Fatwā* is contradicting to the view catered by Hashim Kamali. Conversely, by not entering into the arena of dispute between the scholars, it is appropriate to state that although the Sunnah is numbered as the second sources after the Quran, it shares

the equivalent stratum in the *Sharī'ah*, according to the explanation of the verse 3 of *Surah Al-Najm* by Al-Sa'di (d. 1956) (2002), noting that:

That the prophet did not follow except that has been revealed to him by Allah S.W.T. of the guidance and the devotion, in his life and others. And this indicates that the *Sunnah* is revelation from Allah to His Messenger S.A.W. that Allah S.W.T. said: 'For Allah hath sent down to thee the Book and wisdom' (4:113). And that the Prophet is inerrant according to the fact he has been enlightened by Allah and by what has been commanded onto him, and due to that, his words are not conveyed on his desire, but on the revelation.

And Ibn Taimiyyah (d. 1328) (2006) explains the *Sharī'ah* as:

...That the term *Sharī'ah*, *Shar'u* and *Shir'ah* is registered as everything that is legislated by Allah, of the *aqeedah* and *amal*. And it is indeed as what is recorded by Abu Bakr Al-Ajri as well as by Ibn Battah, that the definition of *Sharī'ah* refers to the dogma which is the credence of the Sunnis faith, as what they believe that the *Iman* (belief) is rendered by believing through words and by action. And verily that Allah has portrayed it (*Sharī'ah*) with His holy attributes and with His prophet, and that the Quran is the words of God.

Contemporarily, Akram Laldin (2008) holds different opinion on *Sharī'ah*, which he describes *Sharī'ah* as 'not a law in modern sense' because it contains a all-inclusive set containing dogmas, law and ethical principle which he then describes as 'a doctrine of duties and a coded of obligations'.

### 3.3.3. *Maqāsid Al-Sharī'ah* (Objectives of *Sharī'ah*) and Their Importance

Mohammad Hashim Kamali (1998) stated that; as Islam incorporates permanent features and mechanisms for adapting to change, its fundamentals, such as *`aqīdah* (creed), *`ibādah* (worship), and *akhlaq* (morality and ethics), can never change and their manifestations in such secondary areas as economics, business, and other worldly activities require flexibility and development according to time and space. This is embodied in the Shari`ah, which is central to Islam's worldview. (Asyraf Wajdi & Nurdianawati Irwani, 2007)

This is where *Maqāsid* or objectives of the *Sharī'ah* devised to be the guidance especially in the secondary aspects in Islam, which somehow evolve and may be altered according to the change of time and situation, so that the life of its believers did not deviate from the path paved, or legislated to them. Mohammad Hashim Kamali (1998) stated that *Sharī'ah* in general is predicated on benefits to the individual and the community, and that its laws are designed to protect these benefits and to assist the improvement and perfection of the conditions of human life.

The principal in the objectives of *Sharī'ah* lies in the concept of *Al-'Adl* or *Al-Qist* that rendered as 'justice', as well as *Tahdzīb Al-Fardh* (educating an individual) and that both of these may subsequently render to the position of *Masālih* (benefits; plural of *Maslahah*) (Mohammad Hashim Kamali, 1998. As cited in Asyraf Wajdi & Nurdianawati Irwani, 2007), according to Al-Imam Al-Ghazzali (d.505):

The objective of the Shari`ah is to promote the well-being of all mankind, which lies in safeguarding their faith (*dīn*), their human self (*nafs*), their intellect (*`aql*), their posterity (*nasb*) and their wealth (*māl*).

Whatever ensures the safeguard of these five serves public interest and is desirable.

Al-Imam Al-Shatibi (d. 1388) has also agreed with the record presented by Al-Ghazzali (Chapra, 2008). Nonetheless, these five is not the only objectives aimed at ensuring the wellness of human-being, where there are others stated in the Quran, and Sunnah, or inferred by the scholars, with the five objectives as the primary (*Al-Asliyyah*) or the essential part to the normal order of the society as well as to the continued existence and individuals' spiritual well-being. (Chapra, 2008; Kamali, 2008)

#### **3.4. CONCEPT OF *SHARĪ'AH*-COMPLIANT**

The terms '*Sharī'ah*-compliant', '*Sharī'ah* compliance', or '*Sharī'ah* compliancy' have never been really found defined in any literature. However, the Oxford Dictionaries Online (2012) defines the word 'compliant' as "disposed to agree with others or obey rules, especially to an excessive degree; acquiescent" and Longman Dictionary of Contemporary English (2005 as cited in Siti Nora Haryati, 2011) defines the word 'compliant' as "made or done according to particular rules or standards". Thus, the term "*Sharī'ah* -compliant" may refer to an actions or activities that is carried out in line with the tenets of *Sharī'ah*, or obeying the rules and standard of *Sharī'ah*, and does not contravene to it.

The spirit of *Sharī'ah*-compliant does not only exist in the practise that is complying with *Sharī'ah*, but as well as in realising its objectives (*maqāsid al-Sharī'ah*) (Asyraf Wajdi, 2009) whereby any activity that fails to protect and preserve the public interest

or vice versa can be deemed to be included as a Non *Sharī'ah* -compliant practise (Siti Nora Haryati, 2011). Therefore, based on the argument provided in advance, it may well be concluded that a *Sharī'ah* -compliant concept is a commercial (*mu'āmalah*) activity where it practise adhering to the *Sharī'ah* derived from the substantive sources (*al-Quran, al-Sunnah, al-Ijmā'* and *al-Qiyās*) with the aim to safeguard the faith, life, intellect, posterity and wealth.

The usage of *Sharī'ah*-compliant term is popular in the area of financing and banking. It is evident with the existence of diverse products in financing and banking that are adherence to the *Sharī'ah*, the emergence of Islamic financing and banking establishments throughout the world, as well as establishment of various research and academic institutions such as IIUM Institute of Islamic Banking and Finance (IIBF) and International *Sharī'ah* Research Academy for Islamic Finance (ISRA), both based in Kuala Lumpur, Islamic Research and Training Institute (IRTI) based in Jeddah, and Institute of Banking Studies of Amman, Jordan.

By looking to this phenomenon, it can be deduced that the concept of *Sharī'ah*-compliant has become very important these days and can set a standard to practices of Islamic oriented transaction to various sector including construction industry.

### **3.5. SHARĪ'AH-COMPLIANT IN COMMERCIAL TRANSACTION**

In the recent years, *Sharī'ah* has become among the main driving factors in Malaysian banking and financing environment. This is evident with the most of the banks in the country have ventured into *Sharī'ah* investment and introduce Islamic banking and

financing product. Based on the list produced by Central Bank of Malaysia or BNM as follows, there are sixteen (16) Islamic Banks in the country.

**Table 3.1:** List of Islamic Banks in Malaysia (Source: <http://www.bnm.gov.my>)

No.	Name	Ownership
1	Affin Islamic Bank Berhad	L
2	Al Rajhi Banking & Investment Corporation (Malaysia) Berhad	F
3	Alliance Islamic Bank Berhad	L
4	AmIslamic Bank Berhad	L
5	Asian Finance Bank Berhad	F
6	Bank Islam Malaysia Berhad	L
7	Bank Muamalat Malaysia Berhad	L
8	CIMB Islamic Bank Berhad	L
9	HSBC Amanah Malaysia Berhad	F
10	Hong Leong Islamic Bank Berhad	L
11	Kuwait Finance House (Malaysia) Berhad	F
12	Maybank Islamic Berhad	L
13	OCBC Al-Amin Bank Berhad	F
14	Public Islamic Bank Berhad	L
15	RHB Islamic Bank Berhad	L
16	Standard Chartered Saadiq Berhad	F

Besides that, the emergence of *takaful* product and operators as cited as early as in the Ahmad (1991), started with the establishment of Syarikat *Takaful* Malaysia in 1984. *Takaful*, derived from the word that *kafala* which means to guarantee, to help or to take care of one's needs by another party through a pre-agreed upon agreement (Billah, 2007; Walid and Lahlou, 2012). In modern context, *takaful* might be interpreted as a cooperative insurance or cooperative risk sharing (Fisher and Taylor,

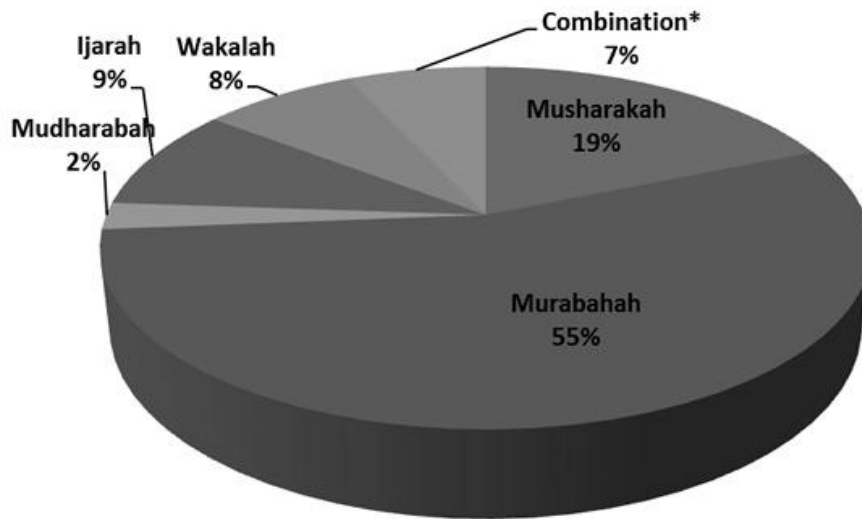
2000; Walid and Lahlou, 2012) and Khairuddin (2010) has coined the term equivalent to *takaful* as “*Shari’ah*-compliant insurance”.

Table 3.2 shows the list of the *takaful* operator in Malaysia.

**Table 3.2:** List of *takaful* operators in Malaysia (Source: <http://www.bnm.gov.my>)

No.	Name	Ownership
1	AIA AFG Takaful Bhd.	F
2	AIA PUBLIC Takaful Bhd	F
3	AmFamily Takaful Berhad	L
4	Etiqa Takaful Berhad	L
5	Great Eastern Takaful Sdn Bhd	F
6	HSBC Amanah Takaful (Malaysia) Sdn Bhd	L
7	Hong Leong MSIG Takaful Berhad	L
8	MAA Takaful Berhad	L
9	Prudential BSN Takaful Berhad	L
10	Sun Life Malaysia Takaful Berhad (formerly known as CIMB Aviva Takaful Berhad)	L
11	Syarikat Takaful Malaysia Berhad	L
12	Takaful Ikhlas Sdn. Bhd.	L

Moreover, the involvement of *sukuk* or the Islamic investment certificates or commonly known as Islamic bond (Wilson, 2004) has taken place to finance various sector in Malaysia. And the Securities Commission of Malaysia (2013) indicated that a sum of RM 71.1 billion of corporate *sukuk* has been approved, which constituted 68.8% from the total bond that has been approved in this country. Figure 3.1 shows the statistic of corporate *sukuk* approved in 2012.



**Figures 3.1:** Size of corporate Sukuk approved based on *Sharī'ah* principle in 2012

(Source: <http://www.sc.com.my>)

### 3.5.1. *Sharī'ah*-Compliant in Malaysia Construction Industry

Muslim population and their activities have increased by years, as well as the demands in those investment and financial related products that does not contradicting to the *Sharī'ah* due to the fact that the investor has become the part-owner of the business structure. This then has triggered the development of *Sharī'ah*-compliant investment product. (Khatkhatay and Nisar, 2007; Derigs and Marzban, 2008)

This norm has become evident with the existence of *Sharī'ah* screening practises in the commercial transaction as what has been discussed by Donia and Marzban (2010) that there are mechanisms used to assess whether the commercial transaction complying the *Sharī'ah* standards or not. Apart from this, the existence of different kind of *Sharī'ah* related service, especially in Malaysia, of Islamic Banking System

(IBS), *takaful*, *sukuk* and other variety of *Sharī'ah* compliant contracts, for instance, *bay' bithaman ājil* (credit sale), *bay' salām*, *istisnā'*, *ijārah* (leasing), *bay' dayn* (debt trading) and other (Nik Norzrul, Mohamed Ridza & Megat Hizaini, 2003; Mohamed Firdaus, 2007; Bank Negara Malaysia, 2007; Fernandez, 2007; Siti Nora Haryati, 2011).

This tremendous progress of Islamic banking and financial systems has brought positive effects to the other sector of economy including the construction industry (Siti Nora Haryati, 2011) that has employ products such as *bay' al-istisnā'* (manufacturing contract) and *sukuk* (debt security or Islamic bond) in financing the construction projects (Nik Norzrul, Mohamed Ridza & Megat Hizaini, 2003). Apart from that, it is evident that the industry has insured against risk through many products available under *takaful* schemes (Khairuddin, 2007). Islamic loan that has been provided by the Islamic bank to the construction sector has also shown a positive increment (Siti Nora Haryati, 2011).

According to the Malaysia news portal, The Star Online ([www.thestar.com.my](http://www.thestar.com.my)) dated 27<sup>th</sup> April 2012, Malaysia Airport Holdings Berhad (MAHB) has utilised its *sukuk* of the amount of RM 2.5 billion out of RM 3.1 billion allocated for Kuala Lumpur International Airport 2 (KLIA2) project. With such amount of *sukuk* used for such major project, it can be deduced that the awareness towards *Sharī'ah*-compliant construction financing is increasing and that there is positive attitude in accepting *Sharī'ah*-compliant product.

Moreover, according to the Security Commission (SC) of Malaysia, there are forty-eight (48) out of fifty (50) *Sharī'ah*-compliant securities in the construction market listed on Bursa Malaysia (Malaysian Index) as reflected in the Table 3.3 below.

**Table 3.3:** List of *Sharī'ah*-compliant securities on Bursa Malaysia as of November 2009 (Source: <http://www.sc.com.my>)

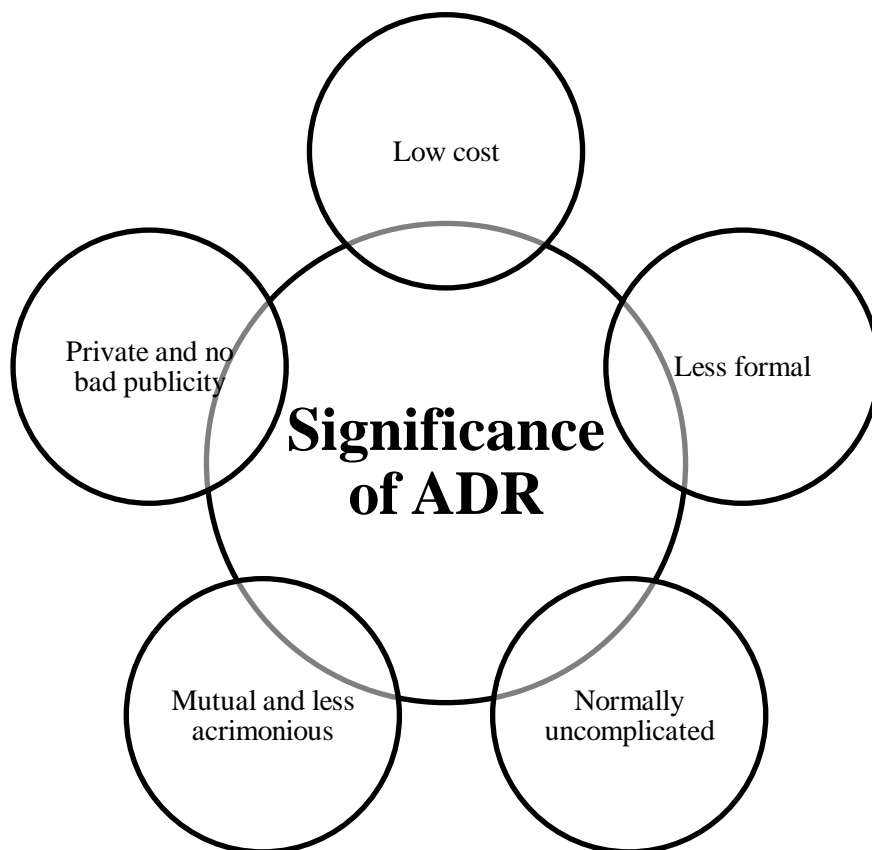
Main Market/ACE Market	<i>Sharī'ah</i> - compliant securities	Total securities	Percentage of <i>Sharī'ah</i> - compliant securities (%)
Consumer Products	126	135	93
Industrial Product	280	290	97
Mining	1	1	100
Construction	48	50	96
Trading/Services	171	199	86
Properties	73	88	83
Plantation	38	43	88
Technology	98	101	97
Infrastructure (IPC)	6	7	86
Finance	5	40	13
Hotels	Nil	4	Nil
Closed-end Fund	Nil	1	Nil
<b>Total</b>	<b>846</b>	<b>959</b>	<b>88</b>

Apart from all the practice of *Sharī'ah* related product in the industry, it is still vague on what is the *Sharī'ah* compliant construction industry really falls on. Although there is no definite term in defining “*Sharī'ah* compliant construction”, Khairuddin (2007) and Khairuddin and Siti Nora Haryati (2008) have coined the term as “any activity or affair which is made or done according to *Sharī'ah* rules and standards derived from its sources and does not contravene with the objectives of *Sharī'ah*.” This rendition has then set the basic idea of what is *Sharī'ah*-compliant in construction industry besides the technical practices and phrases that have already been explained. Therefore, a *Sharī'ah*-compliant in Malaysian construction industry may be inferred as – but not limited to – an activity in the field of architecture and civil engineering or any other sectors in Malaysia that involves the process of building, assembling

repairing and maintaining a structure which is done in accordance to the tenets of *Shari'ah* and does not infringing the objectives of *Shari'ah* from the commencement to the completion.

### **3.6. ALTERNATIVE DISPUTE RESOLUTION (ADR) IN *SHARI'AH* AND ITS SIGNIFICANCE**

Based on the definition of ADR in Chapter 2, the significance of the “conventional” Alternative Dispute Resolution to resolve disputes compared to litigation is summarised in the figure 3.2.



**Figures 3.2:** Significance of ADR

In Islam, the existence of *qadhi* is equivalent to the judge and *taqādh* or *khuṣumah* is equivalent to litigation, thus it can be inferred that the nature of the court, the complexity of the processes and technicalities are, too, equivalent. However, besides acknowledging that these impacts are mutually shared by the ADR in Islamic context, question arises whether if there are more to this. By looking at the nature of the Arabian Peninsula before Islam which can be described as barbaric where the segregated tribes were most likely to maintain justice based on personal vengeance and battles where the peaceful negotiations – usually facilitated by the soothsayers or *kahins* - only serve as instrumental method (Samir, 2006; El Ahdab and El Ahdab, 2011; Nora et. al., 2013). However, the advent of Islam has standardised the process of ADR with the essence of religious sanctity attached through fair and just procedures and that ADR is pervasive in nature (Syed Khalid, 2008; Nora et. al., 2013) whereby in Islam ADR is not auxiliary, where the amicable settlement is adapted to resolve important disputes which will be explained in the subsequent subtopics.

Therefore, the existence of ADR in Islam is clearly important. Apart from the significances shared with the “conventional” ADR, ADR in Islam is neither isolated from the system of justice nor being treated as subservient, unlike before the advent of Islam. The absence of ADR in Islam may cause the disputes to be referred only to *qadhi* and amicable settlement as promoted in the Quran may not be fulfilled.

### 3.7. *SHARĪ'AH-COMPLIANT ALTERNATIVE DISPUTES RESOLUTION*

Although there are no records showing that the term such as “Alternative Dispute Resolution” exist in Islam or Arabic language, ADR exist in its own unique way. The religion has promoted civil and trivial criminal disputes to be settled through negotiation, mediation, conciliation, arbitration or compromise which has been vindicated in both Quran and *Sunnah* (traditions) of the Prophet (PBUH). (Syed Khalid, 2006)

In Islam, ADR exists broadly in the principles of justice which has been promoted by *Sulh*, *Nasīhah*, *Muhtasib*, *Wali al-Mazālim*, and *Tahkīm*. (Syed Khalid, 2006; Syed Khalid. 2008; Md Zahidul, 2012; Nora et al., 2013)

It is a popular belief that ADR has emerged and originated in the West during the last few decades. But contrary to this belief, such ADR processes like Negotiation, Mediation, Arbitration, Expert Determination, Ombudsman and Med-Arab are as old as Islamic law itself, that is, 1400 years old. All of these have been not only mentioned in the Quran but were practised since the times of the Prophet, who was a great supporter of the idea of amicable settlement of disputes. Many historic evidences are available in support of this statement. ADR in Islamic Law occupies a high religious status because of the Quranic origin of *Sulh* (negotiation, mediation and compromise of action), *Tahkīm* (arbitration), a combination of *Sulh* and *Tahkīm* (med-arb), and *muhtasib* (ombudsman). (Syed Khalid, 2008)

Syed Khalid (2006) added that these practises are the norms laid in the Quran and the *Sunnah*. And the existence of ADR in Islam can be seen generally in some verses and narrations of *hadith*. These include:

*“In most of their secret talks there is no good: But if one exhorts to a deed of charity or justice or conciliation between men, (Secrecy is permissible): To him who does this, seeking the good pleasure of Allah, We shall soon give a reward of the highest (value).” (Al-Nisā’: 114)*

*“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things.” (Al-Nisā’:35)*

Narrated Abu Huraira: Allah's Apostle said, *“There is a sadaqa to be given for every joint of the human body; and for every day on which the sun rises there is a reward of a sadaqa (i.e. charitable gift) for the one who establishes justice among people.” (Al-Bukhari, Book of Peacemaking, Number 870)*

Narrated Urwa bin Az-Zubair: Az-Zubair told me that he quarrelled with an Ansari man who had participated in (the battle of) Badr in front of Allah's Apostle about a water stream which both of them used for irrigation. Allah's Apostle said to Az-Zubair, *“O Zubair! Irrigate (your garden) first, and then let the water flow to your neighbor.”* The Ansari became angry and said, *“O Allah's Apostle! Is it because he is your*

*cousin?"* On that the complexion of Allah's Apostle changed (because of anger) and said (to Az-Zubair), *"I irrigate (your garden) and then with-hold the water till it reaches the walls (surrounding the palms)."* So, Allah's Apostle gave Az-Zubair his full right. Before that Allah's Apostle had given a generous judgment beneficial for Az-Zubair and the Ansari, but when the Ansan irritated Allah's Apostle he gave Az-Zubair his full right according to the evident law. Az-Zubair said, *"By Allah! I think the following Verse was revealed concerning that case: "But no by your Lord they can have no faith until they make you judge In all disputes between them." (4.65) (Al-Bukhari, Book of Peacemaking, Number 871)*

These are some of many verses as well as the narrations extracted from the Quran and the *Sunnah* regarding the existence of ADR in Islam. The practise of amicable settlement is carried by the Prophet's successors. Syed Khalid (2008) mentioned that in a letter from the second Caliph, Umar Al-Khattab to Abu Musa Al-'Asha'ari who have been appointed as *Qadi*, contains several instructions about the administration of justice:

“All types of compromise and conciliation among Muslims are permissible except those which make *Haram* (unlawful) anything which is *Halal* (lawful), and a *Halal* as *Haram*.”

All of this has constituted that ADR in Islamic Law occupies a high religious status because of the Quranic origin of all the method of dispute resolution that can be found in conventional law. (Syed Khalid, 2008)

Thus, what comes into question is whether the mechanism of ADR that has been employed in the construction industry is complying with the tenets of *Sharī'ah*. Without abandoning the goods promoted by the current practise in the industry, it is believed that a new dimension to the practises of construction disputes resolution may be discovered by having *Sharī'ah*-compliant ADR implemented in the industry.

### **3.8. TYPES OF *SHARĪ'AH* DISPUTE RESOLUTION**

#### **3.8.1. *Sulh***

*Sulh* is etymologically derived from the word ṢA-LA-HA (صَلَحَ) which means to be good, right, proper, in order, righteous, suitable or appropriate; and lexically, it means peace, conciliation, reconciliation, settlement, compromise, peace-making and conclusion of peace (Nora et al., 2013) and the word *Sulh* used in Quran simply brings the meaning of mediation, conciliation and compromise (Syed Khalid, 2006). Syed Khalid (2006) further asserts that the meaning of *Sulh* is wide enough and inclusive of every mode of amicable settlement except arbitration; such as negotiation, mediation, compromise and conciliation.

The word *Sulh* has been mentioned in the Quran in various chapters and verses such as;

*The believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive mercy. (Al-Hujurāt:10)*

*In most of their secret talks there is no good: but if one exhorts to a deed of charity or justice or conciliation between men, (Secrecy is*

*permissible): to Him who does this, seeking the good pleasure of Allah, we shall soon give a reward of the highest (value). (Al-Nisā':114)*

*If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; Even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do. (Al-Nisā':128)*

Abdullah Yusuf Ali – the famous translator - has translated the meaning of *Sulh* in these verses as “conciliation”, and Syed Khalid (2006) concluded that the word *Sulh* in Quran means mediation, conciliation and compromise. And it is evident that *Sulh* is a method favoured by Allah, as stated in the verse 128 of Surah al-Nisa': “and such settlement (*Sulh*) is the best.”

Although the context of the verse is related to marital dispute, Ibn ‘Ashur argued that the concept of *Sulh* can be generalised in all case and that it is not exclusive for marital dispute. (Nora et al., 2013)

### **3.8.2. Tahkīm**

*Tahkīm*, as what is defined in the typical modern Arabic-English dictionary, literally carries out the meaning of arbitration. It is derived from root word of HA-KA-MA (حَكَمَ) which means to judge or to arbiter. The concept of *Tahkīm* will be further explained in Chapter 4.

### **3.8.3. *Muhtasib***

*Muhtasib* or مُحْتَسِب is equivalent to ombudsman in today's world. In Islam, the function of *hisbah* as the superintendent to the account record and take the responsibility of on the spot weight checking as well as measurement, the qualities of the items, as well as of the assessment on the honesty of the dealing, its modesty and the general behaviour of people. (Stone, 1977; Syed Khalid, 2006; Nora et al., 2013)

The early function of *hisbah* is primarily related to oversee the market affairs, the maintenance of the mosque, as well as the municipal affairs. And since then, the role of *muhtasib* has become formalised and proactive. (Stone, 1977; Syed Khalid, 2006; Nora et al., 2013)

### **3.8.4. *Wali al-Mazalim***

*Al-Mazālim* is a form of 'extraordinary justice' that illustrates as a type of superior justice which is not determined by any precise and fixed rules that can be carried out by individuals, administration or a group (El Ahdab and El Ahdab, 2011) and the term *Wali al-Mazālim* refers to the chancery or special tribunals, or in the Kingdom of Saudi Arabia is known as Board of Grievances (Baamir, 2010) – 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 that may not be settled through *Sulh*, for example embezzlement by public officer (Md Zahidul, 2012; Nora et. al., 2013).

### **3.8.5. *Fatwā of a Mufti***

*Fatwā* refers to is a technical term that refers to the "legal judgment or learned interpretation" given by a qualified jurist or a mufti on issues related to the *Sharī'ah*

(Hallaq, 2004). Essentially *Fatwā* is a religious ruling, however within the context of dispute resolution and conflict avoidance, *Fatwā* serves and is likened to the expert determination, where the disputed parties recourse to an impartial-neutral third party with knowledge to end their dispute – which in this case a mufti – and the nature of *Fatwā* as advisory and “non-binding evaluative opinion” is similar to the expert determination (Syed Khalid, 2008; Md Zahidul, 2012; Nora et. al., 2013).

### 3.8.6. Summary

Table 3.4 shows the summary of the types of ADR in Islam.

**Table 3.4** Summary of the types of ADR in Islam

<b>Types of ADR in Islam</b>	<b>Equivalent</b>	<b>Characteristic</b>
<i>Sulh</i>	Mediation	<ul style="list-style-type: none"> <li>- Derived from the word ṢA-LA-HA which means to be good, right, proper, in order, righteous, suitable or appropriate</li> <li>- Lexically, it means peace, conciliation, reconciliation, settlement, compromise, peace-making and conclusion of peace</li> <li>- The word <i>Sulh</i> used in Quran simply brings the meaning of mediation, conciliation and compromise</li> <li>- The word <i>Sulh</i> has been mentioned in the Quran in surah al-Hujurat:10, al-Nisa':114 &amp; 128</li> <li>- Concept of <i>Sulh</i> can be generalised in all case and that it is not exclusive for marital dispute</li> </ul>
<i>Tahkīm</i>	Arbitration	<ul style="list-style-type: none"> <li>- Derived from root word of HA-KA-MA which means to judge or to arbiter</li> <li>- Derived from the concept of ‘<i>adl</i> or justice</li> <li>- Would appear similar to the concept of conventional arbitration where both hold the core intention to resolute dispute between the parties</li> </ul>
		<ul style="list-style-type: none"> <li>- In al-Quran ruling of <i>Tahkīm</i> is stated in <i>al-Nisaa</i> verse 35 and 65</li> <li>in Sunan Abi Dawud, the Prophet is amazed with what Hani bin Yazid has done – to arbitrate the disputed among his people</li> </ul>

<i>Muhtasib</i>	Ombudsman	<ul style="list-style-type: none"> <li>- The function of <i>hisbah</i> as the superintendent to the account record</li> <li>- 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.</li> </ul>
<i>Wali al-Mazalim</i>	Chancery or special tribunals	<ul style="list-style-type: none"> <li>- 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</li> </ul>
<i>Fatwā</i> of Mufti	Expert determination	<ul style="list-style-type: none"> <li>- The disputed parties recourse to an impartial-neutral third party with knowledge to end their dispute – which in this case a mufti</li> <li>- The nature of <i>Fatwā</i> as advisory and “non-binding evaluative opinion”</li> </ul>

### 3.9. CONCLUSION

This chapter has established the knowledge on the *Sharī’ah* and the concept of *Sharī’ah*-compliant and has explained about the *Sharī’ah*-compliant ADR, namely *Sulh*, *Tahkīm*, *Muhtasib*, *Wali al-Mazalim*, and *Fatwā* of Mufti.

This chapter starts with the definition of *Sharī’ah* followed by the discussion on the evidences of *Sharī’ah* in the Quran and the Prophetic tradition (*Sunnah*). And then the discussion advanced with the concept of *Sharī’ah*-compliant in Malaysia and in the construction industry. This chapter proceeds with the explanation on the *Sharī’ah*-compliant or *Sharī’ah*-based ADR to set the understanding towards this concept and set out the further discussion on *Tahkīm* in the subsequent chapter.

## CHAPTER 4

### ***TAHKĪM (SHARĪ'AH-MODELLED ARBITRATION)***

#### **4.1. INTRODUCTION**

*Tahkīm*, as what is defined in the typical modern Arabic-English dictionary, literally carries out the meaning of arbitration. However, Oseni (2009) refer *Tahkīm* as, “the Islamic law model of arbitration.” This has introduced and differentiates the definition of *Tahkīm* or *Sharī'ah*-compliant arbitration from the conventional arbitration.

In the light of this matter, this chapter will report about what is *Tahkīm* in Islam in general and then draw the explanation on the principles of arbitration according to Islamic jurisprudence supported by approved evidence from the Quran and *Sunnah* as well as the other methodology such as *Ijma'* and *Qiyas*. This includes the explanatory statement from scholars regarding the practice of *Tahkīm* from the classical perspective to gives an insight to the meaning of *Tahkīm* and its *modi operandi*.

And in detail, the chapter will outline the definition, linguistically and scientifically, and the concept and scope of *Tahkīm* to set the basis on the processes involved in its procedural which will be reproduced to assist in preparing the comparison between conventional arbitration with *Sharī'ah*-compliant arbitration, *Tahkīm*.

## 4.2. DEFINITION OF *TAHKĪM*

### 4.2.1. Definition of *Tahkīm* from language perspective

*Tahkīm* or تحكيم is derived from root word of HA-KA-MA (ح - ك - م) which means to judge or to arbiter while the word *hakam* (حَكَمَ) refers to arbitrator. In the dictionary of Al-Mawrid by Baalbaki (1995), the word تحكيم and all of its related terms refers to the mean of arbitration and its subsidiaries.

Oseni (2009) in citing from Abdul Karim Zaidan's book, *Nizaam Al-Qadā'a* explained the lexical meaning of *Tahkīm* as "to entrust adjudication to someone else".

The Kuwait Ministry of Religion and Islamic Affairs (2010) in *Al-Mausuuah Al-Fiqhiyyah Al-Kuwaitiyyah* (The Kuwaiti Encyclopaedia of Fiqh) states that *Al-Tahkīm* or التحكيم in the light of language means authority given to a person to judge in all matters, in example, to compose the rules and which the power to do so is delegated to him. And among other meaning of *Tahkīm* is *al-hukm* (الحكم) which means to judge or to arbitrate between two disputing parties, and to give judgement to both parties.

### 4.2.2. Definition of *Tahkīm* in *fiqh* (Islamic jurisprudence) perspective

In traditional terminology, *Tahkīm* means to inaugurate between two disputed parties with a judgement that governs on both of them. Samir (2006) however indicates that it is usually generally viewed as "treaties or treated cursorily" which normally described as lawful substitute of another man instead of an ordinary *qadi* to administrate justice.

Oseni (2009) in citing from Abdul Karim Zaidan writes that, "In the juristic sense, *Tahkīm* means the reference or submission of a dispute by two or more parties to a third party neutral for adjudication according to Islamic jurisprudence."

Samir (2006) identified that, “Arbitration as what described in *Sharī’ah* texts as the spontaneous or more or less improvised move by two people or more parties in a dispute to a third party called *Hakam* (arbitrator).”

*Tahkīm* could also be defined as an agreement between two or more parties to give mandate to arbitrate regarding their conflict to the third party, which may be an individual, or more, with a binding judgement. (Al-Zaid, 2004)

To define *Tahkīm* and in comparing it with *qada’* or judicial, Al-Zaid (2004) states that; “*Tahkīm* is a secondary judgement or substitute of *qada’*. And this defines the jurisdiction of *Tahkīm* as the subordinate of *qada’*. This means that the jurisdiction of *Tahkīm* is lower compared to the jurisdiction of *qada’* and a *Hakam* (arbitrator) possesses less power, and lower rank compared to a judge thus his ruling is inferior compared to a judge ruling.”

In the light of this matter, it can be understood that *Tahkīm* in Islamic jurisprudence refers to the occasion where two, or more disputed parties to refer their disagreement to a third party who will amicably resolve upon their dispute.

And the disagreement is to be resolved in accordance to *Sharī’ah* law in procedure and essentially regardless the dispute is extrajudicial or pending before court. (Samir, 2006)

The terminologies of *Tahkīm* as what that has been referred and explained construct the main idea of what *Tahkīm* is as well as the conditions and its nature.

### 4.3. MAIN CONCEPT OF *TAHKĪM*

*Tahkīm* is derived from the concept of ‘*adl* or justice, which to resolve dispute and bring peace, where it inherits the fragment of dispute resolution practice before the reign of Islam. El Ahdab and El Ahdab (2011) explain that, “The organised judicial power there was a tribal justice administered by the chief of the tribe in a form adapted to their elementary way of life. The Arabs of the *Jahiliyya* (pre-Islamic period) knew arbitration because adversaries whether individuals or tribes usually resorted to arbitration in order to settle their disputes.”

*Tahkīm* would appear similar to the concept of conventional arbitration where both hold the core intention to resolute dispute between the parties.

There are two views on the topic, where the first signifies *Tahkīm* as a form of conciliation which is close to ‘amiable composition’ that is not binding on the party. And the second brings the view where if one is given the power to judge, consequently he is authorised to make a binding judgements, thus the arbitral decision settle disputes and must be binding upon the parties. (El Ahdab and El Ahdab, 2011)

These two concepts are derived from the verse of Quran. The first concept was depicted from the verse 35 of *Surah Al-Nisaa*’ while the latter was from the verse 58 of the same *Surah*.

However, despite these concepts suggested, there are no school of thoughts in Islam that have clear attitude towards this notion although there are a lot of opinions generated among them. (El Ahdab and El Ahdab, 2011)

And Faisal Maulawi (2003) states that before the twentieth century, the function of *Tahkīm* is as the peacemaker between the disputed parties and to conciliate them, but it is not binding as the *qada' al-rasm* (official litigation).

Thus the main concept of *Tahkīm* is laid on conciliation of the disputed parties; where the concern is create peace upon the judgement of the *Hakam* (arbitrator).

#### **4.4. CONCEPT OF *TAHKĪM* IN ISLAMIC JURISPRUDENCE**

For *Tahkīm* to be adopted in Islam and in the concept of *Sharī'ah*, its legitimacy needs to be referred to the affirmative evidence that is derived from the primary sources. As what is defined by Oseni (2009), "Arbitration, as a prescribed mechanism for resolving disputes, finds ample support in the primary sources of Islamic jurisprudence."

##### **4.4.1. Arbitration according to Quranic text**

In the Quran the ruling of *Tahkīm* is stated in *Al-Nisā'* verse 65;

*"But no, by your Lord they can have no faith until they make you (O' Muhammad) judge in all disputes between them."*

Al-Sa'di (2001) in explaining this verse said that Allah has sworn by His own name that they are not a believer until they make the Prophet as the arbitrator in their disagreements.

Then Allah has sworn with His own holy name that they are not among the believers until they've make the Prophet as the arbitrator in disagreement among them, i.e. in every disputation, which the disputation

concerns with public affairs, of it can only be resolved based on the Quran and *Sunnah*, and the arbitration will not consider as completed until the hardship has been reduced and resolved, and they are govern by it. And those arbitration will not suffice until they submit to the rule issued and recognised it exuberantly, with feel of peace, and to abide by it physically and mentally.

Arbitration is the key of Islam, and the reduction of hardship (among the two parties) is the key of faith, and to feel in peace with the decision is the key of charity. And those who completed these three steps will suffice the arbitration, and those who completed it, he complete his religion. And those who leave the mentioned arbitration and not to commit by it, he is an infidel. And whoever abandons it, and adhere (to his will to abandon it), for him the rules of those like him among the rebellious.

Another is the verse 35 of the same *surah* (chapter) which mentions arbitration;

*“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things”*

Al-Qurtubi (d. 1273) (2010), the famous *mufassir* (commentator) of the Quran said, “This is the verse that vindicates the practice of arbitration.”

And for this verse, it is described by Al-Sa’di (2001) that the characteristic of the two umpires appointed as; “Two *mukallaf* (accountable) man, Muslim, fair, intelligent, and have knowledge on what happened between the couple, and have sensible mind. And

these are the basis of the word *al-Hakim* (arbitrator, or judge) because he will not be qualified to arbitrate unless he possesses those characteristic.

Abdullah Ibn Abbas (May Allah have mercy on him), the companion of the Prophet and the prodigious commentator of the Quran commented, on this verse as; “If they resulted with treaty, Allah will reconcile them.” And Al-Tabari (d. 923) (1999) in relation to the saying said that, “This is the wisdom, and for every peacemaker will be rewarded by Allah for his righteousness and truthfulness.”

#### **4.4.2. Arbitration according to the *Sunnah* and the Companion’s Consensus**

Narrated Hani ibn Yazid as reported in Sunan Abi Dawud:

When he went with his delegation to the Apostle of Allah (PBUH), he heard them calling him by his kun-yah (surname), Abu Al-Hakam. The Apostle of Allah (PBUH) called him and said: “Allah is the judge (*Al-Hakam*), and to Him the judgment belongs. Why are you given the kun-yah Abu Al-Hakam?” He replied: “When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision.” The Prophet said: “How good this is! What children have you?” He replied: “I have Shurayh, Muslim and Abdullah. He asked: Who is the oldest of them?” He replied: “Shurayh.” He said: “Then you are Abu Shurayh.”

In this *hadīth*, the Prophet is amazed with what Hani bin Yazid has done – to arbitrate the disputed among his people – and this can be considered as recognition from the Prophet when he give compliment to Hani.

Muhammad Shams Al-Haq Al-Azim Abādi (d.1901) (1994) when commenting the expression given by the Prophet in *'Aun al-Ma'bud Syarh Sunan Abu Dawud* said; “And it was expressed in form of exaggerated astonishment in (hearing) what he has done.”

During the battle of *Khandaq* (trench), the people of *Quraiza*, a Jewish tribe in Medina, has breach their agreement with the Muslim of Medina, whether to help them defend Medina or remain neutral. However the Jewish of Quraiza then breached this agreement and helped the besiegers from Mecca and other Jewish tribes to attack and conquer Medina. This has caused the Muslim, led by the Prophet to response and besieges them. After a long period of warfare, the Muslims were able to conquer their fort and seize the people. The prophet has ordered for the man to be handcuffed and women and children to be isolated in a confinement. The tribe of al-Aws has begged for the Prophet to be lenient towards the Quraizas. They agreed to appoint Sa'ad bin Mu'az, a former ally of the tribe to give verdict on them. (Mubarakfuri, 1996)

Narrated by Al-Bukhari and Muslim from Abu Said al-Khudri, he said that;

The people of Quraiza only to accept the decision of Sa'ad bin Mu'az upon them. Accordingly, the Messenger of Allah sent for Sa'ad who came to him riding a donkey. When he approached the mosque, the Messenger of Allah said to the people of Ansar: Stand up to receive your chieftain. Then he said (to Sa'ad): These people have surrendered to only accept your decision. Sa'ad said: Kill their soldiers and capture their women and children. (Hearing this), the Prophet said: You have adjudged by the command of God. The narrator is reported to have said: Perhaps he said: You have adjudged by the decision of a king.

It is recorded by Muslim in the chapter of Justification For Killing Those Guilty Of Breach Of Trust And Making The People Of The Fort Surrender On The Arbitration Of A Just Person.

Ibn Hajar Al-Asqalany (d. 1449) (2009) in *Fath Al-Bari* described that; “In this hadīth the arbitration is the best of the best (method).” While Al-Nawawi (d. 1278) (2010) in *Syarh Sahih Muslim* said that;

In (this *hadīth*) is the legality of (the act) of arbitration upon the matters of the Muslims and it has big significance and indeed that the Muslim agreed upon it and there are no argument (upon this) among them except for the *al-Khāwarij*.

#### **4.4.3. Arbitration according to the consensus of the Muslim Jurists**

Nora et. al. (2013) has indicated that Al-Ṭarāblisī has reported in Mu’in Al-Hakkam that:

“A settlement of a dispute by a third party, where the parties have voluntarily agreed to submit their dispute to *Tahkīm*; has been recognised in the Quran, Sunnah as well as the consensus of the *ummah*.”

#### **4.5. HISTORY OF *TAHKĪM***

Living in the desert is all about the ‘law of the jungle’ without any law enforcer and without judge to administrate the jurisdiction. It is what mentioned by El Ahdab and El Ahdab (2011) as ‘a system of personal vengeance’. There is no central power to administrate justice among the disputed people.

However, the strongest opinion is that the tribal order of each is used as reference. This is what as shared by El Ahdab and El Ahdab (2011) where he stated that, “The pre-Islamic Arabs did not have a true judicial power which would be entitled to settle disputes, to ensure the rights were respected and to put an end to anarchy.”

And Faisal Maulawi (2003) states that the practise of “arbitration in pre-Islamic Arabs is voluntary.”

It is legitimate to say that arbitration is among the pieces from practice of pre-Islamic Arabs that is inherited and practiced in Islam. In the scope of *Usul Al-Fiqh* (foundation of Islamic science), it may be included under the provision known as *syar'u man qablana* or ‘law of the people before us (Islam)’ which expressed the legitimacy to exercise the practice of pre-Islamic people as long as it is not opposing and complying the rights outlined by *Sharī'ah*.

Arbitration in Islam went all way back before reign of Islam. The most popular case that related to the Muhammad himself occurred long before him being a prophet. Mubarakfuri (1996) recorded the case of dispute among the tribe chieftains on who should place the sacred Black Stone or *Hajar al-Aswad* after the *Kaaba* has been rebuilt. In this case, the Prophet himself became an arbitrator between the disputed tribes. During the dispute, the chieftains have agreed that the first person that walks into the Sanctuary will be the arbitrator. And it is the Prophet who entered and he is chosen, and all of the chieftains agreed to abide by the Prophet’s decision as his reputation is appreciated among the clans.

The Prophet then, came up with a decision to put the Black Stone on a piece of cloth, while the representative of every clan will carry each end of the cloth jointly to its

place, and the Prophet himself to lay it in the proper place. This decision reconciled the chieftains thus managed to prevent bloodshed among them.

Perhaps, the most popular arbitration case in Islam is *Majlis Tahkīm* between Ali bin Abi Talib, the successor of the Prophet and Muawiyah bin Abi Sufyan, the governor of Syam (now Syria). The arbitration occurred after the war of *Siffin* between both sides which resulted bloodshed among Muslims at that time. Ali and Muawiyah agreed to enter into arbitration to stop the massive blood spill due to the civil war. (Al-Sulami, 2001)

They have made an agreement to step into arbitration, and they have agreed that they will be presented by a representative from both sides. Group of Ali bin Abi Talib will be represented by Abu Musa al-Asy'ari and Muawiyah will be represented by 'Amru bin al-'Ash.

They have agreed that both of the sides will remain in peace and the public will protect them on their decision and what they agreed in the arbitration. And for the Muslims from the both sides to respect the agreement made in the name of God, and for them to accept what have been decided.

Al-Sulami (2001) described that, "Abu Musa al-Asy'ari was chosen because of his ability of which he is full of knowledge, his experience in giving judgment, he did not related the *fitnah* (means that he did not known to support either sides), (which resulted him as neutral) and with that he is expected to give the judgment objectively."

#### 4.6. *TAHKĪM* ACCORDING TO THE FOUR MAJOR SCHOOL OF THOUGHTS

There are four major school of thoughts in Islam, which are; Malikis, Hanbalis, Shafi'is and Hanafis.

*Tahkīm* is usually mentioned or included in the topic of justice or judgement. This is supported by Samir (2006) who said that it is; “usually in a chapter of *qada'*.”

Thus, the inclusion of this topic under the chapter of *qada'* - as what is explained by Al-Zaid (2004) – because *Tahkīm* is the branch of *qada'*.

El Ahdab and El Ahdab (2011) in his book includes a detail opinion on *Tahkīm* by the four major doctrines where he states that the Hanafis holds the opinion that the arbitration is legal as Quran, *Sunnah*, *Ijma* and *Qiyas* authorised it. The Shafi'is said that it is legitimate for the disputed parties to appoint an ordinary man in order to settle disputes among them. The Malikis have such a trust in the *Tahkīm* where they accept if one of the parties to be the arbitrator, if the second party agreed. And so as the others, the Hanbalis also hold that a decision made by an arbitrator is binding as one that is made by a judge.

On the contrary, it is can be induced that the opinions may still be reviewed as whether or not the arbitration is legitimate, there might be disagreements between the scholars.

Al-Zaid (2004), for example, happened to say that the scholars from Malikis, Hanbalis and Hanafis said that it is lawful while some of the *fuqaha* (jurist) of Shafi'is and renowned scholar such as Ibn Hazm said that it is not. However, recent scholars of the Shafi'is agreed with the majority and said that it is *Ijma'* (consensus) upon the

lawfulness of *Tahkīm* according to dictum of al-Nawawi upon the hadīth, “In (this hadīth) is the legality of (the act) of arbitration upon the matters of the Muslims and it has big significance and indeed that the Muslim agreed upon it and there are no argument (upon this) among them except for the *Khawarij*.” And they have said that this is the correct opinion of the (Shafi’is) school.

Thus, it is to be acknowledged that the *jumhur* (majority) of scholars agreed on the lawfulness of *Tahkīm* to be implemented in Muslim’s affairs.

#### **4.7. TAHKĪM IN CONSTRUCTION INDUSTRY**

The availability of the subject of ‘Islamic construction arbitration’ or ‘construction *Tahkīm*’ is scarce, vague and uncertain. This is caused by the unawareness of such subjects in the Middle Eastern countries. Nevertheless, it is not mentioned specifically in the classical references. Most of these countries did not put definite indication pertaining to this subject. However, the disputes arise in the construction industry are usually referred in the topic of commercial *Tahkīm*. (Oseni, 2011)

Thus, in determining the concept and procedurals of *Tahkīm* in the construction area, it is deemed to be referred to the concept of the commercial *Tahkīm* that legally bind on all commercial trades dispute.

However, these countries did not develop any sustainable ideas on this subject and did not disclose the materials regarding to the construction disputes that have been determined by *Tahkīm*. Nonetheless, to distinguish which of these countries that implemented arbitration law or act that is fully comply with the *Sharī’ah* is still unclear and uncertain. (Samir, 2006; El Ahdab and El Ahdab, 2011)

Therefore, it may be implied that these countries are having an issue on the implementation of arbitration law that is fully complying with the *Sharī'ah* requirements.

#### **4.8. *TAHKĪM* AND ARBITRATION IN SAUDI ARABIA**

Saudi Arabia however employs the arbitration law that fulfil the major requirements of the *Sharī'ah*. This is due to the fact that the 'common law' of Saudi Arabia is the *Sharī'ah* where the *Sharī'ah* courts will handle the common jurisdiction. On the other hand, the Kingdom did recognise the 'Board for Settlement of Commercial Disputes' which has replaced the previous Commercial Courts, and has jurisdiction over the commercial disputes. (El Ahdab and El Ahdab, 2011)

The arbitration system in Saudi Arabia is based on Arbitration Act 1983 (Royal Decree No. M/46 dated 1983) and implementation rules of 1985 by Council of Ministers Resolution (No.7/2021/M) which outmoded the previous law of arbitration in Saudi Arabia; the Commercial Courts Act (Al-Oufi, 2011; El Ahdab and El Ahdab, 2011). Currently, the latest Law of Arbitration is been used in Saudi Arabia pursuant to the Royal Decree No. M/34 dated on 16/4/2012 by the King Abdullah ibn Abdulaziz Al-Saud. This new Arbitration Law is based on UNCITRAL Model Law (Finizio and Howitt, 2013) which is similar to the Arbitration Act 2005 that used the same model law as basis.

El Ahdab and El Ahdab (2011) describes that the 'Saudi legal thinking' is discerned by the influence of *Sharī'ah*, and although some of the writers, including Samir Saleh, described that the new Saudi Arbitration Act did not incorporated the *Sharī'ah* values

in its practice, this view is seen to be incorrect to the analysis of El Ahdab and El Ahdab, because of the nature of *Sharī'ah* that is ample with perspectives and ideas that produce many contemporary design of thoughts which are difficult to be argued as 'non-*Sharī'ah*', except for rules that have been made compulsory by the Quran and *Sunnah*.

And the latest KSA Arbitration Law has proved that *Sharī'ah* is a major part to the Saudi Arabia's law system with the Article 2 has cited with certain that the provisions of the law is "without prejudice to provisions of Islamic *Sharī'ah*" and Article 14 highlighted that the arbitrator shall possess "of at least a university degree in *Sharī'ah* or law."

Meanwhile, the construction and development industry is among Kingdom's 'core businesses'. Thus, in such environment, it may be assumed that disputes are deemed to occur. This presumption is supported by the fact that the Saudi Council of Engineers or SCE is highly committed in discussing the implementation of arbitration derived from the FIDIC form of contract that is widely used in the Kingdom. In conjunction to the vast development of the Kingdom, the SCE in recent years has organised the Engineering Arbitration Conference.

In 2009, the Third Conference of Engineering Arbitration has been held at Hilton Hotel in Jeddah, under the slogan "Arbitration engineering and its impact on national development". This conference have discussed mainly on the three important objectives which are; the reality of arbitration in Saudi Arabia, highlighting the importance of engineering arbitration to settle disputes, and proposing mechanisms to expand the application of arbitration contracts. And among other topics discussed are the ways and methods of arbitration to resolve disputes, engineering arbitration

obstacles and its treatment, the role of technical expert in arbitration, comparison of the engineering arbitration issues and its applications from the perspective of *Shari'ah*. (Saudi e-Government National Portal, 2009)

The conference focus on the interest of the SCE in the scope of engineering arbitration, and its commitment to develop the facility and performance and the qualifications of the arbitrators, corresponding with the developments in the Kingdom and the engineering sector where 51 cases of arbitration were referred to the SCE. Abdul Rahman Bin Abdul Aziz Al-Rabeeah, Chairman of the Board of Directors of the Saudi Council of Engineers said that, “This conference aims to shed light on the developments in the area of arbitration in the current phase where there is a major acceleration in the volume and type of construction and development projects in the Kingdom.” (AlSaudiArabia.com, 2009)

According to what has been presented in the conference, the focus of the construction arbitration in Saudi Arabia is mainly related to the role and power of the engineers in such cases if disputes occur, highlighted in the clause 67 of FIDIC for Civil Engineering Construction 1987 or the ‘FIDIC Redbook’ 1987, which seems to be having a limitation. First is because of the fact that the engineer is employed by the client, which may affect his judgment during the dispute settlement. Second, is the fact that many disputes occurred usually caused by the crisis between contractor and architect, who is the representative of the client, which may cause conflict of interest to the engineer since he is appointed by the client. (Hamzah Ahmed, 2009)

And in 2010, مركز تحكيم هندسي or the Engineering Arbitration Centre has been established in Riyadh, Saudi Arabia to facilitate arbitration in the construction and engineering industry of the Kingdom. (Al-Haidar, 2010)

#### **4.9. ISLAMIC ARBITRATION IN MALAYSIA AND KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRCA) i-ARBITRATION RULES 2012**

Islamic arbitration is not new in Malaysia, however its scope was only limited to administration of the family law under the *Sharī'ah* Court where the Malaysian Islamic Family Law (Federal Territory) Act 1984 allows a provision for “arbitration by *hakam*” under the Section 48 of the Act (Nora, 2006). And in October 2011, Kuala Lumpur Regional Centre for Arbitration (KLRCA) has implicitly informed that they are working on a new set of Islamic Arbitration Rules and that it will be ready in 2012 (Rajoo, 2011) and in September 2012, it is announced that KLRCA is unveiling their i-Arbitration Rules 2012 at the Global Islamic Finance Forum; with the “i” prefix is to indicate *Sharī'ah* compliance (Hodges et al., 2012; Spalton, 2012). The KLRCA Director, Sundra Rajoo (2013) in an interview explains that the need of the i-Arbitration Rules is due to the growth of the *Sharī'ah*-based commercial transaction especially in the Islamic finance and *halal* product industry; whereby it is expected that the disputes will also increase in these sectors, thus the i-Arbitration Rules 2012 fits into the picture where the parties who employ *Sharī'ah*-related contracts may resolve their dispute in confidence. In the same article, he also mentioned that:

“Resolving disputes using *Sharī'ah* -based arbitration rules is actually not too different from its conventional counterpart, and dispute settlement in both cases should also be comparable. Our hope is to give business parties the assurance and confidence that arbitration using the i-Arbitration Rules would give the same benefits – privacy and confidentiality, the flexibility

to choose their tribunal as well as *Sharī'ah* expertise, and international enforceability.”

It can be inferred that the main focus of the rules is on the Islamic finance as well as the halal food industry. Mixed comments received in regards to the introduction of the i-Arbitration Rules by KLRCA. Hodges et al. (2013) for instance, has commented on the broad wording used in the Rule 8 and the discrepancy in Rule 13.

#### **4.10. SCOPE OF *TAHKĪM* AND ITS ELEMENTS**

##### **4.10.1. Scope of *Tahkīm***

For *Tahkīm* to be implemented in the construction industry it is crucial to identify the scope of *Tahkīm* and on what type of cases that it could governs.

Basically, on the affirmative references presented, it could be indicated that *Tahkīm* is usually employed in the matter of family dispute, or tribal crisis, which point that *Tahkīm* too, is applied in the Muslim public affairs.

On the contrary, it is to be highlighted that *Hakam* (arbitrator) is not a *qadi* (judge), which means that there are different between *Tahkīm* and *qada'* which Al-Zaid (2004) mentioned that ‘both – *Tahkīm* and *qada'* – stands in different region of jurisdiction.’

The main elements that differentiate the scope of *qada'* and *Tahkīm* is the nature of *qada'* that it is determined and inaugurated by the ruler of an authoritative body, for example, the ruler of a government or country because *qada'* remains as rights of the nation, or government on the basis of *al-fasl fi al-nazā'at* (arbitrament) and *hamaayatu al-huquuq* (safekeeping of the rights). And as stated by Al-Zaid (2004); “it

features the nation sovereignty that differentiates it from *Tahkīm* which can be classified as secondary judgement or substitute of *qada'*.”

This provides the basic idea that *Tahkīm* may not intervene in the areas that are govern to be decided by *qadi*. As such, it is to be understood that *qada'* refers to the establishment of judgement in divine law while *Tahkīm*, as stated by Oseni (2009), governs the principle of ‘private or individual rights’.

In Islam, the private or individual rights is differentiated from the public right by defining their core principles. The ‘public rights’ or *huquuq Allah* includes the fixed punishment or *hadd* or *hudud* which is beyond the jurisdiction of *Tahkīm*. (Oseni, 2009)

While *Tahkīm*, as according to the majority of the Hanafis, valid to all matters which as long did not involve *Sharī'ah* fixed punishments (*hudud*) or criminal sanction (*Qisas*) and only confined to private or individual rights (*huquuq al-Ibad*) which may include – what has been explicitly authorised – marriage disputes, sale, loan and guarantee contract. (Samir, 2006)

Al-Nashmi (2000) said that: “The scholars agreed on unacceptability of *Tahkīm* in the context of *Qisas* as well as unlikely because both are restricted under *haqq Allah* which exclude the practice of *Tahkīm*, but it is permitted under the context of *haqqliadmii* (the rights of human being).”

In conjunction to that, the Malikis allow *Tahkīm* to be applied in all financial cases and compensation cases. While the Shafi’is and majority of Hanbalis permit *Tahkīm* in all financial matters. (Samir, 2006)

On the contrary, there are matters which are prohibited to be entered into *Tahkīm* according to the major doctrines. Malikis prohibit *Tahkīm* in *hadd* (*Sharī'ah* fixed punishment), *li'an* (conjugal anathema), homicidal cases, guardianship, and divorce, while the Shafi'is restricted the action of *Tahkīm* in area of *hadd* (*Sharī'ah* fixed punishment), *ta'zir* (judicial determined offence) and in marriage. And Hanbalis forbid *Tahkīm* in *qadzaf* (false allegation), *ta'zir* (judicial determined offence) and *li'an* (conjugal anathema). (Samir, 2006)

Oseni (2009) in summarising this issue stated;

Without entering the arena of controversy of jurists as regards the classification of the respective issues that are arbitrable under the law, it is appropriate to state that the following issues are regulated by specific provisions in the primary sources and thus excluded from arbitration: *li'an* (conjugal anathema), *nasab* (paternity), *talaq* (divorce), *'itq* (manumission of slaves), *faskh nikah* (judicial annulment of marriage), *mafqud al-khabar* (a missing person), *waqf* (endowments), *safih* (an imprudent), *rushd* (age of discretion), *wala'a* (guardianship).

Accordingly, it is fair to say that the scope of *Tahkīm* may govern all affairs related to commercial and proprietary transactions to the extent that it does not intervening the matters as described above.

#### **4.10.2. Main elements of *Tahkīm* agreement**

For *Tahkīm* agreement to be valid, there must be certain criteria, or elements, or requirements to be exist. Oseni (2009) defines that the nature of *Tahkīm* as 'sui

generis' which resorted the *Tahkīm* agreement to be inviolable thus it set the basic principle for the subsequent proceedings.

However, *Tahkīm* agreement is not necessarily to be part of existing contract. As such, it is a distinct contract that the parties may conclude due to, or when disputes arise. (Oseni, 2009, pp. 75)

Samir (2006) compiled the main elements in *Sharī'ah* that are required as follows;

- i. Existence of the dispute, regardless of it is pending before the court, or not;
- ii. Consent from the parties to refer the dispute to *Tahkīm*;
- iii. The appointment of a *Hakam* (arbitrator) which is qualified under *Sharī'ah* to determine the dispute.

And Oseni (2009) has cited the similar conditions from the Article 1848 of *Medjella* – Islamic Code of Law of the Ottoman Empire – which stated that;

- i. The dispute must have arisen and clearly defined.
- ii. The parties must have agreed to arbitration by reciprocal offer and acceptance and they must say the following to the arbitrator: “Proceed to an arbitration between us because we have appointed you as an arbitrator”.
- iii. The arbitrator must be appointed by name. If the parties agree that the arbitrator shall be, for example, the first person encountered in the street or the first person to enter into the mosque, then the arbitration is void.
- iv. The arbitrator must have the capacity to be a witness.

Samir (2006) also indicated that, “there are no rules governing the terms and conditions of *Tahkīm* agreements such as time-limits or their extension, remuneration of arbitrators, definition of the dispute and specific arbitral rules of procedure.”

Oseni (2009) point out that the provisions presented in *Medjella* is similar to what that is introduced by Samir, but with the addition on the capacity of the *Hakam* that must be a qualified person under the standards established by Islamic law.

Thus, the *Tahkīm* agreement as laid out by Samir and in the *Medjella* reflects the framework of *Tahkīm* that construct the bedrock of the consequential proceedings.

#### **4.10.3. Criteria of the *Hakam* (arbitrator) and his appointment**

For someone to be an arbitrator or *Hakam*, there are vital conditions that must be met. In contrast to the view of the conventional arbitration in modern Western law which focus on the academic and technical skills of the arbitrator, *Tahkīm* outlined a strict *Shari'ah* requirements for a *Hakam*.

In accordance to the affirmative evidence as stated in the Quran of verse 4:35, the criteria of an arbitrator, could be as what was described by al-Sa'di (2001) as;

- i. A Muslim
- ii. *Mukallaf* (Accountable)
- iii. *'Adl* (Fair)
- iv. Intelligent
- v. Have knowledge on the case
- vi. *Husn al-'Aql* (Sensible mind)

And Al-Sulami (2001) said that the criteria of Abu Musa al-Asya'ari – one of the two arbitrators in the case of 'Ali and Muawiyah – comprise the values such as knowledgeable or intelligent, experienced, neutral and not bias.

Samir (2006) notified that in contrast to the Western laws that focused on the technical skill and the qualification aspects of the arbitrator, *Sharī'ah* law bring the ideas of a rigid requirements to be fulfilled by a *Hakam* which are;

- i. Muslim in faith
- ii. Male
- iii. Knowledge in *Sharī'ah*
- iv. Possess the qualification of *qadi* (*Sharī'ah* judge) which means that he is capable to be a witness in the *Sharī'ah* court.

Article 1848 of *Medjella* enumerates the fourth condition in the *Tahkīm* agreement as; 'The arbitrator must have the capacity to be a witness'.

Thus, the criteria presented bring the idea that for someone to be an arbitrator according to the *Sharī'ah* law; he must possess the minimum qualification of a *qadi* (judge).

Samir (2006) in expressing the qualifications of a *Hakam* pointed out seven qualification of *qadis* which was derived from the collective ideas of the four major doctrines in Islam.

First, the *qadi* or the *Hakam* should be an adult male. This is based on the verse of the Quran in the Surah of *Al-Nisaa'* that stated: "Men have authority over the women since Allah has conferred on the one more strength than the other."

Although the Hanafis stand lenient and accept women to deliver judgement on the matters outside the *Sharī'ah* fixed punishment (*hadd*) and criminal sanction (*Qisas*), the majority of the school of thoughts exclude this view and the appointment of

women as *qadi* or *Hakam*, and the same opinion is expressed by the modern jurist and practitioners. (Samir, 2006)

Second, the *Hakam* must be a Muslim. This conveys the tenets of the *Sharī'ah* law which requires one to be Muslim in faith in order to testify. This is based on the Quranic verse of Surah *Al-Nisaa'*: “Allah will never grant non-believers advantage over the believers.” (Samir, 2006; El Ahdab and El Ahdab, 2011)

This is the essential part of the criteria of a *Hakam* which governs all of the other principles. In the concept of *Sharī'ah* law, judgement made by a non-Muslim on Muslim is not binding. However, modern jurists of the Hanafis allow a non-Muslim to be a *Hakam* to the extent that his jurisdiction is confined to the financial and commercial matters on the basis that the restriction of a Muslim to be *Hakam* only mentioned in the matters related to family law. (Samir, 2006; El Ahdab and El Ahdab, 2011)

El Ahdab and El Ahdab (2011) however recognised the appointment of the non-Muslim as arbitrator in the family disputes if the wife is a non-Muslim, to the extent that the arbitration council is made by two arbitrators, a Muslim and a non-Muslim.

Third, a *Hakam* must have intelligence. This qualification is agreed and recognised by the four doctrines unanimously.

According to Samir (2006), the *Hakam* must have ‘the ability to solve the intricate problems’.

Fourth, a *Hakam* must be free, and not a slave. However Samir (2006) states that this condition is ‘no longer relevant in modern times’ as the practice of slavery has been abolished.

Fifth, a *Hakam* must possess '*adala* (fair and justice character) which extends to the criteria or rectitude, combined with the moderation and avoidance of sins, and he is an honoured person in both religious and worldly matters. (Samir, 2006)

This – as whole – reflects the criteria of Abu Musa presented by Al-Sulami which is known for his unbiased character and an honoured person among the Arabs people.

Sixth, a *Hakam* must not be a handicapped person. As *qadi* should not be blind, deaf or dumb, so does a *Hakam*. Samir (2006) in relation to this, stated that 'partial sight and hardness of hearing is tolerated'.

These major sense-organs are crucial to the *Hakam* in aiding him to give a fair judgement and determining the case which is why a person with sight and hearing impaired is not entitled to be a *Hakam* since these problems might cloud his fair judgement.

Finally, the *Hakam* should have knowledge in *Sharī'ah*. Samir (2006) states that the *Hakam* should possess good knowledge in the science (*fiqh*) based on four principal sources of *Sharī'ah* which are the Quran, *Sunnah*, *Ijma'* and *Qiyas*.

These qualifications listed by Samir, although could not be considered as final, but can be considered as accurate as they comply with what that have been outlined by the affirmative evidence.

#### **4.10.4. Procedural rules of *Tahkīm* proceeding**

There are no certain rules pertaining to the *Tahkīm* proceeding outlined neither by the affirmative evidence of Quran and *Sunnah* nor by the four major doctrines in Islam. Oseni (2009) states that; "There are no express rules in the law governing

remuneration of arbitrators, extension of time stipulated for the proceedings, stay of proceedings, and adherence to strict procedural rules.”

This allows flexibility in the proceedings thus permits the *Hakam* to use his sense of justice based on the manifested principles of Islamic law in completing the procedural of *Tahkīm*. (Oseni, 2009)

This flexibility allows *Tahkīm* to fit in any conditions. Prior to that, it must be understood that there are no *Sharī'ah* rules that fundamentally define the law concerning the remuneration of arbitrators, time-limits of the proceedings as well as the requirement to remain strictly to the procedural rules. (Oseni, 2009)

#### **4.10.5. Place and time of *Tahkīm* session**

The flexibility introduced by the *Sharī'ah* law related to the *Tahkīm* procedural has differentiate the concept of *Tahkīm* and *qada'* thus expressing the idea that the place where *Tahkīm* commenced, brings no significance influences on the procedures practised. And *Hakam* may determine and award the *Tahkīm* at a different place from the place it was conducted. (El Ahdab and El Ahdab, 2011)

Samir (2006) shared the same view which; “there are no detailed provisions in *Sharī'ah* treaties regarding the time and place of arbitral hearings and or what powers the arbitrators have in this respect.”

As such, it is subjected to the wisdom of the *Hakam* to select the place for the session to be conducted unless the disputed parties have agreed upon the place. (Samir, 2006; El Ahdab and El Ahdab, 2011)

Thus, Oseni (2009) writes that: “The problem of *lex loci arbitri* does not arise in Tahkīm proceedings.” And Samir (2006) states such incident happened; “because of the combination of two factors: first, because *Sharī’ahis* applicable to Muslims wherever they live, and secondly because arbitration under *Sharī’ahis* exclusively subject to *Sharī’ah* procedural and substantive rules.”

In conjunction to this view, the concept of timeframe or the timeline of *Tahkīm* applied the same principle where the powers conferred to the *Hakam* through the *Tahkīm* agreement executed by the parties, therefore delegates the right to time of arbitration to the limits and restriction agreed upon by the parties. (Samir, 2006)

The *Medjella* depicted the time aspect of *Tahkīm* in the Article 1846 which provide that if the *Tahkīm* is being limited by term, *Hakam* should determine the disputation before the term expires. And failure to comply can result the award to be invalid. (Samir, 2006)

In regards to the place of the *Tahkīm*, Al-Nashmi (2000) states a contemporary view which allows the place – unless it has been agreed by the parties – to be determined by the *Mahkaamat Al-Tahkīm* (arbitration chamber) taking into consideration of the conditions of the *Tahkīm*, thus the session may be executed in the court or centre of arbitration, for instance Cairo International Commercial Arbitration Centre.

#### **4.10.6. Numbers of *Hakam***

In referring to the affirmative evidence of the Quran, it is fair to say that the ideal number of the arbitrator or *Hakam* according to *Sharī’ah* view is two, which is based on the verse 35 of *Surah Al-Nisā’* which clearly instructed to appoint arbitrators from each side of the disputed parties.

However, Oseni (2009) writes that: ‘It is important to zoom into the precedents of the Prophet Muhammad to determine the application of the rules on arbitration in the primary sources of the *Sharī’ah*’.

According to the view of *Sunnah*, there is no vivid evidence in stating the numbers of *Hakam*. However, the character of the Prophet as the ultimate judge with a binding nature of awards and judgements indicated the sufficiency of a single – highly qualified *Hakam* to see to a case. This is parallel to the cases of Umar al-Khattab and Ubay bin Ka’b where they resorted to Zaid bin Thabit as the arbitrator to resolve their disputation. (Oseni, 2009)

As such, Oseni (2009) has refuted the view of the Hanafis that permits the appointment of more than one *Hakam* or constitution of a panel as *Hakam* – in cases other than marital disputation – by citing the majority opinions by the Malikis, Shafi’is and Hanbalis that they ‘do not allow more than one judge or *Hakam* to sit in a case.’

It is fair to view that according to the judgement of *Sharī’ah*, the *Hakam* could be of a single people that possess the essential qualification ruled by *Shar’iah*. And Oseni (2009) writes that based on the verse of *Surah Al-Nisā*’ “for family arbitration, the panel is duly constituted by two arbitrators appointed by the parties.”

#### **4.10.7. Substantive law used in *Tahkīm***

Oseni (2009) in referring to this matter states that ‘substantive law is mandatorily the *Sharī’ah*’, thus, it is crucial to understand that the only substantive law applied in *Tahkīm* proceeding is the law of *Sharī’ah* and the arbitrator must adhere to the guideline presented by the *Sharī’ah*.

Al-Nashmi (2000) writes that; ‘The *Sharī’ah* law is the fundamental source which the *Hakam* should reside on in awarding his ruling’.

And for a *Hakam* to adhere to the substantive law in *Tahkīm*, he needs to have firm knowledge in the four principle of *Sharī’ah* which are; Quran, *Sunnah*, *Ijma’* (consensus opinions) and *Qiyas* (analogical reason) (Oseni, 2009).

Thus, the parties must agree to submit their disputes to the *Sharī’ah* system, and to the *Sharī’ah* certified *Hakam*, they have entered into the sacred area which do not allow any intervention from the conventional system, in one way or another. (Samir, 2006)

Oseni (2009), in citing from Syed Khalid Rasyid, writes:

“Islamic law does not require the arbitrator to strictly adhere to any procedural or evidential rules. It is considered enough if both parties are heard in the presence of each other and the award gives reasons on which it is based.”

As such, the main principle of *Tahkīm*, apart from the usage of *Sharī’ah* as the essential establishment, is the equity and amiable composition. Oseni (2009) states that:

“The arbitrator is legally permitted to use his discretion, sense of justice, equity, fairness and *maslahah* (public policy) to arbitrate any dispute brought before him, and he is required to give an award in that regard without infringing on any substantive provision of the *Sharī’ah* regulating the subject matter of the dispute.”

In the light of this matter, it is to be understood that the position of a *Hakam* under the *Sharī’ah* code is also as the *amiable compositeur* in sense that he is allowed to make

judgement based on the rule of ‘equity, justice and good conscience’. (Syed Khalid Rasyid, 2006)

#### **4.10.8. Rules of evidence**

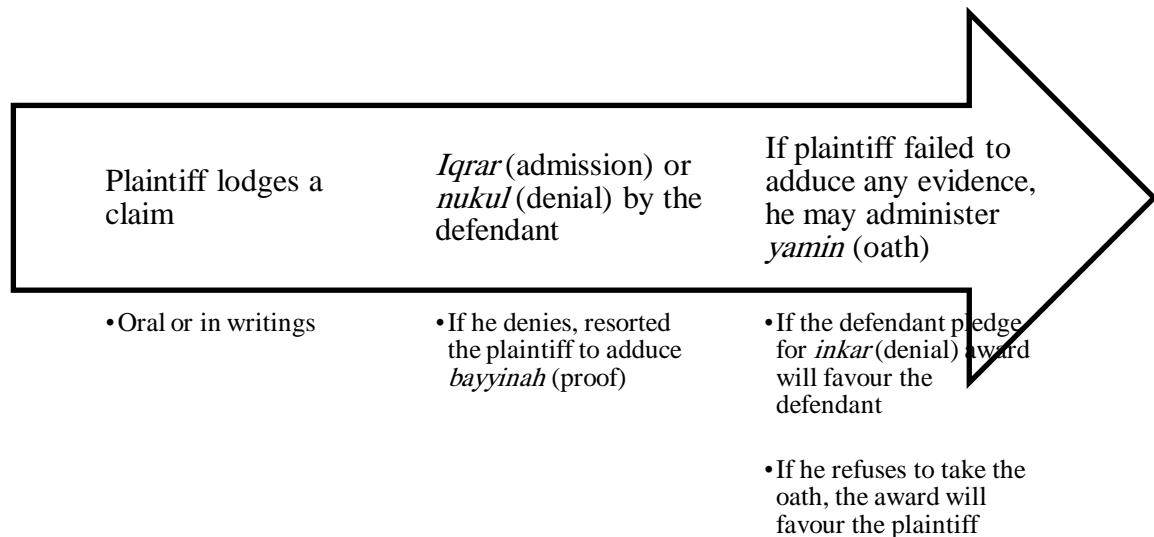
As the *Hakam* is only permitted to adhere and only to apply the substantive and procedural rules based on *Sharī’ah* law, the rules of the evidence in *Tahkīm* proceeding should remain under the scope outlined in *Sharī’ah* as it is classified under the procedural rules which is conspicuously different from its equivalent in the perspective of Western law. (Samir, 2006)

Thus, the main concept of conviction in *Sharī’ah* is deemed to the evidence that is presented by both plaintiff and defendants which may appear in three conditions; oral testimony, admission, and oath. Samir (2006) described them as ‘three classic forms of evidence’.

Islam upholds the oral evidence; the testimony of two witness which is deemed much superior than oath and written evidence, and is preferred than the testimony of one witness. (Samir, 2006)

Samir (2006) writes that the stages on the procedure of in the court that the *Tahkīm* can adapt and may appear in three hierarchy which the first stage occurs when the plaintiff lodges a claim to the *qadi* with precise details on the matter, verbally or in written. The second stage focused on the *iqrar* (admission) or *nukul* (denial) by the defendant in order to give answer to the plaintiff’s claim which if he denies, resorted the plaintiff to adduce *bayyinah* (proof) in front of the *qadi*. And stage three described in the event of plaintiff failed to adduce any evidence as required, he may administer *yamin* (oath) to the defendant, which if the defendant pledge for *inkar* (denial), the

*qadi* should favour the award to the defendant, yet if he refuses to take the oath, the case will be awarded in plaintiff's favour. Thus, it is fair to view that the *Sharī'ah* sustains the use of oral evidence as it constitute of the rule of evidence in *Tahkīm*.



**Figure 4.1:** Stages of court procedure by Samir (2006)

The written document or *al-katabah* is permitted to be used according to *Sharī'ah*. El Ahdab and El Ahdab (2011) describes that the *Sharī'ah* 'did not give written documents the same value as the oral testimony which constituted the basis of the rules of evidence'.

Samir (2006) summarises that the written documents do not constitute a sufficient evidence in the process, and it should be validated by the oral evidence due to the verity that it constitute the real evidence. And the solicitation of the documents do not award the status of 'unquestionable authenticity' to their content, consequently it is equal to special and professional witnesses to the oral evidence.

As such, Oseni (2009) affirms that:

“It is clear that the same procedure adopted in the court proceedings under Islamic law are used *mutatis mutandis* in arbitral proceedings but with a little modification in such aspect of the requirement of the application of amiable composition as well as equitable principles in the spirit of the objective of the *Sharī’ah* (*maqasid al-Sharī’ah*).

#### **4.10.9. Form and nature of the award**

Sparsity of the evidence in the history of Islam indicates that the award was made verbally by the arbitrator upon the parties. However, developments in the judicial system allow it to be made in written form although it is not mandatory according to Quran and *Sunnah*. It is, in fact, the practice professed to ascertain the details and to avoid forgery. The written form may be secured by *katib* (scribe) in the *sijill* (register) which describe in brief on the description the dispute, finding of facts according to the rule of evidence, reasoning under the *Sharī’ah* and the decision, and it should be signed by the *Hakam* and the witnesses. (Samir, 2006)

Nature of award in *Tahkīm* came into disputes among the scholars on whether it is binding or not. Oseni (2009) writes that: ‘The majority opinion of the jurists favours the binding nature of an award once issued by the *Hakam*’.

Samir (2006) conversed on the opinion of jurists from Malikis, Hanbalis, and Hanafis, including articles in the *Medjella*, that favours the binding nature of the *Tahkīm* award which they believe ‘has a stronger effects’ which allows it to be enforceable as an ordinary judgement of the *qadi*.

The term *res judicata* is used in describing the nature of the award, on which it is final and no longer subject to be appealed, thus the opinions of the Malikis and the Hanbalis that the award when comes into effect ‘to puts an end to the litigation’ (*yarfa’ al-khilaf*) and binding and enforceable character (*lazim wa nafidh*). (Samir, 2006)

However, in reflecting this matter, it is to be understood that for an award to binding and enforceable, all of the aspects prior to the end of the arbitration should adhere strictly to the *Sharī’ah* rules from the very beginning including the qualification of the *Hakam* in order to determine his position as the ‘substitute’ or ‘secondary’ to *qadi* which allows him to make a binding judgement.

#### **4.11. SIMILARITIES AND DIFFERENCES BETWEEN *TAHKĪM* AND CONVENTIONAL ARBITRATION**

Based on the discussions above, it is expedient to examine and compare the fundamental principle in *Tahkīm* with the conventional arbitration that is applied in Malaysia.

**Table 4.1** Comparison of conventional arbitration and *Tahkīm* (Muhammad Ariffuddin, 2011)

AREA	CONVENTIONAL ARBITRATION (ARBITRATION ACT 2005 AND ARBITRATION (AMENDMENT) ACT 2011)	<i>TAHKĪM</i> ACCORDING TO <i>SHARĪ'AH</i>
Arbitration Agreement	<ul style="list-style-type: none"> <li>- Accommodated in the Section 9 (1) of Arbitration Act 2005.</li> <li>- May be included in the arbitration clause in commercial contract for the future disputes to be entered into arbitration.</li> </ul>	<ul style="list-style-type: none"> <li>- Arbitration agreement may only be constituted after the dispute has arisen.</li> </ul>
Criteria and appointment of arbitrator	<ul style="list-style-type: none"> <li>- Chapter 3 of the Arbitration Act 2005 discussed on the composition of arbitrator.</li> <li>- Qualification of the arbitrator is not mentioned in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>- Criteria of the <i>Hakam</i> is similar to what has been outlined in the subject of <i>Qada'</i>. (Samir Salleh in Commercial Arbitration In Arab Middle East)</li> <li>- <i>Sharī'ah</i> strictly outlines the qualifications of the arbitrator.</li> </ul>
Procedural rules	<ul style="list-style-type: none"> <li>- 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.</li> <li>- Based on equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.</li> </ul>	<ul style="list-style-type: none"> <li>- No strict provisions. <i>Sharī'ah</i> allows the parties to mould the procedures as they wanted to.</li> <li>- Promoting the concept of '<i>adl</i>' or justice that the parties shall adhere.</li> <li>- There is a "safety valve" under the <i>Sharī'ah</i> that allows concept of <i>Sulh</i> (two conciliators from each party to reconcile the dispute) to be adapted in the procedure.</li> </ul>
Place and time of arbitration session	<ul style="list-style-type: none"> <li>- Included under the provision of the Section 22 and Section 23 of the Act.</li> <li>- The parties to decide where are the seats of arbitration and when it will commence.</li> </ul>	<ul style="list-style-type: none"> <li>- No provisions in <i>Sharī'ah</i> that suggest any strict term regarding the time and place of arbitral hearings.</li> <li>- Flexible.</li> </ul>

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 <i>Sharī'ah</i> .
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>Tahkīm</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).

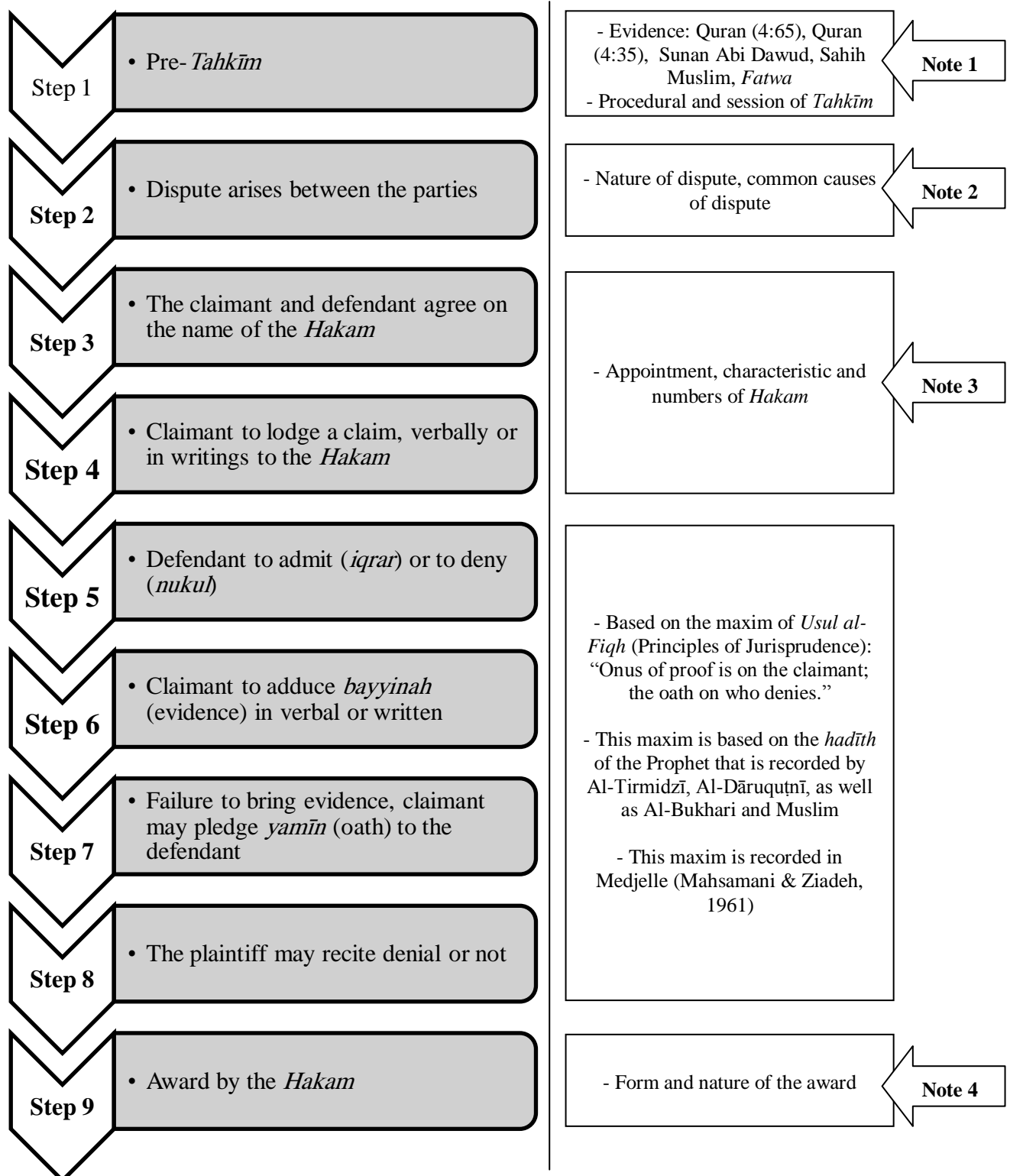
## 4.12. PROPOSAL OF FRAMEWORK FOR REFERENCE OF DISPUTE TO *TAHKĪM* IN MALAYSIAN CONSTRUCTION INDUSTRY

### 4.12.1. Framework For Reference of Dispute to *Tahkīm*

By using the stages of court procedure presented by Samir (2006) in Figure 4.1 as the basis and analysing the content throughout the Chapter 2, 3 and 4, a framework for reference of dispute to *Tahkīm* in Malaysian construction industry has been developed.

Figure 4.2 illustrates the steps of referring dispute to *Tahkīm* in Malaysian construction industry.

This framework is developed to translate the prospect that *Tahkīm* as an alternative to the conventional arbitration. However, there is no *modus operandi* made available. Therefore, this framework enables the parties inside and outside construction industry to appreciate how *Tahkīm* can be applied to resolve dispute. Without prejudice to the current system employed, the study tries to investigate the possibility of employing *Tahkīm* in the Malaysian construction industry.



**Figure 4.2** Framework for referring dispute to *Tahkīm*

#### 4.12.2. Supporting Notes For The Framework

Table 4.3 shows the associated note to the steps to form the proposed framework aforementioned. This note supports the framework provided and serves as an explanatory document to the framework.

**Table 4.2** Supporting notes for the Figure 4.2

<b>Note 1: Pre-Tahkīm</b>		
<b>General Notes</b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Substantive Evidence on Tahkim	<i>“But no, by your Lord they can have no Faith until they make you (O Muhammad) judge in all disputes between them.”</i>	Quran (4:65)
	<i>“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things”</i>	Quran (4:35)
	<p><i>Hadīth</i> narrated Hani ibn Yazid that the Prophet astonished by the action of Hani to reconcile disputations of his people:</p> <p><i>“When he went with his delegation to the Apostle of Allah (PBUH), he heard them calling him by his kun-yah (surname), Abu al-Hakam. The Apostle of Allah (PBUH) called him and said: Allah is the judge (al-Hakam), and to Him the judgment belongs. Why are you given the kun-yah Abu al-Hakam? He replied: When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. The Prophet said: How good this is! What children have you? He replied: I have Shurayh, Muslim and Abdullah. He asked: Who is the oldest of them? I replied: Shurayh. He said: Then you are Abu Shurayh.”</i></p>	Sunan Abi Dawud

	<p>The appointment of Sa'ad bin Mu'az by the people of Quraiza which has been endorsed by the Prophet:</p> <p><i>“The people of Quraiza only to accept the decision of Sa'ad bin Mu'az upon them. Accordingly, the Messenger of Allah sent for Sa'ad who came to him riding a donkey. When he approached the mosque, the Messenger of Allah said to the people of Ansar: Stand up to receive your chieftain. Then he said (to Sa'ad): These people have surrendered to only accept your decision. Sa'ad said: Kill their soldiers and capture their women and children. (Hearing this), the Prophet said: You have adjudged by the command of God. The narrator is reported to have said: Perhaps he said: You have adjudged by the decision of a king.”</i></p>	Sahih Muslim
	<p>The Prophet reconciles the tribes' disputation regarding the <i>Hajar al-Aswad</i> (Black Stone) as recorded Al-Raheeq Al-Makhtum (Sealed of the Nectar).</p>	Al-Mubarakfuri (2006)
	<p><i>Majlis Tahkīm</i> between Ali bin Abi Talib and Muawiyah bin Abi Sufyan as recorded by Ibn Katsir in Al-Bidayah wa Al-Nihayah</p>	Al-Sulami (2001)
<b>Procedural and Session of <i>Tahkīm</i></b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of <i>Tahkīm</i>	Does not necessarily to be the part of the existing contract and can bring to <i>Tahkīm</i> at any juncture when dispute happens	Oseni (2009)
Time and place of <i>Tahkīm</i>	Flexible	El Ahdab and El Ahdab (2011)
		Samir (2006)
		Oseni (2009)
	Subjected to the <i>Hakam</i> discretion and wisdom	El Ahdab and El Ahdab (2011)
Samir (2006)		
	If any term agreed, <i>Hakam</i> must adhere to it or else the award would be invalid	Samir (2006)
	Contemporary view: Subjected to the <i>Mahkaamat Al-Tahkīm</i> (arbitration chamber)	Al-Nashmi (2000)

Substantive law	<i>Sharī'ah</i>	Al-Nashmi (2000)
		Samir (2006)
		Oseni (2009)
Procedural and rules of evidence	Flexible	Oseni (2009)
		Syed Khalid Rasyid (2006)
	Verbal evidence: Testimony by the witness	Samir (2006)
	Written evidence	El Ahdab and El Ahdab (2011)
Samir (2006)		
<b>Note 2: Matters Related to Disputes</b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of dispute to be referred to <i>Tahkīm</i>	Dispute must exist and clearly defined	Samir (2006)
		Oseni (2009) cited from Article 1848 of Medjella
Common causes of dispute inside the construction industry	Occur due to the specific disagreement and/or one of the parties feels that his right, needs and interest is not being fulfilled by the responding party, and the latter refuse to hold any liability against it, which the parties proceed by way of claims, counter-claims, denials and so on	Collier and Lowe (1999)
		Khairuddin (2008)
	Changes of conditions, interpretation, workplace conditions, communications, law, access to construction site and access to materials	Blake Dawson Waldron (2006)
	Management , people, communication, and contract documents	Cheung & Yiu (2006)
	Delay and unrealistic expectations	Yiu & Cheung (2007)
	Change orders, pre-award design, pre-construction, quality assurance	Killian (2003)
	Uncertainty, contractual problems, opportunistic behaviour	Mitropoulos & Howell (2001)

	Changes of conditions, changes of scope, design, unpredictability, contract documents, management, delay, communications, and unrealistic expectations.	Kumaraswamy (1997)
	Payment, performance, delay, negligence, quality, administration.	Colin et al. (1996)
	Misunderstanding, unpredictability	Sykes (1996)
	Unrealistic expectations, contract documents, communications, lack of team spirit, changes	Bristow & Vasilopoulos (1995)
	People, process, product	Diekmann et al. (1994)
	Change of scope, change in conditions, delay, distribution, acceleration, termination	Heath et al. (1994)
	Management, culture, communication, design, economics, tendering pressures, law, unrealistic expectations, contracts, workmanship	Rhys-Jones (1994)
	Acceleration, access, weather, changes	Sample et al. (1994)
	Changes, law, delay	Watts & Scrivener (1992)
	Change of scope, change of condition, acceleration, delay, disruption, termination	Hawitt (1991)
<b>Note 3: Referring to <i>Hakam</i></b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Appointment of <i>Hakam</i>	Must be appointed and agreed by name by the parties	Oseni (2009) cited from Article 1848 of Medjella
	To recite the agreement of appointment to the <i>Hakam</i> ( <i>Sīghah</i> )	Oseni (2009) cited from Article 1848 of Medjella
		Nora et. al. (2013)

Characteristic of <i>Hakam</i>	Muslim	Al-Sa'di (2001)
	Modern jurists of the Hanafis allow a non-Muslim to be a <i>Hakam</i> to the extent that his jurisdiction confined to the financial and commercial matters on the basis that the restriction of a Muslim to be <i>Hakam</i> only mentioned in the matters related to family law	Samir (2006)
		El Ahdab and El Ahdab (2011)
	El-Ahdab & El Ahdab (2011) however recognised the appointment of the non-Muslim as arbitrator in the family disputes if the wife is a non-Muslim, to the extent that the arbitration council is made by two arbitrators, a Muslim and a non-Muslim.	
	Male	Samir (2006)
	Hanafis however stand lenient and accepts women to deliver judgement on the matters outside the <i>Sharī'ah</i> fixed punishment ( <i>hadd</i> ) and criminal sanction ( <i>Qīṣas</i> ); and that women can be the <i>Hakam</i> in the case of dispute concerning property and issues that specifically related to women.	Nora et. al. (2013)
	<i>Mukallaf</i> (Accountable)	Al-Sa'di (2001)
	' <i>Adl</i> (Fair)	Al-Sa'di (2001)
		Al-Sulami (2001)
		Samir (2006)
		Nora et. al. (2013)
	Intelligent	Samir (2006)
	<i>Ijtihād</i>	Nora et. al. (2013)
Have knowledge in <i>Sharī'ah</i>	Samir (2006)	
Have knowledge on the case	Al-Sa'di (2001)	
Attained adulthood and have <i>Husn al-'Aql</i> (sensible mind)	Al-Sa'di (2001)	
	Nora et. al. (2013)	

Numbers of <i>Hakam</i>	Two for family and marital disputes	<i>Al-Nisaa</i> verse 35
	One	Oseni (2009)
	Panel of <i>Hakam</i>	Oseni (2009)
<b>Note 4: Award</b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Form of award	Orally or in writings	Samir (2006)
Nature of Award	Binding	Samir (2006)
		Oseni (2009)
	Res judicata	Samir (2006)

#### 4.13. CONCLUSION

This chapter has established the *Sharī'ah* model on *Tahkīm*, including the legitimacy of the processes and procedure according to *Sharī'ah*. And subsequently, a comparison between the conventional arbitration and *Tahkīm* has been made to establish that there is potential to employ *Tahkīm* in the construction industry.

And then, this chapter has also presented the framework for the process of reference of dispute in the construction industry according to *Sharī'ah* that was developed using the content analysis as well as the stages of court procedure.

## **CHAPTER 5**

### **RESEARCH METHODOLOGY**

#### **5.1. INTRODUCTION**

This chapter corresponds with the concept of the research methodology that has been discussed briefly in the Chapter 1 of the dissertation. This chapter will discuss on the research methodology designed for the research. This chapter will be constructed by five (5) sections:

- i) Aims and objectives of the research
- ii) Research strategy
- iii) Research model
- iv) Secondary Data Collection
- v) Primary Data Collection

#### **5.2. AIM AND OBJECTIVES OF THE RESEARCH**

As mentioned in Chapter 1, the aim of the research is to determine the opportunities presented in employing the *Sharī'ah*-compliant Alternative Dispute Resolution (ADR) medium in the Malaysia construction industry and to develop a proper framework for reference of disputes to *Tahkīm* and its processes. And to achieve such aim, these are the objectives of the study;

- 1) To identify the process and procedures of arbitration.

- 2) To define *Tahkīm* and to identify the procedures involved.
- 3) To appraise *Tahkīm* in terms of its opportunities in the Malaysian construction industry.
- 4) To develop and validate a framework for the process of reference of disputes to *Tahkīm* in the Malaysian construction industry.

### **5.3. RESEARCH STRATEGY**

Traditionally, research strategy or research design has been divided into two schools which are quantitative and qualitative (Berg, 1995; Creswell, 2003; Naoum, 2007) and there is the third paradigm that employs quantitative and qualitative which is known as *mixed method* (Creswell, 2003; Johnson and Onwuegbuzie, 2004).

The nature of the quantitative research is ‘objective’ (Naoum, 2007) that used “post positivist claims” akin to hypotheses or theory composed of measurable variables and presented in numbers and it employs strategies such as experiments, surveys and data

Meanwhile, qualitative research is ‘subjective’ in nature and is used to gather non-numerical information, in words, from the respondents which the results is usually open-ended and emerging, and can be employed in various ways; for example, empirical findings, interviews and ethnography (Creswell, 2004; Naoum, 2007; Neill, 2007). This methodology focuses on the meanings as well as knowledge of the respondent and Naoum (2007) classified this method into two categories which are exploratory and attitudinal research.

On the other hand, the mixed method is a bridge between these two conventional methods to complement the merits and demerits of both methodologies and based the

knowledge claims on the pragmatic ground, using both techniques of data collection; open- and close-ended questions and various data (Creswell, 2003; Johnson and Onwuegbuzie, 2004; Siti Nora Haryati, 2011)

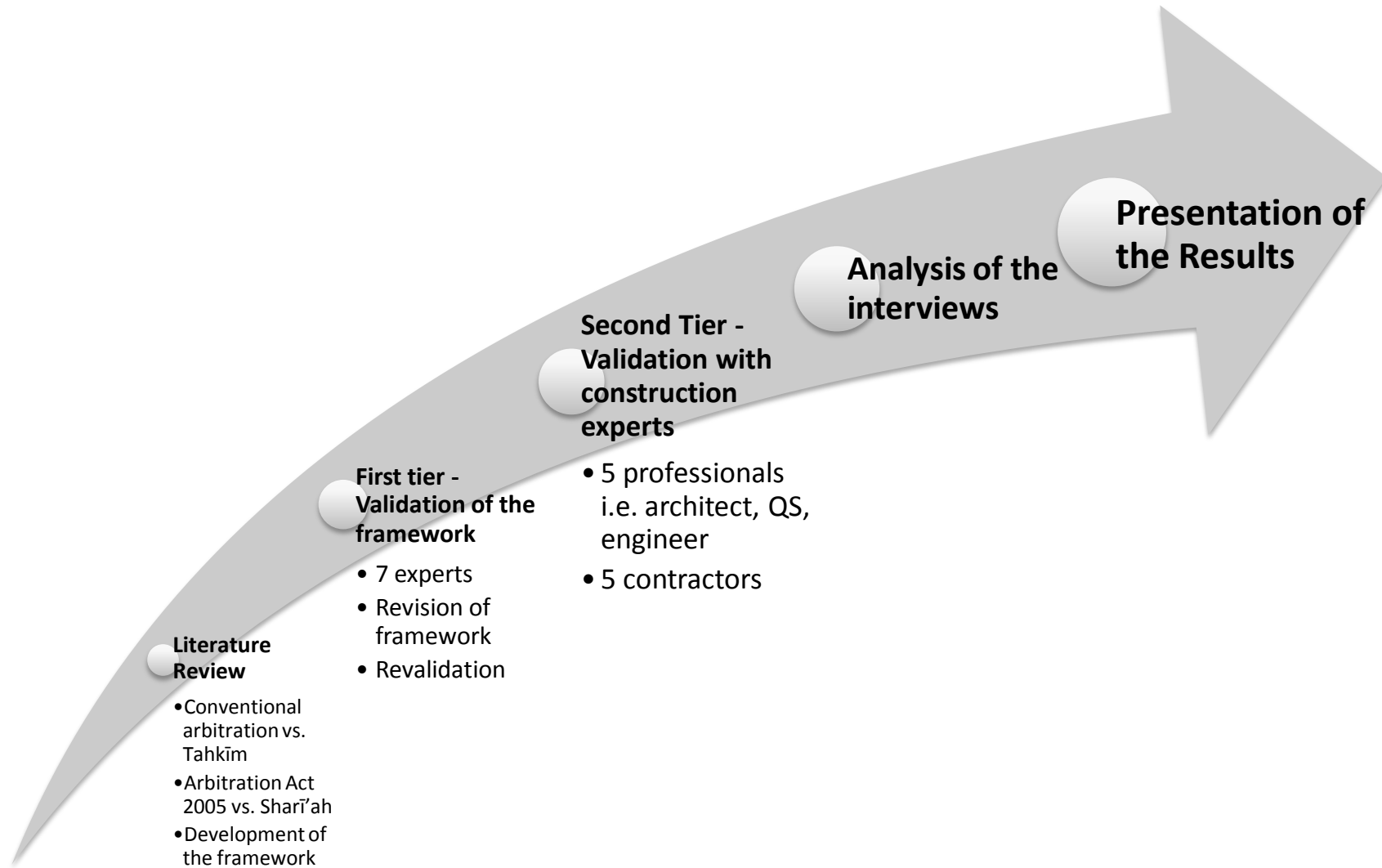
The research strategy selected to be used is to be based on the knowledge claim, inquiry, and methods that would be employed. And different problem needs to be treated with different approaches. Based on the understanding that have been established above, the researcher strongly believes that the qualitative research is the most appropriate approach for the study. The information required for the study is subjective in nature, hence requires views from the expert in order to appraise the knowledge on *Tahkīm* as well as the other mechanisms of ADR in and the current practice of arbitration in this country, and their opinion on the concept of *Tahkīm* to be applied in the construction industry.

#### **5.4. RESEARCH MODEL**

Research model is the critical part of the research in order to obtain the knowledge in regards to *Sharī'ah*-compliant ADR and *Tahkīm* as well as the conventional ADR that has already been employed in the construction sector in this country. And since this research is exploratory in nature, the method of secondary data collection is employed to construct the basis of the knowledge and the primary data collection is employed to develop the framework and guideline of employment of *Tahkīm* in Malaysian construction industry and later to validate the data presented.

The model for this research has been designed to be as flexible as possible in order to achieve the aim and objectives of this research.

Figure 5.1 explains the concept of this research model.



**Figure 5.1** Research Model

Figure 5.1 explains the concept of the research model, the relationship between the methodology, and the research flow as well as the expected outcome of the study. And as suggested earlier in this chapter that the research is qualitative in nature since it involves the concept of *Sharī'ah* compliant as well as legal research, both which cannot be appraised using statistics and numbers. Siti Nora Haryati (2011) – who conducted a research in a similar area of knowledge –in her contention based on previous works by various authors has suggested that a research that deals with religious matters can only be carried out by analysing the literatures as well as conducting consultation with experts if verdicts on Islamic ruling or *ḥukm* are needed. And the researcher believes that the important addition to this statement is that the classical literatures or *kutūb al-turath* need to be scrutinised so that ample knowledge in the area of research can be gained. Similarly, this research also carries the weight of legal and law related studies in it. Therefore, it is expedient to adopt qualitative approach to lay down the general concept on arbitration.

The secondary data collection or literature review is the major part of this research because it involves scrutinising and reviewing the Islamic legal theory; which cannot be carried out using the primary data collection. The strength of the secondary data collection is because of the need to establish the rules and procedures contained in revealed and non-revealed sources. The primary data collection is merely to verify the validity, legitimacy and applicability of the framework developed.

The objectives of the research are expected to be obtained through the methods as follow:

- i. Literature review: To lay down the basis of the knowledge on the subject discussed and to be used to develop the key questions that will be discussed during the next stage of data collection.
- ii. Semi-structured interview: To validate the framework developed out of the literature review in terms of compliancy to the *Sharī'ah* and applicability of the framework to the current setting of construction industry as well as gathering additional inputs from the experts regarding the framework.

## 5.5. SECONDARY DATA COLLECTION

Naoum (2007) describes that the secondary data collection is also referred as desk study. Secondary data is the data that has already been collected and obtained for some other reason than the current study. Thus, the secondary data may also be defined as data and information which are obtained from the other sources. It can be used to get a new perspective on the current study, to supplement or compare the work or to use part of it as another study. (Fraenkel & Wallen, 2009)

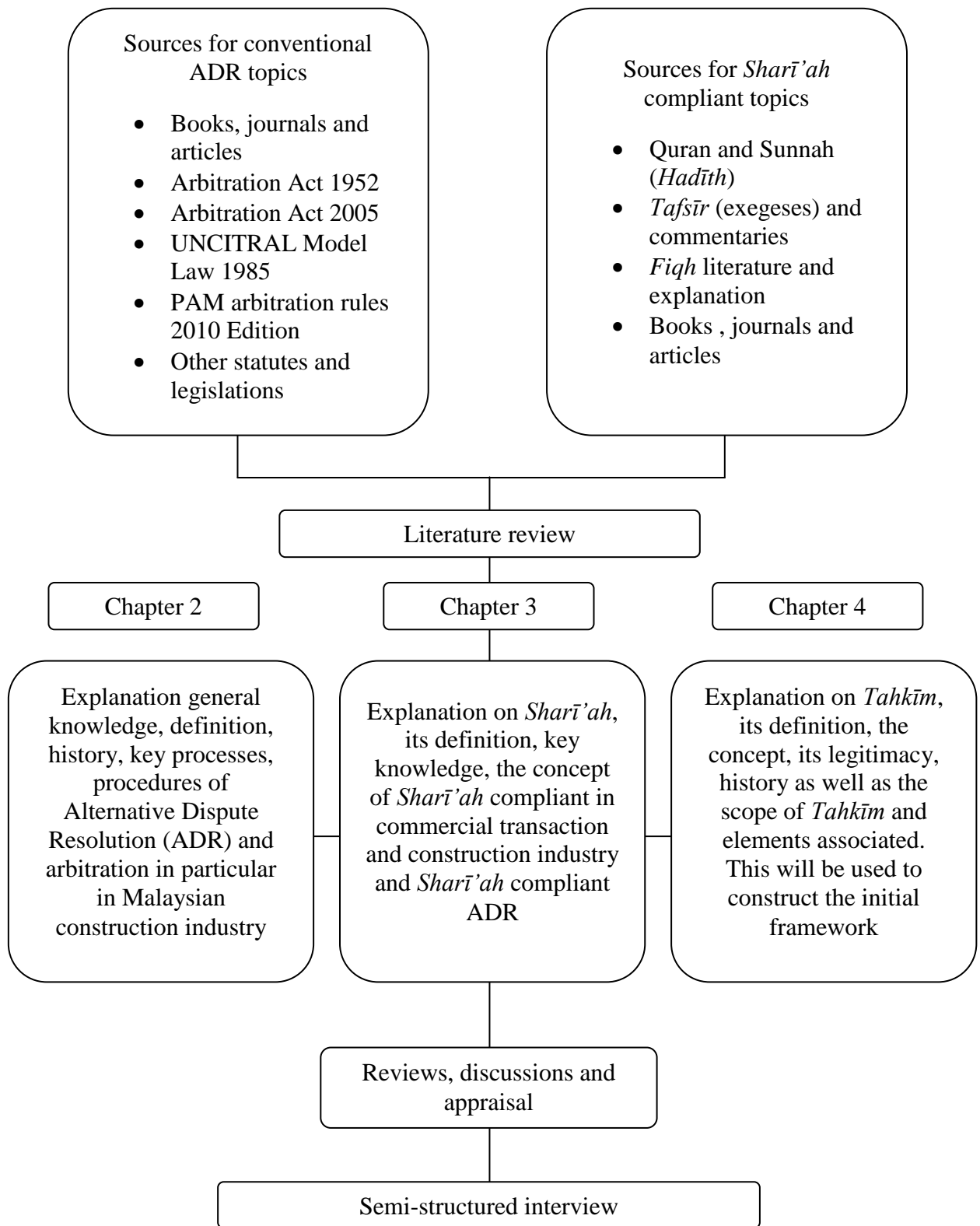
The secondary data that has been collected is composed and arranged as the literature review that converse on the informations obtained from published materials pertaining to the topic of *Sharī'ah*, conventional arbitration and *Tahkīm*, as well as their relation to the construction industry in Malaysia. The main intention of the literature review is to give deep understanding on the background, and scenario of the arbitration, conventionally and in Islam, and to develop the appropriate framework. Literature review will help the researcher to organise the understandings as well as providing the precise information on arbitration, its concept and procedures. Similarly, the information on the concept of *Sharī'ah* and *Tahkīm* and its procedures will also be

gathered through literature review to assist the researcher to develop the framework intended.

Various sources such as the Holy Quran and its translation by various translators, *hadīth* derived from various books, exegeses and commentaries, books on *fiqh* (Islamic jurisprudence) from different *madzhab* (school of thoughts), lexicons, and statutes such as Arbitration Act 2005 and Amendment Act 2011, the previous Arbitration Act 1952, forms of contract i.e. PWD 203A (With Quantities) Standard form of Contract (Rev. 2007), PAM Standard Form of Contract (Rev. 2006), and PAM Arbitration Rules 2010 and some parts of UNCITRAL Model Law 1989. And in regards to the Saudi Arabia as the case study, the Kingdom of Saudi Arabia Arbitration Law has been referred to and reviewed. And this also includes articles, journals, theses and research papers, and other statutes and legislations that have significance relation to the research. All of the information and data extracted has been organised and digested to help the researcher in conducting the semi-structured interview. The data have been presented in:

- i. Chapter 2, namely Arbitration In Mitigating Disputes In Malaysian Construction Industry
- ii. Chapter 3, namely *Sharī'ah and Sharī'ah-Compliant ADR*
- iii. Chapter 4, namely *Tahkīm (Sharī'ah-modelled arbitration)*

Figure 5.2 describes the process of collecting secondary data for the literature review



**Figure 5.2** Secondary data collection processes

Literature review is carried out to lay down the key concepts of the research: conventional arbitration, and *Tahkīm*. The first part requires the researcher to scrutinise the key concept of arbitration, its processes and procedures in general and in the Malaysian construction industry. Therefore, the statutes, legislations and documents related to arbitration in the context of Malaysian construction industry will be reviewed. Among them are Arbitration Act 2005 (Act 646), Arbitration (Amendment) Act 2011 (Act A1395), forms of contract such as PWD 203A (With Quantities), PAM Contract 2006 (With Quantities) and CIDB Standard Form of Contract for Building Works 2000 Edition. Apart from that, books, journals, articles and other sources related to the topic are reviewed. Consequently, the knowledge on ADR, arbitration and the key processes of arbitration in Malaysia and local construction industry is established.

The second part requires the researcher to examine on the concept of *Sharī'ah* in Islam and the objectives of *Sharī'ah* to lay down the foundation of the knowledge before explaining on the term of *Sharī'ah*-compliant in Malaysia in regards to the construction industry and subsequently to examine the concept of ADR and *Tahkīm* according to *Sharī'ah*. And only then the key knowledge on *Tahkīm* can be laid down to compare with the process of arbitration in Malaysia Arbitration Act 2005. The Holy Quran and translation from Abdullah Yusuf Ali is used as main reference. Al-Sunnah or *hadīth* are obtained from, but not limited to, *Kutub al-Sittah* or the Six Books; Sahīh al-Bukhari, Sahīh Muslim, Sunan al-Nasa'ie, Sunan Abu Dawūd, Jami' al-Tirmidhi, and Sunan Ibn Majah. The Quranic exegeses and commentaries on *hadīth* are also been referred to in order to obtain proper information on Quranic verses and *hadīth*. Classical and contemporary literature on *fiqh* (Islamic jurisprudence) as well

as books and articles discussing the subject are examined. The researcher tries to refer to the sources for the *Sharī'ah* related topics in the original language, which is in Arabic. However, this is not limited to that language. References in other language especially English and Malay are also appreciated. The limitation of the researcher who only possesses basic proficiency in Arabic may contribute to misunderstanding or misinterpretation. Nevertheless, consultations with experts during the research period have been done to ensure the accuracy of the understandings that have been laid out in the research.

In regards to the Kingdom of Saudi Arabia, the researcher has examined the KSA Arbitration Law of 2012 which was enacted on 16<sup>th</sup> April 2012 to replace the old legislation. The unique characteristic of the law is that it was designed from UNCITRAL Model Law – which is similar to the Malaysia Arbitration Act 2005 – but still retaining the *Sharī'ah* law as the law of the country that need to be respected.

## **5.6. PRIMARY DATA COLLECTION**

Primary data collection is the original data obtained “first hand” by the researcher for specific goal, and there are a few techniques in collecting the data, but not limited to, such as survey, case study and action research approach. (Hox and Boeije, 2005; Ernest, 2007; Naoum, 2007)

The primary data collection is the area of the research model that is designed to be flexible in order to achieve the aim and objectives of the research. The methodology devised to obtain the primary data is through the focused semi-structured interview.

### 5.6.1. Focused Semi-Structured Interview

Interview can be simply defined as a conversation with a purpose (Berg, 2001). However, in the light of the qualitative research, an interview is a conversational process that requires face-to-face interaction to interrogate and inquire and most importantly to understand the subject from the interviewees' point of view (Berg, 2001; Wengraf, 2001; Seidman, 2006; Naoum, 2007)

Interview can be divided into three forms which are; unstructured, semi-structured and structured (Naoum, 2007; Gill et. al, 2008; Harrel and Bradley, 2009). These three forms represent the controls that the interviewer has, usage of the questions and may as well represent the level of formality involved (Kajornboon, 2005; Naoum, 2007). Table 5.1 explains the criteria of the type of interview aforementioned.

**Table 5.1** Types of interview and the criteria

Interview	Criteria
Unstructured	<ul style="list-style-type: none"> <li>- Non-directed and flexible (Kajornboon, 2005)</li> <li>- No requirement to follow the guidelines (Kajornboon, 2005)</li> <li>- Exploratory and informal (Kajornboon, 2005; Naoum, 2007)</li> <li>- Utilise open-ended question (Naoum, 2007)</li> </ul>
Semi-structured	<ul style="list-style-type: none"> <li>- More formal compared to unstructured interview (Naoum, 2007)</li> <li>- Usually used in policy research (Harrel and Bradley, 2009)</li> <li>- For qualitative research (Kajornboon, 2005)</li> <li>- Non-standardised (Kajornboon, 2005)</li> <li>- Utilise open and close-ended questions (Naoum, 2007)</li> <li>- Exploratory and elucidatory in nature (Barriball and While, 1994; Kajornboon, 2005; Naoum, 2007)</li> <li>- To gather the opinions from the respondent (Barriball and While, 1994; Naoum, 2007)</li> </ul>

	<ul style="list-style-type: none"> <li>- Questions are predetermined but respondents have the freedom to digress (Berg, 2001)</li> <li>- Allows interviewer to probe into various subject during the session (Berg, 2001; Kajornboon, 2005; Naoum, 2007; Harrel and Bradley, 2009; Roulston, 2011)</li> </ul>
Structured	<ul style="list-style-type: none"> <li>- Also known as standardised interview (Berg, 2001; Kajornboon, 2005)</li> <li>- Formally structured question (Berg, 2001)</li> <li>- Interviewer has full control over the entire process (Kajornboon, 2005; Naoum, 2007; Harrel and Bradley, 2009)</li> <li>- Questions are tabulated and presented in a sequenced manner (Berg, 2001; Kajornboon, 2005; Naoum, 2007; Harrel and Bradley, 2009)</li> <li>- Questions are predetermined, specific and directive (Berg, 2001; Kajornboon, 2005)</li> <li>- Rigid and mostly utilise close-ended questions (Kajornboon, 2005; Naoum, 2007)</li> <li>- Accurate and clarifying answer (Barriball and While, 1994; Naoum, 2007)</li> </ul>

Meanwhile, a focused interview is an interview conducted to determine the responses from people who are exposed or familiar to the subject researched (Merton and Kendall, 1946; Merton, 2008). The main functions of a focused interview, according to Merton and Kendall (1946), are to discover: 1) the significant aspects of the total situations to which response has occurred, 2) the discrepancies between predicted and actual effects, 3) responses by deviant subgroups in the population, and 4) the processes involved in experimentally induced effects. And among other uses of a focused interview is to focus on the “subjective experience” of the respondent who has been exposed to the pre-analysed situations in order to ascertain a hypothesis or the subject involved with the situation (Merton and Kendall, 1946; Merton, 2008; Clifford et al., 2010).

Therefore, with consideration to the definitions aforementioned and this respected research, the researcher believes that a focused semi-structured interview is the appropriate tool to evaluate the following matters:

- i) To verify that the framework proposed fulfil the *Sharī'ah* requirements and to attain further clarification from the *Sharī'ah* experts which may be included to support the research.
- i) To corroborate that the potentials and opportunities for the application of *Tahkīm* in the construction industry do exist.
- ii) To ensure that the framework is robust and vigorous by testing it onto the experts of arbitration and construction and to obtain their view and validation on the framework proposed.

There will be two tiers of focused semi-structured interview involve:

- i) The first tier is with the experts to determine the robustness of the framework.
- ii) The second tier is to validate the framework with the construction industry experts in terms of suitability to be implemented in Malaysia.

#### **5.6.1.1. Determining the number and type of experts**

Since the purpose of the semi-structured interview is to validate the framework proposed and its applicability to be employed in the Malaysian construction industry; as well as to gather comments and additional inputs from the experts, the researcher has adapted the sampling for focus group discussion to be applied in the interview; the sampling relies on the purposive nature where the researcher selects the participants based on the project and on the potential contributions of the participants (Barnett, 2002). And the research adopts such method of sampling due to these reasons:

1. To provide a balance perspective towards the research especially in concept of conventional arbitration and *Sharī'ah* perspective. The background of the researcher is from Quantity Surveying therefore did not possess adequate knowledge on the law and *Sharī'ah*. Thus, the researcher is not able to draw any conclusion on the religious rulings (*hukm*), and due to this factor, it is crucial for the preliminary findings be presented to the experts to confirm and determine the aspects of the research.
  
2. The background of the study requires the interviewees to be from different sector of expertise so that they could provide the accurate information and generate vast discussion pertaining to the subject of the research. The research involved a detailed study on the Malaysian law, legislation, ADR particularly arbitration, *Sharī'ah* specifically in the subject related to *hukm* (Islamic rulings) and *fiqh* (Islamic jurisprudence) and Malaysia construction industry. Thus, the detailed, specific and accurate information may only be obtained through the discussions with the experts.

#### **i. Experts for the first tier semi-structured interview**

And as this study involved a deep coverage on subjects aforementioned, the experts will be selected on these criteria:

- i. Expert in law and Malaysian law
- ii. Expert in ADR and Arbitration
- iii. Expert in construction law
- iv. Expert in *Sharī'ah* law and Islamic jurisprudence
- v. Expert in Malaysian construction industry

And by using these bases, the researcher has produced a list of criteria to select the respondents for this semi-structured interview

- i. Criteria i:
  - a. Possessing at least Legum Baccalaureus or LLB or any other equivalent qualification.
  - b. Has been practising law in Malaysia or familiar with the law of the country.
- ii. Criteria ii:
  - a. Registered arbitrators to Kuala Lumpur Regional Centre of Arbitration (KLRCA), OR members of the CIARB or Chartered Institute of Arbitrators OR other equivalents qualification.
  - b. Possess wide knowledge in regards to alternative dispute resolution (ADR) OR arbitration.
- iii. Criteria iii:
  - a. Practicing law in construction industry OR has expertise in construction law OR a construction arbitrator OR a construction mediator.
- iv. Criteria iv:
  - a. Possessing at least a degree in Legum Baccalaureus (*Sharī'ah*) or LLB.S or other equivalent qualifications in Islamic law studies.
  - b. Possessing at a least a bachelor degree in *Sharī'ah*, or *Fiqh Wa Usulih* (Science of Islam and its principles) or other equivalents qualification.
  - c. Possess wide knowledge in regards to the *Sharī'ah*, the *nāṣ* (textual evidence) and *dalīl* (proof) derived from the Quran and *Sunnah*.

- v. Criteria v:
  - a. Studied and possessing of at least a bachelor degree in construction or civil engineering related area.
  - b. Has a vast experience in Malaysian construction industry OR has been practising in civil engineering and construction industry for more than 10 years.

The experts may possess only one of the criteria, or any criteria combined. And since the research is qualitative in nature, it is important to investigate the topic and delve into the root of research in order to gain better understanding towards the subject. Thus, the research is rather empirical than statistical. And with the discussion is intended to be focused; only a small number of experts those fulfil the criteria described abovementioned will be selected, which the researcher arrived to a decision that the experts will be limited to seven (7) people. This is based on the previous study like Siti Nora Haryati (2011) who has conducted similar research i.e. *Shari'ah*-compliant research, has obtained five (5) experts for the focus group discussion (FGD). The researcher has opted for odd numbers of experts so that in the case of disagreement or non-consensus, the researcher may adopt the consent from the majority to determine the validity, legitimacy and applicability of the framework. The list of the experts is as follow:

**Table 5.2** List of experts and their specialised area

Criteria	Expertise	Expert 1	Expert 2	Expert 3	Expert 4	Expert 5	Expert 6	Expert 7
i	Possessing at least Legum Baccalaureus or LLB or any other equivalent qualification	✓	✓	✓		✓	✓	
	Has been practising law in Malaysia or familiar with the law of the country	✓	✓	✓		✓	✓	
ii	Registered arbitrators to Kuala Lumpur Regional Centre of Arbitration (KLRC), OR members of the CIARB or Chartered Institute of Arbitrators (Malaysia Branch), OR other equivalents qualification.						✓	
	Possess wide knowledge in regards to alternative dispute resolution (ADR) OR arbitration.	✓	✓	✓			✓	
iii	Practicing law in construction industry OR has expertise in construction law OR a construction arbitrator OR a construction mediator.					✓		
iv	Possessing a degree in Legum Baccalaureus ( <i>Sharī'ah</i> ) or LLB.S or other equivalent qualifications in Islamic law studies.	✓	✓	✓			✓	
	Possessing at a least a bachelor degree in <i>Sharī'ah</i> , or <i>Fiqh Wa Usulihi</i> (Science of Islam and its principles) or other equivalents qualification.							✓
	Possess wide knowledge in regards to the <i>Sharī'ah</i> , the <i>nāş</i> (textual evidence) and <i>dalīl</i> (proof) derived from the Quran and Sunnah	✓	✓	✓			✓	✓
v	Studied and possessing of at least a bachelor degree in construction or civil engineering related area.				✓			
	Has a vast experience in Malaysian construction industry OR has been practising in civil engineering and construction industry for more than 10 years.				✓			

Based on the Table 5.2 the experts are concluded as follow:

- 1) Expert 1: Expert in law and Malaysian law, expert in ADR and Arbitration and expert in *Sharī'ah* law and Islamic jurisprudence.
- 2) Expert 2: Expert in law and Malaysian law, expert in ADR and Arbitration and expert in *Sharī'ah* law and Islamic jurisprudence.
- 3) Expert 3: Expert in law and Malaysian law, expert in ADR and Arbitration and expert in *Sharī'ah* law and Islamic jurisprudence.
- 4) Expert 4: Expert in Malaysian construction industry.
- 5) Expert 5: Expert in law and Malaysian law and expert in construction law.
- 6) Expert 6: Expert in law and Malaysian law, expert in ADR and Arbitration and expert in *Sharī'ah* law and Islamic jurisprudence.
- 7) Expert 7: Expert in *Sharī'ah* law and Islamic jurisprudence.

## **ii. Experts for the second tier semi-structured interview**

The experts selected for the second tier of the semi-structured interview are mainly the construction industry professionals. While the first tier is considered to test the framework robustness in terms of theoretical application, the second tier of the interview is designed to validate the framework with the construction industry professionals in terms of applicability and practicality of the framework to be used in the Malaysian construction industry.

The characteristics of the respondents are deemed to be as follow:

- i. Having more than 4 years experience in the Malaysian construction industry.

- ii. Registered member or at least graduate member of the professional bodies i.e. Pertubuhan Arkitek Malaysia (PAM), Board of Engineers Malaysia (BEM), Board of Quantity Surveyors Malaysia (BQSM), or other institution related to the profession in construction.
- iii. Owner of any construction company, or their representative i.e. any personnel who is working in the construction sector.

There are ten (10) construction professionals selected for the second tier interview. The list of the professionals is as per table 5.3.

**Table 5.3** List of experts and their profession

	Architect	Civil Engineer	M&E Engineer	Quantity Surveyor	Contractor
<b>Respondent 1</b>				✓	
<b>Respondent 2</b>				✓	
<b>Respondent 3</b>	✓				
<b>Respondent 4</b>		✓			
<b>Respondent 5</b>			✓		
<b>Respondent 6</b>					✓
<b>Respondent 7</b>					✓
<b>Respondent 8</b>					✓
<b>Respondent 9</b>					✓
<b>Respondent 10</b>					✓

#### **5.6.1.2. Developing the questions and discussion content**

As explained in the Figure 5.1, the semi-structured interview is intended to verify the validity, legitimacy and the applicability of the framework for referring the dispute to *Tahkīm* in the Malaysian construction industry.

There are two (2) main questions developed on the basis to investigate into the problems, and since the purpose of the interview is to access the information based on the experience of the experts, knowledge and opinions, and these questions will serve as a trigger to a more detail discussion throughout the session.

The questions constructed are as follow:

- i. “Do you think that there are opportunities present to employ *Tahkīm* in the construction industry?”

This question serves to investigate the judgment of the experts towards the applicability of *Tahkīm* in the current setting of construction industry.

- ii. “What is your opinion regarding the framework that has been proposed in the document?”

This question serves as a triggering question and is derived from the proposed framework to probe on the opinion of the experts towards proposed framework and to obtain their comments to enhance the framework. The experts are expected to give their comment according to their expertise i.e. from the *Sharī'ah*, legal and construction perspective. For the *Sharī'ah* experts, the researcher may add additional question to this as per iii.

- iii. “Do you think that the framework contains the appropriate *Sharī'ah* substantiation and does it comply with what has been outlined by the *Sharī'ah*?”

The questions however will not be limited to the proposed structure and the moderator as facilitator may utilise any method to probe into the said matters. The researcher may utilise any open-ended question on the basis to build rapport, to get factual information, to establish knowledge, to clarify terminology, and to explore new topics.

And in regards to the logistic matter and interview model, the semi-structured interview will be conducted using a strategy where a document named “Interview Kit” as per Appendix E has been distributed to the experts using electronic method or through the email before the actual session so that they can thoroughly examine the framework.

Before the actual session of the interview, a pilot study has been conducted with two experts. The first expert is someone who has knowledge in construction and law. The second expert is a research methodology expert. This pilot study is important to ensure that the content of the interview kit is adequate, and to ascertain that the questions and the interview technique developed are vigorous.

#### **5.6.1.3. Data analysis**

The analysis for interview is done by examining the transcription and the use of an audio recorder is to “collect the voices” (Burnard, 1991; Wengraf, 2001; Back, 2012). Wengraf (2001) suggested that the pre-eminent way is to transcribe the data from the audio-tape instead of jotting down the information during the interview which can break the rapport between the interviewer and his respondent. Thus, it can be inferred that it is a good practice to record the session and transcribe the interview based on the recording.

And the analysis of open-ended question according to Naoum (2007) is rather complicated and the best way is to code the information into idea and themes. This corresponds to the suggestion made by Siti Nora Haryati (2011) (cited from Bloor et al., 2001) who conducted a focus group discussion that utilised a set of open-ended question; so that the data to be manageable for the analysis, the information need to be indexed. However, by taking the nature of the present research into consideration, it is important to mention that besides analysing the verdicts given by the experts into an index; the other crucial part of the interview is to explore the notions by the experts on the issue presented to them, which shall be described together with the aforesaid method of analysis. However, for this study, the researcher has utilised validation sheet to capture the response from the experts in a detail and concise manner. The validation will be recorded through the “Yes” and “No” boxes provided in the sheet and their explanations and inputs towards the framework are captured using the “Comments” section provided as well as the transcription from the interview session. The validation sheet is shown in the Figure 5.3.

**VALIDATION SHEET**

**NAME:**  
\_\_\_\_\_

**ORGANISATION/INSTITUTION:**  
\_\_\_\_\_

**VALIDATION:**

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO

**COMMENTS:**  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**INITIAL:**  
 \_\_\_\_\_

**DATE:**  
 \_\_\_\_\_

**Figure 5.3** Validation sheet

The method of analysis for the validation will be carried out as per Table 5.4 where the scores from the validation sheet are collated and shown in such table and the total of agreement and disagreement will be calculated in form of percentage.

**Table 5.4** Method of recording the answer for data analysis

<b>Validation</b>	<b>Framework</b>		<b>Applicability</b>	
	<b>Yes</b>	<b>No</b>	<b>Yes</b>	<b>No</b>
Expert 1				
Expert 2				
Expert 3				
Expert 4				
Expert 5				
Expert 6				
Expert 7				
<b>Total</b>				
<b>Percentage</b>				

Meanwhile, the comments from the experts towards the framework will be dissected and used to enhance the framework. The scope however will be limited to the specific discussion of the framework. The thematic analysis will be used in order to capture the information from the experts. The theme will be divided based on which area of the document that the expert has criticize, commend or given inputs.

The researcher has divided the themes as per the Table 5.5 and the way to record the comments from the experts.

**Table 5.5** Thematic analysis for the inputs and recommendations by the experts

THEME	COMMENTS FROM THE EXPERT						
	Expert 1	Expert 2	Expert 3	Expert 4	Expert 5	Expert 6	Expert 7
<b>General comments</b>							
<b>Steps of the framework</b>							
<b>Pre-<i>Tahkīm</i></b>							
<b>Procedural and session of <i>Tahkīm</i></b>							
Nature of <i>Tahkīm</i>							
Time and place of <i>Tahkīm</i>							
Substantive law							
Procedural and rules of evidence							
<b>Matters related to disputes</b>							
Nature of dispute to be referred to <i>Tahkīm</i>							
Common causes of dispute inside the construction industry							
<b>Referring to Hakam</b>							
Appointment of <i>Hakam</i>							
Characteristic of <i>Hakam</i>							
Numbers of <i>Hakam</i>							
<b>Award</b>							
Form of award							
Nature of award							
<b><i>Shari'ah</i> validation</b>							
<b>Framework validation</b>							
<b>Applicability validation</b>							

### 5.6.2. Revalidation of The Framework

Any changes to the framework after the semi-structured interview will be regarded as a revision. Therefore, a process of revalidation will be carried out to ensure that the framework proposed maintains the agreement and consent from the experts. The revalidation of the framework will be presented to the same experts to ensure that there is coherency to the research. Their consent will be recorded and the researcher will attempt to capture the majority of the agreement from the experts to arrive to a conclusion based on the following table.

**Table 5.6** Method of recording the revalidation for data analysis

<b>Revalidation</b>			
<b>Result</b>	<b>Yes</b>	<b>No</b>	<b>Silent</b>
Expert 1			
Expert 2			
Expert 3			
Expert 4			
Expert 5			
Expert 6			
Expert 7			
<b>Total</b>			
<b>Percentage</b>			

### 5.6.3. Validation of the Framework with the Construction Industry Experts

The revised framework is shown to the construction professionals and contractors with the intention to validate the framework in terms of applicability and practicality to be employed in the construction industry. Their consent will be recorded and the researcher will attempt to capture the majority of the agreement from the experts to arrive to a conclusion based on the Table 5.7.

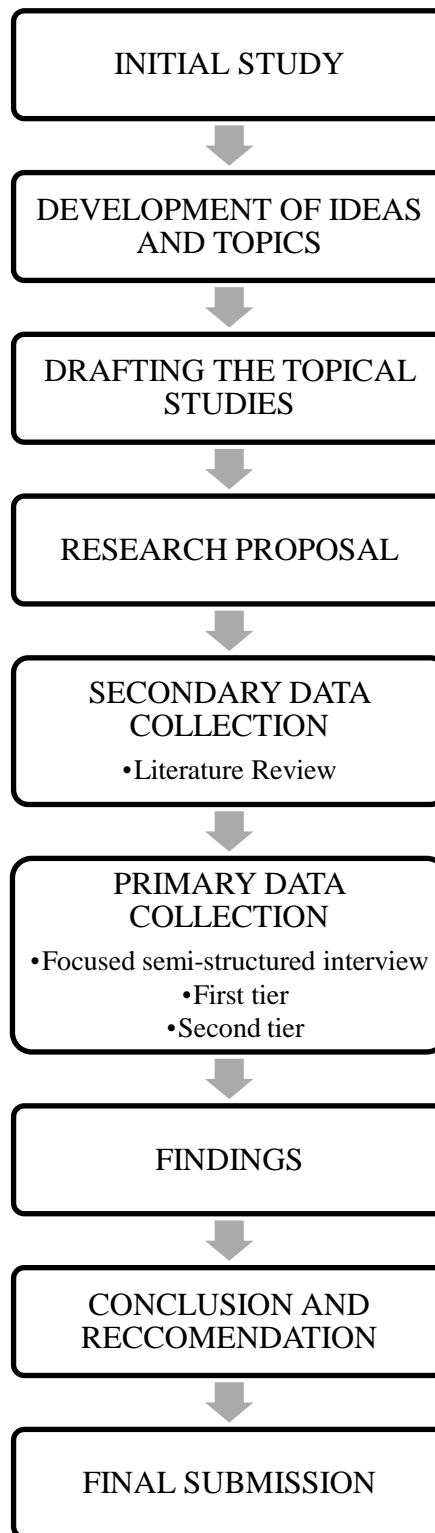
**Table 5.7** Method of recording the validation of construction industry experts

<b>Validation by Construction Industry Experts</b>				
<b>Construction Expert</b>	<b>Yes</b>	<b>No</b>	<b>Not Sure</b>	<b>No Answer</b>
Expert 1				
Expert 2				
Expert 3				
Expert 4				
Expert 5				
Expert 6				
Expert 7				
Expert 8				
Expert 9				
Expert 10				

## **5.7. CONCLUSION**

This chapter provides a detailed illustration on how the research is conducted where it underlines the aim and objectives of the research; to magnify the importance of research methodology to accomplish the objectives, research strategy selected, research design crafted, the data collection and data analysis. The primary concern of this chapter is the primary data collection that has been engaged by the researcher to obtain the data from the experts in order to accomplish the aim and objectives of the research.

Figure 5.4 summarises the processes mentioned in this chapter and the whole research methodology espoused.



**Figure 5.4** Summary of Research Methodology Employed

## CHAPTER 6

### ANALYSES OF RESULTS

#### 6.1. INTRODUCTION

This chapter is related to analyses of the data, presentation of the results and the discussion of the findings. In this chapter, the shortcomings occurred during the research which resulted to carry out the semi-structured interview instead of focus group discussion will be mentioned. The structure of the chapter is as follow:

- i) Analyses of semi-structured interview
- ii) Discussion on the research findings

#### 6.2. ANALYSES OF THE SEMI-STRUCTURED INTERVIEW

The objective of the semi-structured interview is to assist the researcher to validate and appraise the proposed framework of referring dispute to *Tahkīm* in Malaysian construction industry based on client-contractor dispute as stated in PWD 203A and PAM 2006 (With Quantities) in terms of its compliancy with *Sharī'ah* and applicability in the current setting of the industry.

The framework has been developed as in Chapter 4, and then has been presented to the experts as the basis of the interview (see Appendix E) to seek for their opinions and inputs. Two questions have been designed to elicit their comments towards the framework and the supporting notes. The document was previously designed to be

presented in a focus group discussion (FGD) with a moderator to guide the discussion and debate between the experts. However, due to the constraint of time and the schedule conflict between the experts, the researcher has resorted to conduct an in-depth interview to compensate the FGD.

Transcription of the interview sessions is shown in the Appendix F. The data are then coded and collated using the method of analysis as discussed in the Chapter 5. The analyses are arranged to be divided into two themes as follow:

- i) The validation of the framework in terms of compliancy with the *Sharī'ah* and legal perspective.
- ii) The validation of the applicability of the framework to be applied in the construction industry.
- iii) The inputs and recommendations from the experts towards the framework proposed.

#### **6.2.1. Validation Of The Framework In Terms Of Compliancy With The *Sharī'ah* And Legal Perspective**

The experts have been asked whether the framework is appropriate or not in terms of the compliancy with the *Sharī'ah* and legal perspective as well as accuracy and robustness of the information presented. The researchers presented and explained about the background of the research, the purpose of the interview session and what is the expected outcome of the research. The interview kit that has been provided prior to the actual session also contains similar explanation has assisted the researcher to explicate the study throughout the interview session.

The result collated is as shown in the Table 6.1.

**Table 6.1** Experts validation on the framework

Validation	Framework	
	Yes	No
Expert 1	✓	
Expert 2	✓	
Expert 3	✓	
Expert 4	✓	
Expert 5	✓	
Expert 6	✓	
Expert 7	✓	
<b>Total</b>	<b>7</b>	
<b>Percentage</b>	<b>100%</b>	

The experts have unanimously agreed that the framework is appropriate; it contains the acceptable amount of *Sharī'ah* evidence, it is compliant to the *Sharī'ah*, and it is accurate and sufficient from the legal perspective.

### **6.2.2. Validation Of The Applicability Of The Framework In The Malaysian Construction Industry**

The experts have then been asked whether the proposed framework of referring dispute to *Tahkīm* is applicable to be adopted particularly in the current setting of Malaysian construction industry, and whether it is appropriate alternative for dispute resolution apart from the arbitration clause embedded in the form of contract.

The result is as shown in the Table 6.2.

**Table 6.2** Experts validation on the applicability of framework

<b>Validation</b>	<b>Applicability</b>	
	<b>Yes</b>	<b>No</b>
Expert 1	✓	
Expert 2	✓	
Expert 3	✓	
Expert 4	✓	
Expert 5	✓	
Expert 6	✓	
Expert 7	✓	
<b>Total</b>	<b>7</b>	
<b>Percentage</b>	<b>100%</b>	

The experts have collectively agreed that such framework is appropriate to be adapted in Malaysian construction industry.

### **6.2.3. Inputs and Recommendations From the Experts Towards the Framework**

The comments from the experts have been transcribed as per Appendix G and have been summarised and tabulated as per Table 6.3. These comments will then be analysed and a revised framework will be established.

**Table 6.3** Tabulated comments from the experts towards the framework

THEME	COMMENTS FROM THE EXPERT							FINDINGS
	Expert 1	Expert 2	Expert 3	Expert 4	Expert 5	Expert 6	Expert 7	
<b>General comments</b>			To look into the aspect of harmonisation of law between <i>Tahkīm</i> and conventional arbitration			The authorities and power of <i>Tahkīm</i> must be clearly stated to show that it has a legal decision similar to the conventional ADR		
<b>Steps of the framework</b>	<ul style="list-style-type: none"> <li>- The steps should be revised and the consequence of admitting and denying should be illustrated in the steps i.e. if the defendant admit, the <i>Hakam</i> can arrive to an award, if the defendant denied, the steps will continue as proposed</li> <li>- In Islam, <i>Tahkīm</i> can be entered into many ways including Sulh and negotiations</li> </ul>	The dalīl (canonical text) is not Pre- <i>Tahkīm</i> , instead it's the authorities on legitimacy of <i>Tahkīm</i>			<ul style="list-style-type: none"> <li>- The authorities to refer to <i>Tahkīm</i> in the contract must be established; either a clause in the contract, or the mutual consent from both parties</li> <li>- To include the step of <i>Hakam</i> reverting back to the parties and have preliminary meeting with both parties; where both parties may agree on the procedures and other aspects</li> </ul>		Burden of proof may not necessarily be on the claimant; in contract of al- <i>Istisna'</i> , the contemporary Hanafis view regard that the burden of proof is on the contractor	<ul style="list-style-type: none"> <li>The steps need to be revised to include a few steps as follow:                             <ul style="list-style-type: none"> <li>- The steps should be broken down to two branches i.e. the consequence of admitting and denying</li> <li>- The canonical text should be considered as "Authorities on <i>Tahkīm</i>" instead of Pre-<i>Tahkīm</i></li> <li>- The <i>Tahkīm</i> agreement and <i>Tahkīm</i> clause as well as how the <i>Tahkīm</i> was entered into should be included as part of pre-<i>Tahkīm</i></li> <li>- The additional step to the selection of <i>Hakam</i>; reply from the <i>Hakam</i> whether he agreed or not on the appointment</li> <li>- Additional step on the preliminaries meeting between the parties and <i>Hakam</i></li> <li>- Additional supporting note on the burden of proof</li> </ul> </li> </ul>

<b>Pre-Tahkīm</b>		- " <i>Tahkīm</i> Procedure" might be more appropriate in this context and arbitration agreement can be included as " <i>Pre-Tahkīm</i> "						- This step has been revised where the "General Notes" has been changed to "Authorities on Tahkim". - The step has been revised as per the comment above where the <i>Pe-Tahkīm</i> may be regarded as a component of the framework instead of a step
<b>Procedural and session of Tahkīm</b>	The title of this part to be changed to "Procedural Requirements of <i>Tahkīm</i> "							Title has been changed to "Procedural Requirements of <i>Tahkīm</i> "
Nature of <i>Tahkīm</i>	- A <i>Tahkīm</i> or arbitration agreement may be made before any dispute happens and it's recognised by <i>Sharī'ah</i>	No problem with having <i>Tahkīm</i> or arbitration clause before dispute happens	In general, the scholars favour the submission agreement (to refer to <i>Tahkīm</i> when dispute happens) however arbitration agreement is recognised					It is proper to have <i>Tahkīm</i> agreement or a clause; it is more practical
Time and place of <i>Tahkīm</i>								Agree
Substantive law	The expert suggested that "other rules applied in Malaysia" to be added to the framework							To add "other rules applied in Malaysia" to the supporting note
Procedural and rules of evidence	The expert suggested that the concept of witness in Islam to be incorporated and the explanation regarding the "written evidence" to be added	Rules of evidence under the Islamic Law is applicable in this context						- Concept of witness in Islam to be highlighted - The explanation regarding the "written evidence" - Rules of evidence under Islamic Law

<b>Matters related to disputes</b>								Agree
Nature of dispute to be referred to <i>Tahkīm</i>								Agree
Common causes of dispute inside the construction industry								Agree
<b>Referring to <i>Hakam</i></b>								Agree
Appointment of <i>Hakam</i>								Agree
Characteristic of <i>Hakam</i>	<ul style="list-style-type: none"> <li>- Knowledge in <i>Shari'ah</i> is not necessary but the <i>Hakam</i> need have knowledge in construction</li> <li>- Female <i>Hakam</i> is allowed</li> <li>- Ethical value and integrity of <i>Hakam</i> need to be emphasised</li> </ul>	<ul style="list-style-type: none"> <li>- Based on the substantive law used in Malaysian construction industry, no problem for non-Muslim to become <i>Hakam</i></li> <li>- No issue with female <i>Hakam</i></li> </ul>	Islam is flexible and allow non-Muslim to become <i>Hakam</i>					<ul style="list-style-type: none"> <li>- Knowledge in construction is a necessary trait</li> <li>- Ethical value and integrity of <i>Hakam</i> should be added</li> <li>- Non-Muslim as <i>Hakam</i> is permissible</li> <li>- Female <i>Hakam</i> is accepted in Islam</li> </ul>
Numbers of <i>Hakam</i>	The panels of <i>Hakam</i> usually consisted by odd numbers of panel	Provision by the Maliki for the odd number of <i>Hakam</i> (as panel)						<ul style="list-style-type: none"> <li>- The panels of <i>Hakam</i> shall be in odd numbers</li> </ul>

<b>Award</b>								Agree
Form of award	The award must be in writing	Award must be written down; and must be attested by judged people	Award must be in writing		Award must be a reasoned award; in a good written format with explanation by the <i>Hakam</i> according to Islam			- Award to be in writing and in a good format
Nature of award	Res Judicata may not be necessary		- Award need to be in compliance with <i>Shari'ah</i> - Res Judicata is correct					- Award must be in compliance with <i>Shari'ah</i> - Res Judicata is necessary although Expert 1 disagree; because Expert 3 shows approval and other experts being silent on this
<b>Shari'ah validation</b>	Sufficient, but suggested that the essence from Medjelle and AAOFI to be incorporated	Sufficient, but suggested to look into the <i>Tahkim</i> during the caliphate of Umar al-Khattab					Appropriate; but need to change the "people of Quraiza" to "Jews of Quraiza"	- The notes has been changed to "Jews of Quraiza" - Some of the suggestion has been accepted where the provision of <i>Tahkim</i> under Medjelle has been incorporated and the practise of <i>Tahkim</i> during the time of Umar is incorporated
<b>Framework validation</b>	Framework is valid, but the title need to be changed to case management of <i>Tahkim</i> and emphasise on the proposing the process of referring dispute to <i>Tahkim</i>		Framework is valid; but consider to compare with the rules	Nothing wrong with the framework; but the people in construction industry need to be educated about <i>Tahkim</i> and there must be a governing body to supervise the conduct		The penalty or impact of not complying with the award must be shown	To include the expert testimony/witness in the framework and its characteristic	Experts generally agree that the framework is valid; however due to the scope and limitation of the study is the arbitration as referred in the major form of contracts and Arbitration Act 2005 and Arbitration (Amendment) Act 2011, other suggestions from the experts will not be discounted, however will be added as

								recommendation of research
<b>Applicability validation</b>	Applicable			There's opportunity to employ <i>Tahkīm</i> in construction industry		Applicable; but the term may need to be changed		Experts generally agree that the framework is applicable

### 6.3. DISCUSSION ON THE RESEARCH FINDINGS

Derived from the comments and inputs from the experts, the researcher has established a revised framework. This framework corresponds with the validity of the application in the construction industry, the robustness in terms of *Shari'ah* and legal concept, as well as any contribution within the limit of the study.

The researcher has decided to break down the steps into four main components; Preliminaries, Pre-*Tahkīm*, *Tahkīm* Procedures and Award. This was derived from the perception given by the experts during the interview that these are the major areas in the steps proposed. Pre-*Tahkīm*, instead of incorporated as a step, is identified as one of the components in the steps. This corresponds to the suggestion from Expert 1, 2 and 5 where the experts has given acuity to the researcher that Pre-*Tahkīm* is a major component where *Tahkīm* agreement and the submission agreement reside. Expert 1 has also explained that the Pre-*Tahkīm* is a process before the actual session of *Tahkīm* begins.

*Tahkīm* process must be rooted from a *Tahkīm* clause in a contract, or a submission agreement where the disputed parties may enter into an agreement to refer their dispute to *Tahkīm*. This is the view of Expert 1, 2, and 3 with Expert 5 clearly stated that this authorities to refer to *Tahkīm* must be established in the steps.

The researcher has also revised the framework to have two consequences if the defendant chooses to admit or deny as suggested by Expert 1. The *Hakam* may arrive to an award if the defendant confesses to the allegation made by the claimant.

Expert 5 has suggested the additional step where the *Hakam* reply to the appointment and agree with it. And another step is for the *Hakam* to arrange a preliminary meeting

between him and the parties. The preliminary meeting as suggested by Expert 5 is vital so that the parties can agree on the procedural aspects that will be carried out through the *Tahkīm* process.

Expert 1 and 2 has firmly stated that there is nothing wrong with having a *Tahkīm* clause according to *Sharī'ah* although Expert 3 stated that in general the Muslim scholars prefer the submission agreement. It can be inferred that the in the world of nowadays, a *Tahkīm* clause is appropriate and necessary especially considering the nature of construction industry that involves a complex contract and big amount of money.

In terms of procedural aspect, the experts in general agreed that the features outlined are sufficient. Expert 1 however suggested that “other rules applied in Malaysia” to be added to the substantive law used in *Tahkīm*. Apart from that, Expert 1 also suggested that the concept of witness in Islam i.e. the testimony of a male witness equals to two female witnesses to be stated and the concept of written evidence to be explained further i.e. it corresponds to the section under the Evidence Act 1950. Expert 2 suggested that rules of evidence under the Islamic Law are applicable.

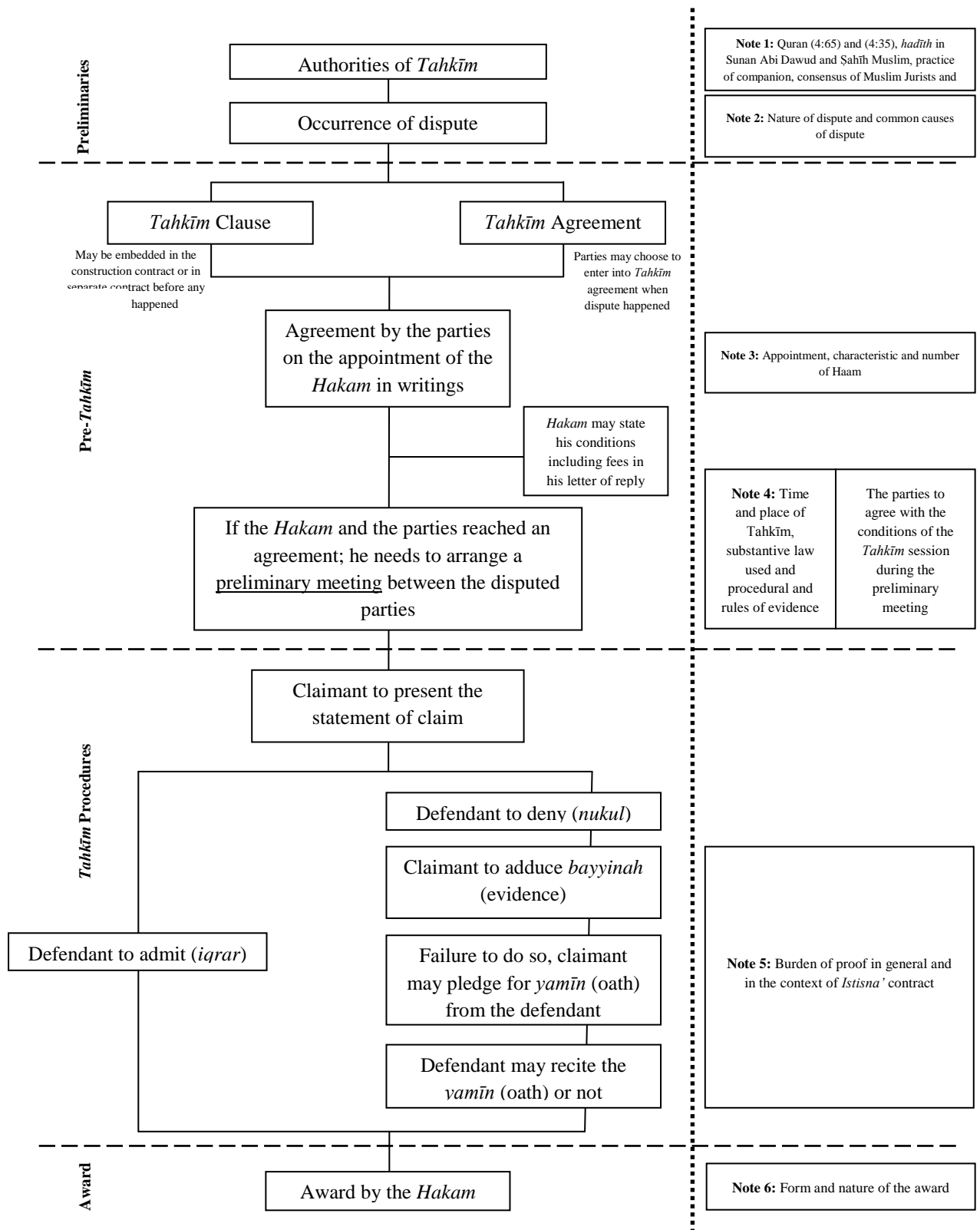
In terms of the characteristics of *Hakam*, Expert 1 suggested that “knowledge in construction industry” is a vital aspect that a *Hakam* should have, and further suggested that “knowledge in *Sharī'ah*” is not applicable in this context of study. Expert 1 also proposed that the character of a *Hakam* should include “ethical value and integrity”. Expert 2 and 3 agreed that there is no restriction in *Sharī'ah* for non-Muslim to become *Hakam* for construction dispute. And Expert 1 and 2 conformed that the female *Hakam* is allowed especially in the commercial dispute.

Panel of *Hakam* must be formed in odd numbers as confirmed by Expert 1 and 2. This is imperative because the award must be achieved through the majority.

Meanwhile, Expert 1, 2, 3 and 5 agreed that the award must be in writing. Expert 3 further explained that it is imperative in Islam for a contract to be in written based on the verse 282 of *Surah Al-Baqarah*. Expert 5 also explained that the award must be a reasoned award, with a good judgment by the *Hakam*.

Expert 3 suggested that the nature of award is *Sharī'ah*-compliant and that it is important that any act that contravenes with *Sharī'ah* is forbidden including i.e. the award or the penalty must not contain any form of usury. Expert 1 stated that the Res Judicata may not be necessary, however Expert 3 agreed and other experts are silent on this matter. Therefore, Res Judicata as a nature of the award is not discounted from the framework.

The revised framework or R1.0 is shown in the Figure 6.1 and the supporting notes which correspond to the Table 6.3 and the Appendix G are displayed in Table 6.4.



**Figure 6.1** Revised framework for the reference of disputes to *Tahkīm* in Malaysian construction industry (R1.0)

**Table 6.4** Supporting notes for the steps presented in Figure 6.1

<b>Note 1: Authorities for <i>Tahkīm</i></b>	
<b>Matters</b>	<b>Details</b>
<p>Authorites for <i>Tahkīm</i></p>	<p>“But no, by your Lord they can have no Faith until they make you (O Muhammad) judge in all disputes between them.” (4:65)</p>
	<p>“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things” (4:35)</p>
	<p><i>Hadīth</i> narrated Hani ibn Yazid that the Prophet astonished by the action of Hani to reconcile disputations of his people:</p> <p>“When he went with his delegation to the Apostle of Allah (PBUH), he heard them calling him by his kun-yah (surname), Abu al-<i>Hakam</i>. The Apostle of Allah (PBUH) called him and said: Allah is the judge (al-<i>Hakam</i>), and to Him the judgment belongs. Why are you given the kun-yah Abu al-<i>Hakam</i>? He replied: When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. The Prophet said: How good this is! What children have you? He replied: I have Shurayh, Muslim and Abdullah. He asked: Who is the oldest of them? I replied: Shurayh. He said: Then you are Abu Shurayh.” (Sunan Abi Dawud)</p>
	<p>The appointment of Sa’ad bin Mu’az by the Jews of Quraiza, which has been endorsed by the Prophet:</p> <p>“The Jews of Quraiza only to accept the decision of Sa’ad bin Mu’az upon them. Accordingly, the Messenger of Allah sent for Sa’ad who came to him riding a donkey. When he approached the mosque, the Messenger of Allah said to the people of Ansar: Stand up to receive your chieftain. Then he said (to Sa’ad): These people have surrendered to only accept your decision. Sa’ad said: Kill their soldiers and capture their women and children. (Hearing this), the Prophet said: You have adjudged by the command of God. The narrator is reported to have said: Perhaps he said: You have adjudged by the decision of a king.” (Sahih Muslim)</p> <p>The Prophet reconciles the tribes’ disputation regarding the <i>Hajar al-Aswad</i> (Black Stone) as recorded Al-Raheeq Al-Makhtum (Sealed of the Nectar). (Al-Mubarakfuri, 2006)</p>

	<p><i>Majlis Tahkīm</i> between Ali bin Abi Talib and Muawiyyah bin Abi Sufyan as recorded by Ibn Katsir in <i>Al-Bidayah wa Al-Nihayah</i>. (Al-Sulami, 2001)</p>
	<p>Umar al-Khattab and Ubay Ibn Ka’ab appointed Zayd bin Thabit as <i>Hakam</i> when they quarrelled over a date farm. (Al-Sarkhasi, 1986)</p>
	<p>Consensus of Muslim Jurist in <i>Mu’in Al-Hukkam</i>:</p> <p>“A settlement of a dispute by third party, where the parties have voluntarily agreed to submit their dispute to <i>Tahkīm</i>; has been recognised in the book (Quran), the <i>Sunnah</i> as well as the consensus of the <i>ummah</i>.” (Al-Tarāblisī as cited in Nora et. al., 2013)</p>
	<p>Article 1790 of <i>Majallah Al-Ahkām Al-‘Adliyyah</i> or <i>Medjelle</i> that states:</p> <p>“<i>Tahkīm</i> (arbitration) consists of the parties to an action agreeing together to settle the question at issue between them, who is called <i>Hakam</i> (arbitrator).”</p>
<b>Note 2: Matters Related to Dispute</b>	
<b>Matters</b>	<b>Details</b>
Nature of dispute to be referred to <i>Tahkīm</i>	The dispute must be clearly defined
Common causes of dispute inside the construction industry	Occur due to the specific disagreement and/or one of the parties feels that his right, needs and interest is not being fulfilled by the responding party, and the latter refuse to hold any liability against it, which the parties proceed by way of claims, counter-claims, denials and so on
	Changes of conditions, interpretation, workplace conditions, communications, law, access to construction site and access to materials
	Management , people, communication, and contract documents
	Delay and unrealistic expectations
	Change orders, pre-award design, pre-construction, quality assurance
	Uncertainty, contractual problems, opportunistic behaviour
	Changes of conditions, changes of scope, design, unpredictability, contract documents, management, delay, communications, and unrealistic expectations.
	Payment, performance, delay, negligence, quality, administration.
Misunderstanding, unpredictability	

	Unrealistic expectations, contract documents, communications, lack of team spirit, changes
	People, process, product
	Change of scope, change in conditions, delay, distribution, acceleration, termination
	Management, culture, communication, design, economics, tendering pressures, law, unrealistic expectations, contracts, workmanship
	Acceleration, access, weather, changes
	Changes, law, delay
	Change of scope, change of condition, acceleration, delay, disruption, termination
<b>Note 3: <i>Hakam</i></b>	
<b>Matters</b>	<b>Details</b>
Appointment of <i>Hakam</i>	Must be appointed and agreed by name by the parties
	To recite the agreement of appointment to the <i>Hakam</i> ( <i>sīghah</i> ) and the <i>Hakam</i> must accept it ( <i>qabul</i> )
Characteristic of <i>Hakam</i>	Muslim and non-Muslim may become <i>Hakam</i> for construction dispute
	Male and female may become <i>Hakam</i> for the construction dispute
	<i>Mukallaf</i> (Accountable)
	' <i>Adl</i> (Fair)
	Intelligent
	<i>Ijtihād</i>
	Have knowledge in construction
	Have knowledge on the case
Numbers of <i>Hakam</i>	Two for family and marital disputes
	One
	Panel of <i>Hakam</i> (in odd numbers)
<b>Note 4: Procedures and Session of <i>Tahkīm</i></b>	
<b>Matters</b>	<b>Details</b>
	Flexible
Time and place of <i>Tahkīm</i>	Subjected to the <i>Hakam</i> discretion and wisdom
	If any term agreed, <i>Hakam</i> must adhere to it or else the award would be invalid
	Contemporary view: Subjected to the <i>Mahkaamat Al-Tahkīm</i> (arbitration chamber)
Substantive law	<i>Sharī'ah</i> and applicable rules in the context of Malaysian construction industry

Procedural and rules of evidence	The procedures are flexible
	Verbal evidence: Testimony by the witness (A male witness is equivalent to two female witnesses)
	Written evidence (In accordance to Act 56, Evidence Act 1950)
	Rules of evidence in Islamic Law is applicable
<b>Note 5: Burden of Proof</b>	
<b>Matters</b>	<b>Details</b>
Burden of proof in general	Generally based on the Based on the maxim of Usul al-Fiqh (Principles of Jurisprudence): “Onus of proof is on the claimant; the oath on who denies.”
Burden of proof in case of <i>Istisna'</i>	In the context of <i>Istisna'</i> (manufacturing) contract, the view of Hanafis articulates that the contractor or the builder may be held liable for the burden of proof based on the maxim الصانع يضمن (the manufacturer to give warranty)
<b>Note 6: Award</b>	
<b>Matters</b>	<b>Details</b>
Form of award	In writings and in certain case need to be attested by judged personnel
Nature of Award	Binding
	Res judicata
	<i>Shari'ah</i> -compliant i.e. avoiding essence of usury in the judgment
	Must be written in a good format; reasoned award

#### 6.4. REVALIDATION OF THE FRAMEWORK

The revised framework, R1.0 has been presented to the similar experts. The findings are as in the Table 6.5.

**Table 6.5** Revalidation of revised framework

<b>Revalidation</b>			
<b>Result</b>	<b>Yes</b>	<b>No</b>	<b>Silent</b>
Expert 1	✓		
Expert 2			✓
Expert 3			✓
Expert 4	✓		
Expert 5	✓		
Expert 6	✓		
Expert 7	✓		
<b>Total</b>	<b>5</b>		<b>2</b>
<b>Percentage</b>	<b>71%</b>		<b>29%</b>

Majority of the experts have agreed and given their consent to the revised framework presented. Two of the experts have been contacted for the revalidation, however, due to the time constrain, the researcher unable to obtain their view upon the revised framework.

#### 6.5. VALIDATION OF THE FRAMEWORK WITH CONSTRUCTION INDUSTRY EXPERTS

The framework then has been presented to the construction professionals and contractors. The findings are recorded in the Table 6.6.

**Table 6.6** Validation by the construction industry experts

<b>Validation by Construction Industry Experts</b>				
<b>Construction Expert</b>	<b>Yes</b>	<b>No</b>	<b>Not Sure</b>	<b>No Answer</b>
Respondent 1	✓			
Respondent 2		✓		
Respondent 3	✓			
Respondent 4	✓			
Respondent 5				✓
Respondent 6	✓			
Respondent 7	✓			
Respondent 8			✓	
Respondent 9		✓		
Respondent 10	✓			
<b>Total</b>	<b>6</b>	<b>2</b>	<b>1</b>	<b>1</b>
<b>Percentage</b>	<b>60%</b>	<b>20%</b>	<b>10%</b>	<b>10%</b>

Majority of the experts i.e. 60% from the total respondents agreed that the framework can be employed in the Malaysian construction industry. One respondent did not response to the questionnaire, while another was uncertain about it.

## **6.6. SUMMARY**

This chapter has discussed about the overall analyses of the research. Table 6.7 shows whole processes of the research methodology to analyses of the data.

**Table 6.7** Research methodology and analyses

Stage	Primary Data Collection			Secondary Data Collection		
<b>Objective</b>	Objective 1	Objective 2	Objective 3	Objective 4		
	To identify the process and procedures of arbitration.	To define Tahkīm and to identify the procedures involved.	To appraise Tahkīm in terms of its opportunities in the Malaysian construction industry.	To develop and validate a framework for the process of reference of disputes to Tahkīm in the Malaysian construction industry.		
<b>Method</b>	Literature Review and Content Analysis			Semi-Structured Interview		
	Literature review based on statute-books, legal documents, Holy Quran, <i>Hadīth</i> , exegeses and commentaries, books on <i>fiqh</i> (Islamic jurisprudence), lexicons			Framework presented to the experts to obtain comments and reviews	<u>R1.0</u> presented to the same experts for revalidation purpose	Presentation of the final framework to the experts in construction industry
<b>Output</b>	Initial framework from the literature review			Revised framework or <u>R1.0</u> with comments and reviews	Final framework	Results

## CHAPTER 7

### CONCLUSION

#### 7.1. CONCLUSION

This thesis focuses on the application of *Tahkīm* in the Malaysian construction industry, focusing on the proposal of framework for reference of dispute to *Tahkīm*.

This research corresponds with the four objectives outlined:

- 1) To identify the mechanism and practice of conventional Alternative Dispute Resolution (ADR) in the industry; i.e. of arbitration.
- 2) To identify the written evidence presented in *Sharī'ah* on the Alternative Dispute Resolution (ADR); mainly on the aspect of *Tahkīm*.
- 3) On the basis of (1) and (2), to appraise the concept of *Sharī'ah* compliance, its value, and mechanism in order to identify any present opportunities in employing *Sharī'ah* compliance ADR in the industry.
- 4) On the basis of (3), to develop and validate a framework for the process of referring disputes to *Tahkīm* in the Malaysian construction industry.

The objective 1 and 2 have been achieved through the Chapter 2, 3 and 4 respectively where the concept of arbitration and *Tahkīm* has been explained and scrutinised. Meanwhile, the objective 3 has been accomplished through the appraisal made at the end of Chapter 4 in Table 4.2.

The objective 4 has been realised through the preliminary framework presented in the Interview Kit as per Appendix E and the validated framework is showcased in the Figure 6.1 and Table 6.4 in Chapter 6.

The framework proposed was derived from the literature review and content analysis primarily based on the appraisal made between Arbitration Act 2005 (Rev. 2011) and the content of *Tahkīm* in *Sharī'ah*. Based on the primary data collection, the framework of referring the disputes to *Tahkīm* is robust and complying with the *Sharī'ah*. Amendments have been made from the inputs given by the experts of law, *Sharī'ah*, and construction. The further primary data collection with construction professionals and contractors reveals that the framework is applicable to be employed in the Malaysian construction industry.

## **7.2. LIMITATION OF THE STUDIES**

This research came with several limitations during its whole period in terms of time, financial and human resources. Thus, it is necessary to highlight the following limitations and the findings should be assessed under these constraints:

- 1) This study is only limited to the process of referring dispute to *Tahkīm* in the context of Malaysian construction industry by assessing the opportunities presented through the comparison of Arbitration Act 2005 and *Tahkīm* and other opportunities presented, as well as by looking into the arbitration clause in PWD 203A 2010 and PAM Contract (With Quantities) 2006.

- 2) The case law regarding arbitration can be considered as scarce since it is not documented due the nature of arbitration to be confidential and the judgment is deemed to be non-public has imposed a difficulty to the research.
- 3) This research is academic in nature, thus the framework proposed does not necessarily constitute the absolute suitability to be applied in the Malaysian construction industry. Further in-depth study is required to appraise the application in the context of legal and the acceptance of the key players in the construction industry.
- 4) The researcher is lacking in knowledge of *Sharī'ah* and law. Therefore, there are several grey areas in these aspects that might be revisited and enhanced to support the application of *Tahkīm* to resolve construction dispute.

### **7.3. SUGGESTIONS AND RECOMMENDATIONS FOR FURTHER RESEARCH**

The researcher feels that there should be more research conducted in the topic of *Sharī'ah*-compliant in resolving construction disputes. Besides contributing to the academia, research in this area will provide references and guidance on how to resolve dispute under the *Sharī'ah* and the opportunities to resolve dispute using the *Sharī'ah*-compliant ADR. Some recommendations on the area that the researcher deemed appropriate to be looked at are as follow:

- 1) Further in-depth study on the practise of *Tahkīm* in construction industry by looking at the seat of *Tahkīm* and its procedure
- 2) The study on the application of *Sulh* in resolving construction dispute.

- 3) The study on the application of *Muhtasib* as on-site dispute resolver in the construction industry.
- 4) The study on the harmonisation of law in context of applying the concept of *Tahkīm* processes into the conventional arbitration practised in Malaysia.
- 5) The study on the fast-track dispute mitigation according to *Shari'ah*.

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# APPENDIX

## A

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Professor

Faculty of Law and International Relations

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**6. Fakhah Azahari**

Partner, Nik Hisham, Fakhah & Co

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**7. Dr. Azman Mohd. Noor**

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# **APPENDIX**

# **B**

## **BACKGROUND OF THE RESPONDENTS**

### **Respondent 1**

Respondent 1 is a lecturer at ABC University. Possessing a PhD, she is a quantity surveyor by nature. A Graduate Member of Board of Quantity Surveyor Malaysia (BQSM), she has 15 years of experience in the industry and academia.

### **Respondent 2**

Respondent 2 is a registered Quantity Surveyor with Board of Quantity Surveyors Malaysia (BQSM). With 34 years of experience as consultant QS, he possessed vast experience about the Malaysian construction industry.

### **Respondent 3**

Respondent 3 is a lecturer at XYZ University. An architect by nature, he has vast experience as consultant and academician. Registered to Pertubuhan Arkitek Malaysia, he possessed a PhD from a renowned university in Australia.

### **Respondent 4**

Respondent 4 is a civil engineer registered to Board of Engineers Malaysia (BEM) as Graduate Engineer. He possessed a PhD and MBA and has an ample experience related to construction industry.

### **Respondent 5**

Respondent 5 is a registered mechanical engineer to the Board of Engineers Malaysia (BEM) with more than 30 years of experience in construction industry.

### **Respondent 6**

Respondent 6 is a managing director of DEF Sdn Bhd, a construction company in Kuala Lumpur, Malaysia; registered to Construction Industry Development Board (CIDB) class G7. Operating since 1996, he is responsible for contracts amounting around 200 million ringgit.

### **Respondent 7**

Respondent 7 is an executive director for JKL Sdn Bhd, a civil engineering construction company based in Johor Bahru, Malaysia; registered to Construction Industry Development Board (CIDB) class G4.

### **Respondent 8**

Respondent 8 is an architect working for PQR Berhad, a renowned developer in Semenanjung Malaysia. Having 6 years of experience as designer and coordinator, he has a good knowledge related to the Malaysian construction industry.

### **Respondent 9**

Respondent 9 is a quantity surveyor at a local construction company located in Selangor, Malaysia. Having 5 years experience as consultant QS and in the industry, he is a Graduate Member of Board of Quantity Surveyor Malaysia (BQSM).

### **Respondent 10**

Respondent 10 is a quantity surveyor at LMN Sdn Bhd, a construction company specialising in civil and infrastructure works.

# APPENDIX C

**VALIDATION OF THE  
FRAMEWORK FOR REFERENCE  
OF DISPUTE TO *TAHKĪM*  
(*SHARĪ'AH*-COMPLIANT  
ARBITRATION) IN MALAYSIAN  
CONSTRUCTION INDUSTRY**

**INTERVIEW KIT**

**MUHAMMAD ARIFFUDDIN BIN ARIFIN**

**MASTER OF SCIENCE IN BUILT ENVIRONMENT**

**MSc. BE (BY RESEARCH)**

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**SUPERVISED BY: PROF SR DR KHAIRUDDIN ABDUL RASHID**

# Part I

### **1.1. Foreword**

This paper is compiled by the researcher as a part of the Master degree thesis. This document works as the fundamental allusion in carrying out the in-depth interview.

This document is delivered to the interviewee prior to the actual interview session. It contains the proposal of the framework for application of *Tahkīm* in the construction industry and the summary of the literature prepared by the researcher as the insight into the research in order to offer a better understanding on the topics discussed in the research to the panels.

### **1.2. Methodology**

In the first part of the document, the background of the study is explained. Subsequently, the milieu and the purpose of the interview will be described in order to provide the information to the panels on why the interview is carried out and what are the expected outcomes from it.

In the second part of the document, the reasons why the research is carried out are explained by summarising the opportunities presented as collated from the literature review. Then, the proposal of the method of referring dispute to *Tahkīm* in the construction industry is outlined.

The third part of the document contains the appendices for the proposed framework. This will be the basic reference for the panels to understand the concept illustrated by the researcher in his research and to help understand the framework presented.

### **1.3. Background and significance of the Research**

Alternative dispute resolution (ADR) has become a major option in resolving disputes in Malaysia. Methods of ADR such as arbitration and mediation are now practised widely in the industry to resolve the construction and engineering disputes. The existence of arbitration and mediation clauses in the major forms of contract such as of PWD and PAM indicate the acceptance of such practises by the industry's key players. And outside the construction industry, the application of ADR has extended to the employment of *Sharī'ah*-compliant ADR, or Islamic ADR, in the scope of marital and family disputes, and recently has moving forward to Islamic banking and

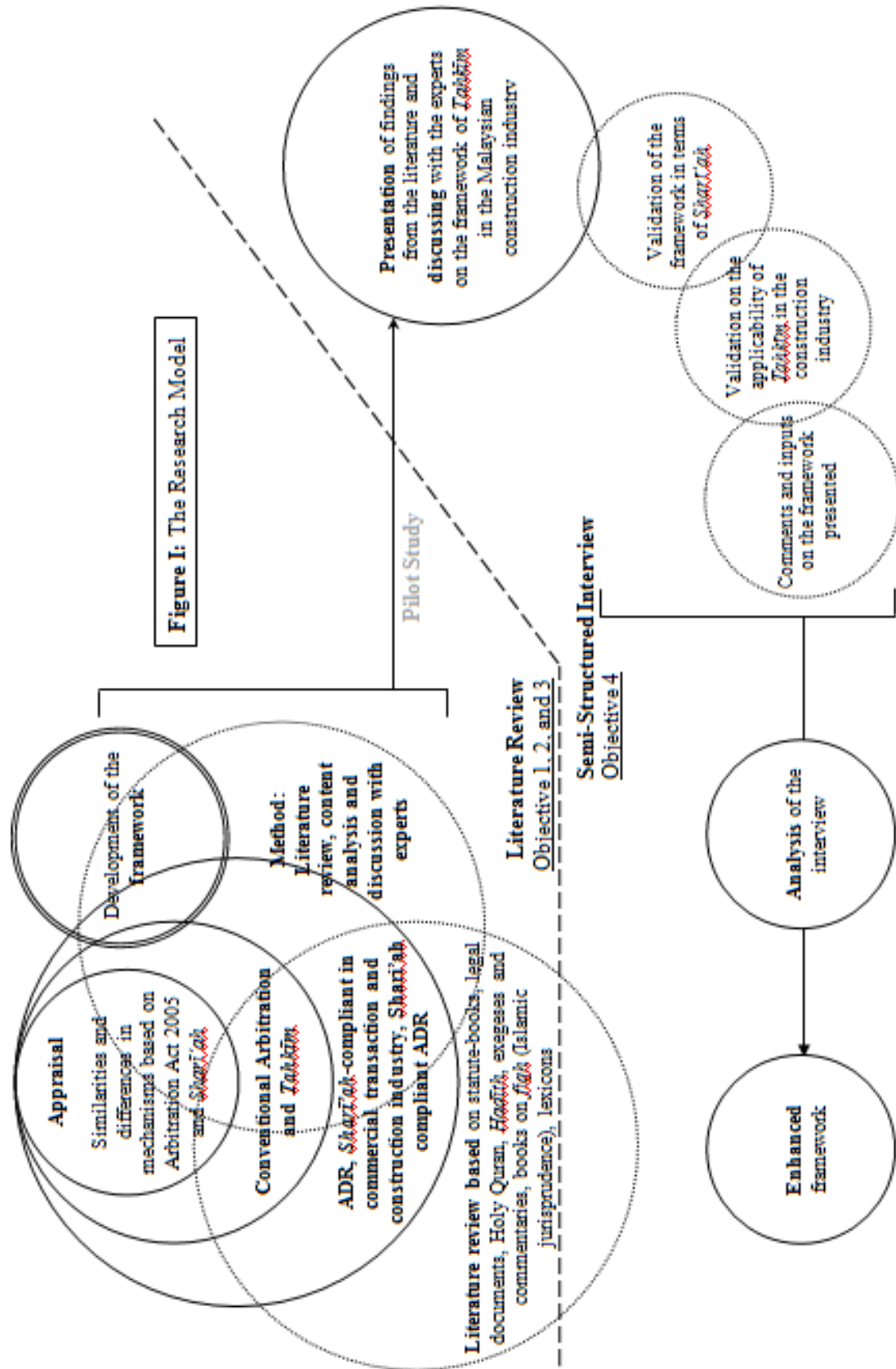
financing sector. *Sharī'ah*, in corresponding to the concept of *Tawhid* (monotheism) in the daily transaction and activities, has a big impact to every Muslim in the context of fulfilling the obligation towards the religion. Despite of this significance, little effort has been made to examine *Sharī'ah*-compliant ADR to be employed in the construction industry. The aim of this research is to determine the opportunities presented to employ the *Sharī'ah*-compliant Alternative Dispute Resolution (ADR) focusing on *Tahkīm* the Malaysian construction industry and to develop a proper and appropriate framework for such purpose.

#### **1.4. Aim and Objectives of the Research**

The aim of the research is to determine the opportunities presented in employing the *Sharī'ah* compliance Alternative Dispute Resolution (ADR) medium in the Malaysia construction industry and to develop a proper framework for referring disputes to *Tahkīm* and its processes. And to achieve such aim, these are the objectives of the study;

- 1) To identify the mechanism and practice of conventional Alternative Dispute Resolution (ADR) in the industry; i.e. of arbitration.
- 2) To identify the written evidence presented in *Sharī'ah* on the Alternative Dispute Resolution (ADR); mainly on the aspect of *Tahkīm*.
- 3) On the basis of (1) and (2), to appraise the concept of *Sharī'ah*-compliant, its value, and mechanism in order to identify any present opportunities in employing *Sharī'ah* compliance ADR in the industry.
- 4) On the basis of (3), to develop and validate a framework for the process of referring disputes to *Tahkīm* in the Malaysian construction industry.

The model to achieve the aim and objectives of this research is further explained in Figure 1 and Table 1.



Stage	Primary Data Collection			Secondary Data Collection	
<b>Objective</b>	Objective 1	Objective 2	Objective 3	Objective 4	
	To identify the written evidence presented in <i>Sharī'ah</i> on the Alternative Dispute Resolution (ADR); mainly on the aspect of <i>Tahkīm</i> .	To identify the mechanism and practice of conventional Alternative Dispute Resolution (ADR) in the industry; i.e. of arbitration.	To appraise the concept of <i>Sharī'ah</i> compliance, its value, and mechanism in order to identify the framework of <i>Tahkīm</i> to be employed in the construction industry.	To propose the preliminary framework of <i>Tahkīm</i> to be implemented in the Malaysian construction industry.	
<b>Method</b>	Literature review, content analysis and discussion with experts			Semi-Structured Interview	
	Literature review based on statute-books, legal documents, Holy Quran, <i>Hadīth</i> , exegeses and commentaries, books on <i>fiqh</i> (Islamic jurisprudence), lexicons			Framework presented to the experts to obtain comments and reviews	<u>R1.0</u> presented to the same experts for revalidation purpose
<b>Output</b>	Initial framework from the literature review			Revised framework or <u>R1.0</u> with comments and reviews	Final framework

**Table I:** The Research Methodology

### **1.5. The Agenda of the In-Depth Interview**

As the research progressed, a preliminary or a proposal of framework is developed to cater the objective number 3. And to address the objective number 4, an in-depth interview needs to be conducted.

There are 3 main agendas to be addressed during the interview sessions:

- i. Firstly, to corroborate that the potentials and opportunities for the application of *Tahkīm* in the construction industry are exist.
- ii. To verify that the framework proposed fulfil the *Sharī'ah* requirements and to attain further clarification from the *Sharī'ah* experts which may be included to support the research.
- iii. To ensure that the framework is robust and vigorous by testing it onto the experts of arbitration and construction and to obtain their view and validation on the framework proposed.

The main agendas need to be verified in consensus manner; the data from the interview will be collated and analysed to find out what is the majority of the opinion by the experts.

# Part II

## 2.1. The Opportunities in Applying *Tahkīm* in Malaysian Construction Industry

The research was conducted because there are a few areas that can be considered as the opportunities to apply *Tahkīm* in the construction industry. The first is the similarity possessed by *Tahkīm* and the Arbitration Act 2005 as highlighted in the table below.

	Conventional Arbitration (Arbitration Act 2005)	<i>Tahkīm</i>
Arbitration Agreement	<ul style="list-style-type: none"> <li>- Accommodated in the Section 9 (1) of Arbitration Act 2005.</li> <li>- May be included in the arbitration clause in commercial contract for the future disputes to be entered into arbitration.</li> </ul>	<ul style="list-style-type: none"> <li>- Arbitration agreement may only be constituted after the dispute has arisen.</li> </ul>
Criteria and appointment of arbitrator	<ul style="list-style-type: none"> <li>- Chapter 3 of the Arbitration Act 2005 discussed on the composition of arbitrator.</li> <li>- Qualification of the arbitrator is not mentioned in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>- Criteria of the <i>Hakam</i> is similar to what has been outlined in the subject of <i>Qada'</i>. (Samir Salleh in Commercial Arbitration In Arab Middle East)</li> <li>- <i>Sharī'ah</i> strictly outlines the qualifications of the arbitrator.</li> </ul>
Procedural rules	<ul style="list-style-type: none"> <li>- 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.</li> <li>- Based on equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.</li> </ul>	<ul style="list-style-type: none"> <li>- No strict provisions. <i>Sharī'ah</i> allows the parties to mould the procedures as they wanted to.</li> <li>- Promoting the concept of '<i>adl</i>' or justice that the parties shall adhere.</li> <li>- There is a "safety valve" under the <i>Sharī'ah</i> that allows concept of <i>Sulh</i> (two conciliators from each party to reconcile the dispute) to be adapted in the procedure.</li> </ul>
Place and time of arbitration session	<ul style="list-style-type: none"> <li>- Included under the provision of the Section 22 and Section 23 of the Act.</li> <li>- The parties to decide where are the seats of arbitration and when it will commence.</li> </ul>	<ul style="list-style-type: none"> <li>- No provisions in <i>Sharī'ah</i> that suggest any strict term regarding the time and place of arbitral hearings.</li> <li>- Flexible.</li> </ul>

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 <i>Sharī'ah</i> .
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>Tahkīm</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).

**Table I:** Comparison between Arbitration Act 2005 and *Tahkīm*

Apart from that, Kuala Lumpur Regional Centre for Arbitration (KLIRCA) has introduced i-Arbitration Rules to cater the Islamic finance and banking disputes, thus prompted that there is probability to employ the *Sharī'ah*-compliant arbitration in the construction industry.

Furthermore, Section 48 of Islamic Family Law (Federal Territory) Act, 1984 provides the appointment of *Hakam* (arbitrator) to resolve marital and family dispute (Nora et. al., 2013) thus has set off the idea that the application of *Tahkīm* for matters outside the marital and family dispute is possible in this country.

## 2.2. Limitation of the Framework

To suit the aim and objective of the study, the framework proposed is limited to the client-contractor dispute as outlined under the PWD Form 203A (Rev. 1/2010), PAM

Contract 2006 (with Quantities) and in CIDB Standard Form of Contract for Building Works 2000 Edition.

### **2.3. Proposal of the Framework and Procedure of referring to *Tahkīm* in the Construction Industry**

This proposal is based on the court procedure proposed by Samir (2006) as illustrated in the Figure 4.1 of the thesis. The researcher has modified it to suit the construction industry's nature and particularly the Malaysian construction industry based on the process of referring to arbitration in the PWD Form 203A (Rev. 1/2010) and PAM Contract 2006 (with Quantities).

Step 1: Pre- *Tahkīm*

- Refer to Note 1

Step 2: Dispute arises between the parties

- Refer to Note 2

Step 3: The claimant and defendant agree on the name of the *Hakam*

- Refer to Note 3

Step 4: Claimant to lodge a claim, verbally or in writings to the *Hakam*

Step 5: Defendant to admit (*iqrar*) or to deny (*nukul*)

Step 6: Claimant to adduce *bayyinah* (evidence) in verbal or written

Step 7: Failure to bring evidence, claimant may pledge *yamīn* (oath) to the defendant

Step 8: The plaintiff may recite denial or not

Step 9: Award by the *Hakam*

- Refer to Note 4

# **Part III**

**(Supporting Notes)**

**Note 1:Pre-Tahkīm**

The “Pre-*Tahkīm*” focuses on the areas to be observed by the parties before they bring their dispute to be settled through *Tahkīm*. It serves as the skeletal framework regarding *Tahkīm* that must be understood and adhered before *Tahkīm* is conducted.

General Notes		
Matters	Details	Reference
Substantive Evidence on <i>Tahkim</i>	“But no, by your Lord they can have no Faith until they make you (O Muhammad) judge in all disputes between them.”	Quran (4:65)
	“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things”	Quran (4:35)
	<p><i>Hadīth</i> narrated Hani ibn Yazid that the Prophet astonished by the action of Hani to reconcile disputations of his people:</p> <p>“When he went with his delegation to the Apostle of Allah (PBUH), he heard them calling him by his kun-yah (surname), Abu al-Hakam. The Apostle of Allah (PBUH) called him and said: Allah is the judge (al-Hakam), and to Him the judgment belongs. Why are you given the kun-yah Abu al-Hakam? He replied: When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. The Prophet said: How good this is! What children have you? He replied: I have Shurayh, Muslim and Abdullah. He asked: Who is the oldest of them? I replied: Shurayh. He said: Then you are Abu Shurayh.”</p>	Sunan Abi Dawud
	<p>The appointment of Sa’ad bin Mu’az by the people of Quraiza which has been endorsed by the Prophet:</p> <p>“The people of Quraiza only to accept the decision of Sa'ad bin Mu'az upon them. Accordingly, the Messenger of Allah sent for Sa'ad who came to him riding a donkey. When</p>	Sahih Muslim

	<i>he approached the mosque, the Messenger of Allah said to the people of Ansar: Stand up to receive your chieftain. Then he said (to Sa'ad): These people have surrendered to only accept your decision. Sa'ad said: Kill their soldiers and capture their women and children. (Hearing this), the Prophet said: You have adjudged by the command of God. The narrator is reported to have said: Perhaps he said: You have adjudged by the decision of a king.”</i>	
	The Prophet reconciles the tribes' disputation regarding the <i>Hajar al-Aswad</i> (Black Stone) as recorded Al-Raheeq Al-Makhtum (Sealed of the Nectar).	Al-Mubarakfuri (2006)
	<i>Majlis Tahkīm</i> between Ali bin Abi Talib and Muawiyah bin Abi Sufyan as recorded by Ibn Katsir in Al-Bidayah wa Al-Nihayah	Al-Sulami (2004)
<b>Procedural and Session of <i>Tahkīm</i></b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of <i>Tahkīm</i>	Does not necessarily to be the part of the existing contract and can bring to <i>Tahkīm</i> at any juncture when dispute happens	Oseni (2009)
Time and place of <i>Tahkīm</i>	Flexible	El Ahdab and El Ahdab (2011)
		Samir (2006)
		Oseni (2009)
	Subjected to the <i>Hakam</i> discretion and wisdom	El Ahdab and El Ahdab (2011)
		Samir (2006)
If any term agreed, <i>Hakam</i> must adhere to it or else the award would be invalid	Samir (2006)	
Contemporary view: Subjected to the <i>Mahkaamat Al-Tahkīm</i> (arbitration chamber)	Al-Nashmi (2000)	
Substantive law	<i>Sharī'ah</i>	Al-Nashmi (2000)
		Samir (2006)
		Oseni (2009)
Procedural and rules of evidence	Flexible	Oseni (2009)
		Syed Khalid Rasyid (2006)
	Verbal evidence: Testimony by the witness	Samir (2006)
Written evidence	El Ahdab and	

		El Ahdab (2011)
		Samir (2006)

**Note 2: Matters Related to Disputes**

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of dispute to be referred to <i>Tahkīm</i>	Dispute must exist and clearly defined	Samir (2006)
		Oseni (2009) cited from Article 1848 of Medjella
Common causes of dispute inside the construction industry	Occur due to the specific disagreement and/or one of the parties feels that his right, needs and interest is not being fulfilled by the responding party, and the latter refuse to hold any liability against it, which the parties proceed by way of claims, counter-claims, denials and so on	Collier and Lowe (1999)
		Khairuddin (2008)
	Changes of conditions, interpretation, workplace conditions, communications, law, access to construction site and access to materials	Blake Dawson Waldron (2006)
	Management , people, communication, and contract documents	Cheung &Yiu (2006)
	Delay and unrealistic expectations	Yiu & Cheung (2007)
	Change orders, pre-award design, pre-construction, quality assurance	Killian (2003)
	Uncertainty, contractual problems, opportunistic behaviour	Mitropoulos & Howell (2001)
	Changes of conditions, changes of scope, design, unpredictability, contract documents, management, delay, communications, and unrealistic expectations.	Kumaraswamy (1997)
	Payment, performance, delay, negligence, quality, administration.	Colin et al. (1996)
	Misunderstanding, unpredictability	Sykes (1996)
	Unrealistic expectations, contract documents, communications, lack of team spirit, changes	Bristow &Vasilopoulos (1995)

	People, process, product	Diekmann et al. (1994)
	Change of scope, change in conditions, delay, distribution, acceleration, termination	Heath et al. (1994)
	Management, culture, communication, design, economics, tendering pressures, law, unrealistic expectations, contracts, workmanship	Rhys-Jones (1994)
	Acceleration, access, weather, changes	Sample et al. (1994)
	Changes, law, delay	Watts & Scrivener (1992)
	Change of scope, change of condition, acceleration, delay, disruption, termination	Hawitt (1991)

**Note 3:** Referring to Hakam

This part focuses on the appointment of the Hakam, his characteristic and the numbers of Hakam that may involved.

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Appointment of <i>Hakam</i>	Must be appointed and agreed by name by the parties	Oseni (2009) cited from Article 1848 of Medjella
	To recite the agreement of appointment to the <i>Hakam</i> ( <i>Sighah</i> )	Oseni (2009) cited from Article 1848 of Medjella Nora et. al. (2013)
Characteristic of <i>Hakam</i>	Muslim	Al-Sa'di (2002) Samir (2006)
	Modern jurists of the Hanafis allow a non-Muslim to be a <i>Hakam</i> to the extent that his jurisdiction confined to the financial and commercial matters on the basis that the restriction of a Muslim to be <i>Hakam</i> only mentioned in the matters related to family law	El Ahdab and El Ahdab (2011)

	El-Ahdab & El Ahdab (2011) however recognised the appointment of the non-Muslim as arbitrator in the family disputes if the wife is a non-Muslim, to the extent that the arbitration council is made by two arbitrators, a Muslim and a non-Muslim.	
	Male	Samir (2006)
	Hanafis however stand lenient and accepts women to deliver judgement on the matters outside the <i>Sharī'ah</i> fixed punishment ( <i>hadd</i> ) and criminal sanction ( <i>Qīṣaṣ</i> ); and that women can be the <i>Hakam</i> in the case of dispute concerning property and issues that specifically related to women.	Nora et. al. (2013)
	<i>Mukallaf</i> (Accountable)	Al-Sa'di (2001)
	' <i>Adl</i> (Fair)	Al-Sa'di (2001)
		Al-Sulami (2004)
		Samir (2006)
		Nora et. al. (2013)
	Intelligent	Samir (2006)
	<i>Ijtihād</i>	Nora et. al. (2013)
	Have knowledge in <i>Sharī'ah</i>	Samir (2006)
	Have knowledge on the case	Al-Sa'di (2002)
	Attained adulthood and have <i>Husn al-'Aql</i> (sensible mind)	Al-Sa'di (2002)
		Nora et. al. (2013)
Numbers of <i>Hakam</i>	Two for family and marital disputes	<i>Al-Nisaa</i> verse 35
	One	Oseni (2009)
	Panel of <i>Hakam</i>	Oseni (2009)

**Note 4: Award**

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Form of award	Orally or in writings	Samir (2006)
Nature of Award	Binding	Samir (2006) Oseni (2009)
	Res judicata	Samir (2006)

# Part IV

## QUESTIONS TO THE INTERVIEWEE

These questions serve as “triggering questions” to elicit opinions from the experts.

1. “Do you think that there are potentials present to employ *Tahkīm* in the construction industry?”
2. “What is your opinion regarding the framework that has been proposed in the document? Can it be applied to the current setting of the industry in this country?”

### **Additional question for the *Sharī’ah* Experts:**

1. “Do you think that the framework contains the appropriate *Sharī’ah* substantiation and does it comply with what has been outlined by the *Sharī’ah*?”

# Part V

# VALIDATION SHEET

**NAME:**

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**ORGANISATION/INSTITUTION:**

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**VALIDATION:**

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO

**COMMENTS:**

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**INITIAL:**

**DATE:**

# APPENDIX D

This transcription only reveals discussions among the experts on matters that relates to the present study only. Other matters discussed which happens to be out of research area are not included in this transcription.

### **Expert 1 (Dr Hakimah Hj Yaacob)**

#### *Steps proposed in the framework*

“Looking at this framework, to arrive to the admission or iqrar ... and bayyinah ... this is (Tahkīm) case management ... if (the party) denied, then only we go to arbitration (Tahkīm). Your step should have two branches ... (the consequences) of admitting and denying. If the (party) admit ... or deny, what would be the procedure. If (the party) admit, then we will have consent judgement ... or consent award. If the party deny, then proceed to step 6. Or if (the party) choose to admit, then you can consider furthering (the process) ... and put specific timeframe.”

“Islam ... encourages us to ... negotiate ... speak the truth... (and to) mediate. The (referee) ... may change hat to become expert (to arbitrate). Hakam needs to be an expert ... (with) very specialised (knowledge) ... and the award is final and binding. The unique part is, you can mention that the appointment of Hakam may come in various ways, through negotiation, mediation or expert determination ... perhaps you can show the transition in the steps ... this could provide options to the clients.”

“The Quranic verse ... about marriage ... requires arbitrator from the both parties ... impliedly it requires expert (to arbitrate) ... and not simply anyone. The beauty (of Tahkīm case management) is the negotiation comes first ... if (parties) fail to negotiate, then (the case can be) referred to chief arbitrator.”

#### *Pre-Tahkīm*

“Pre-Tahkīm is usually the processes (involved) before the commencement of Tahkīm ... this (in the note) ... is procedures (rather than Pre-Tahkīm).”

“These (Step 1 to 4) are all Pre-Tahkīm.”

#### *Procedural and session of Tahkīm*

“(The columns about the) procedural and session of Tahkīm ... (may be changed to) procedural requirements of Tahkīm.”

#### *Substantive law*

“In terms of substantive law, are you sure you only want to refer just to Sharī’ah? I propose ... (you add) other rules referred in Malaysia.”

#### *Time and place of Tahkīm*

“Procedure may be stated in the arbitration agreement ... determined in advance ... to show that the parties agree (with the procedure chosen).”

#### *Appointment of Hakam*

“Arbitration has two main methods, which is ad hoc and institutional. By the virtue of the Arbitration Act, it does not necessarily require the parties to refer to KLRCA ... anyone who is considered as expert may become arbitrator.”

#### *Procedural and rule of evidence*

“(In terms of) witness ... you probably want to explain about the concept of witness (in Islam).”

“Written evidence ... what kind of written evidence required? (If) legal documents ... Section 2 of Evidence Act 1950.”

#### *Numbers of Hakam*

“Panel of Hakam ... need to be formed by odd number of panels ... so that a majority verdict could be achieved.”

#### *Characteristic of Hakam*

“For istisna’ contract for example, Muslim need to be the Hakam.”

“Have knowledge in Sharī’ah is not necessary ... but (Hakam need to) have knowledge in the case or in construction industry (instead).”

“Female (Hakam) is allowed.”

“Ethical value and integrity of the Hakam need to be stressed ... because ADR is conducted in secret.”

“For institutional, how will you ensure the appointed Hakam fulfil these criterias?”

#### *Form of Award*

“Award can’t be in oral ... I oppose (the idea). It has to be recorded.”

“Res judicata is not necessary ... binding is sufficient.”

#### *Sharī’ah validation*

“(In terms of Sharī’ah) I think you need to explore more on *Medjelle*, IOFI.”

#### *Applicability validation*

“I think it is okay (to be applied in the construction industry) with the addition has been mentioned ... opportunities are abundant.”

#### *Framework validation*

“Your framework is valid but subjected to our discussion just now. First, maybe the title (of the document) needs to be changed. Case management on Tahkīm process (as title) is better ... and state ... that your research is proposing similar process to PWD (and PAM) but you’re adding additional features to make it better by applying the Tahkīm spirit.”

### **Expert 2 (Associate Professor Dr Nora Abdul Hak)**

#### *Pre-Tahkīm*

“Maybe you don’t need to state it as pre-Tahkīm ... it is not suitable. Probably Tahkīm procedure is more suitable.”

“This (general notes) is the authorities (of Tahkīm) ... not really a Pre-Tahkīm.”

“Arbitration agreement can be included as pre-Tahkīm.”

#### *Nature of Tahkīm*

“My opinion on this, due to the current practice in conventional arbitration, when the parties enter into legal contracts ... they might put an arbitration clause or they can have separate arbitration agreement. It is not wrong according to Sharī’ah to include arbitration clause to refer future dispute to arbitration ... based on the view of the Hanbalis ... because Hanbalis future dispute to be referred to arbitration ... because no clear authorities in Quran and Sunnah ... we may apply usuli principles... istihsan, ‘urf and maslahah mursalah ... to allow ... arbitration clause. The issue of gharar is not... relevant in case of arbitration clause.”

#### *Procedural and rules of evidence*

“The evidence ... is subjected to the rules of evidence under the Islamic law.”

#### *Character of Hakam*

“It depends on the substantive law ... because Tahkim has two law; substantive law and procedural law. The construction industry for example is using Contract Act as substantive law ... and it is not Islamic law ... thus, it is applicable to have non-Muslim as Hakam. ... and we can use the Hanafis verdict.”

“No problem with woman (to be a Hakam) ... woman can be appointed. There’s no provision in Quran saying that woman can’t be appointed ... and this is commercial matters ... not Hudud and Qisas.”

#### *Form of Award*

“I favour that it has be to written down ... make it mandatory ... and attested by judged people. Hakam must write how he arrived to the award.”

#### *Numbers of Hakam*

Number of Hakam ... There’s no problem to fix the number of arbitrator. Malikis allow odd number of Hakam ... Article 1843 in Medjelle that provides two or more Hakam to be appointed for a single case.”

#### *Sharī’ah validation*

“Perhaps you want to look into the application of Tahkīm during the time of Umar al-Khattab. But this is okay ... as the basis to state the authorities of Tahkīm.”

### **Expert 3 (Assistant Professor Dr Umar Oseni)**

#### *General comments*

“Looking at this... I think it is quite nice, one thing that I would like to add to this is the aspect of ... harmonisation of whatever principle you have in Tahkīm into the existing processes. Because ... there’s nothing like Tahkīm at the moment... the arbitration is well developed ... in construction. It might be necessary to think how we improve the processes itself through the principles of Tahkīm.”

#### *Characteristic of Hakam*

“AAOIFI ... allows non-Muslim arbitrator (Hakam). You can see the flexibility in Islamic law.”

#### *Award*

“Looking at this I think it’s applicable. One aspect that you should incorporate is award Hakam ... I think I prefer writing (reciting the verse 2: 282)

“One element should be there: *Shari’ah*-compliant.”

“Aspect of submission agreement ... you either have arbitration agreement, or a submission agreement. *Shari’ah* prefer ... submission agreement ... this is general opinion by the scholars.”

#### *Framework validation*

“Generally, the framework is okay ... (you might want) try to compare with those rules ... (they contain) procedural aspects ... but this is good as it is.”

### **Expert 4 (Sr Yahaya Mohd Yunos)**

#### *Applicability validation*

“Definitely they are ... should be opportunity there ... to use Tahkīm as dispute resolution method ... there is room to employ ... plus, we are talking about takaful instead of insurance nowadays.”

### *Framework validation*

“There’s nothing wrong with the framework, technically it can be applied ... but the people in the construction industry need to be educated ... no resent from me ... background structure need to be done ... especially the Hakam to be ... (accredited) by accreditation body.”

### **Expert 5 (Madam Fakhah Azahari)**

#### *Steps proposed in the framework*

“So you have to see which clause gives the agreement for arbitration ... where does the validity come? If it’s a contract ... you must quote the provision. If that provision isn’t there, both parties must first establish their mutual agreement to go for arbitration. So there can be two ways. One, is invoking the clause ... secondly, both mutually agree ... but this is fundamental ... this is the paramount matter ... this must be in Pre-Tahkīm ... this is issue of jurisdiction.”

“Hakam must revert back (to the parties) whether he agrees or not ... the fees ... to be taken upfront or some portion of it ... in the letter of reply, he needs to mention his terms.”

“Arbitration is a private contract ... so you have freedom ... to decide on which hakam to appoint and ... how to conduct the proceeding. When the hakam agree ... he may invite the parties for a preliminary meeting. In preliminary meeting ... you can mention what are the things that both parties are going to agree (i.e. the procedures) ... so your step should incorporate that.”

“Step 3 should be ... Hakam replied ... and call (the parties) for preliminary meeting.”

#### *Award*

“Award ... it must be reasoned award ... cannot be contested ... why Hakam find in favour of one of the parties ... so the content of the award is important.”

“In the award, because it is regarding Islamic principle ... how to write the award in the Islamic arbitration ... a good award must have a good format ... so that it cannot be set aside and challenged.”

#### **Expert 6 (Professor Dr Zuhairah Ariff Abd Ghaddas)**

##### *General comments*

“It’s a very good model ... that shows the Sharī’ah concept ADR ... in Islam.”

“In legal concept ... with the arbitration clause ... litigation is suspended until the parties have gone through the arbitration ... however in Islam, there’s no burden ... therefore, the imposition of ADR ... will it has similar judgement to the court? Does the same concept available in Islam?”

“The theory ... and concept ... is ideal ... (however) in terms of implementation ... even though ADR is an “alternative”, it’s a legal decision ... the power is stern ... will it be similar in Islam?”

##### *Framework validation*

“In legal concept ... there are four matters ... First is the type of principle that will be used. Second is the implementation (of Tahkīm) ... Third, the effect (of the Tahkīm) ... Fourth, the penalty or impact if the parties did not comply with the award.”

##### *Applicability validation*

“Can (be applied in the construction industry) ... if both of the parties are Muslims ... unless you used another term (instead of Tahkīm) ... and non-Muslims, if they agree.”

#### **Expert 7 (Associate Professor Dr Azman Mohd Noor)**

##### *Steps proposed in the framework*

“The burden of proof ... who needs to prove ... in construction ... is it the builder? The contemporary Hanafis regarded that the burden of the proof is on the contractor.

Basically, the one who accuse need to bring the evidence ... that's the normal practice, but in certain circumstances, the contractor is held liable ... that burden proof is on the contractor ... that they are not liable ... on these three matters ... any breach of contract, misconduct and negligence.”

“You need to add the view of the Hanafis ... *al-ṣāni' yadhman* (الصانع يضمن) ... that the contractor shall be held liable ... because for the case of *Istisna'* it's different.”

“The (burden of proof may change) ... basically, based on the Islamic maxim, “The burden of proof is on the claimant, and the defendant may recite oath to deny.” But in a certain circumstances ... the burden of proof may not necessary on the claimant.”

#### *Sharī'ah validation*

“You need to write the Jews of Quraizah ... apart from that it's okay.”

#### *Framework validation*

“Expert evidence ... mention the qualification (of the expert) ... his characteristic.”

# APPENDIX E

VALIDATION SHEET

EXPERT 1

NAME:

Dr. Hakimah Haji Yaacob

ORGANISATION/INSTITUTION:

ISRA

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

- With few modifications as discussed during the meeting.

INITIAL:



DATE:

2-12-2014

# VALIDATION SHEET

# EXPERT 2

NAME:

Assoc. Prof. Dr. Nora Abdul Hak

ORGANISATION/INSTITUTION:

International Islamic University Malaysia

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

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INITIAL:



DATE:

5<sup>th</sup> / 12 / 2014

# VALIDATION SHEET

# EXPERT 3

NAME:

Umar A. Oren

ORGANISATION/INSTITUTION:

ANCOL, ILM

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

The framework proposed is feasible subject to some amendments suggested during the interview.

INITIAL:



DATE:

8/12/2014

VALIDATION SHEET

EXPERT 4

NAME:

Sr. Yahaya Mohd. Yusoff

ORGANISATION/INSTITUTION:

IIUM / Director of JMB Utara

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

As mentioned in the interview,

INITIAL:



DATE:

10/12/14

VALIDATION SHEET

EXPERT 5

NAME:

Prof. Dr. Zuhairah Ariff Abd Ghadas

ORGANISATION/INSTITUTION:

Faculty of Law, Accountancy and International Relations,  
UMIS 201.

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

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INITIAL:

*ZAG*

DATE:

18/12/2024

VALIDATION SHEET

EXPERT 6

NAME:

FAKIHAH AZAHARI

ORGANISATION/INSTITUTION:

CHARTERED INSTITUTE ARBITRATOR

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

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INITIAL:

*Kaluluhi*

DATE:

13/12/2014

VALIDATION SHEET

EXPERT 7

NAME:

Assoc. Prof. Dr. Azman Mohd Nor

ORGANISATION/INSTITUTION:

IIUM

VALIDATION:

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

COMMENTS:

with some enhancement by taking into  
consideration, that the builder is held  
liable in the first place as proposed by some neighbours.  
The same with builder of prop.

INITIAL:

DATE:

18/2/14

# APPENDIX F

**VALIDATION OF THE  
FRAMEWORK FOR REFERENCE  
OF DISPUTE TO *TAHKĪM*  
(*SHARĪ'AH*-COMPLIANT  
ARBITRATION) IN MALAYSIAN  
CONSTRUCTION INDUSTRY**

**INTERVIEW KIT**

**MUHAMMAD ARIFFUDDIN BIN ARIFIN**

**MASTER OF SCIENCE IN BUILT ENVIRONMENT**

**MSc. BE (BY RESEARCH)**

**INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA (IIUM)**

**SUPERVISED BY: PROF SR DR KHAIRUDDIN ABDUL RASHID**

# Part I

### **1.1. Foreword**

This paper is compiled by the researcher as a part of the Master degree thesis. This document works as the fundamental allusion in carrying out the in-depth interview.

This document is delivered to the interviewee prior to the actual interview session. It contains the proposal of the framework for application of *Tahkīm* in the construction industry and the summary of the literature prepared by the researcher as the insight into the research in order to offer a better understanding on the topics discussed in the research to the panels.

### **1.2. Methodology**

In the first part of the document, the background of the study is explained. Subsequently, the milieu and the purpose of the interview will be described in order to provide the information to the panels on why the interview is carried out and what are the expected outcomes from it.

In the second part of the document, the reasons why the research is carried out are explained by summarising the opportunities presented as collated from the literature review. Then, the proposal of the method of referring dispute to *Tahkīm* in the construction industry is outlined.

The third part of the document contains the appendices for the proposed framework. This will be the basic reference for the panels to understand the concept illustrated by the researcher in his research and to help understand the framework presented.

### **1.3. Background and significance of the Research**

Alternative dispute resolution (ADR) has become a major option in resolving disputes in Malaysia. Methods of ADR such as arbitration and mediation are now practised widely in the industry to resolve the construction and engineering disputes. The existence of arbitration and mediation clauses in the major forms of contract such as of PWD and PAM indicate the acceptance of such practises by the industry's key players. And outside the construction industry, the application of ADR has extended to the employment of *Sharī'ah*-compliant ADR, or Islamic ADR, in the scope of marital and family disputes, and recently has moving forward to Islamic banking and

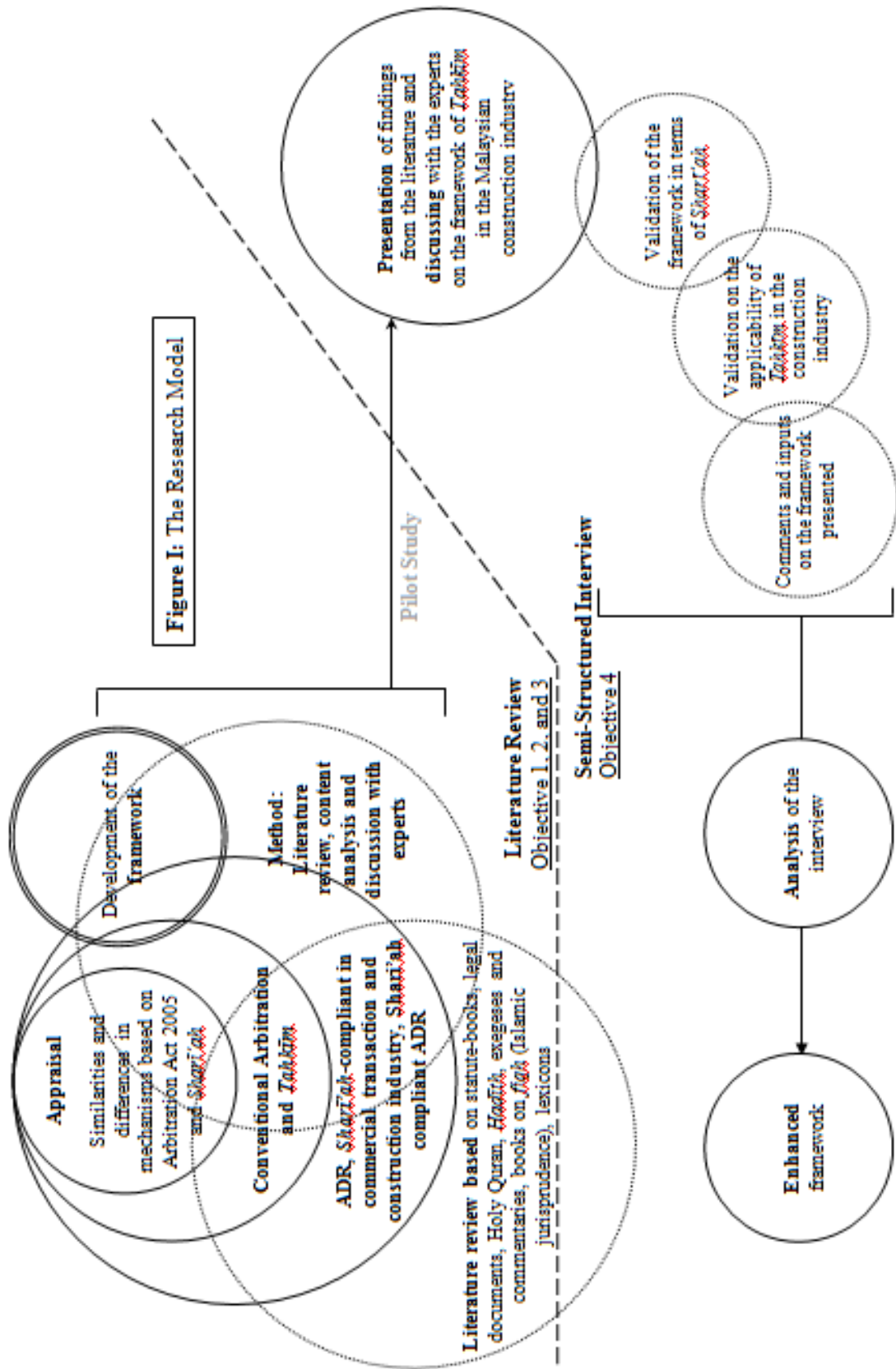
financing sector. *Sharī'ah*, in corresponding to the concept of *Tawhid* (monotheism) in the daily transaction and activities, has a big impact to every Muslim in the context of fulfilling the obligation towards the religion. Despite of this significance, little effort has been made to examine *Sharī'ah*-compliant ADR to be employed in the construction industry. The aim of this research is to determine the opportunities presented to employ the *Sharī'ah*-compliant Alternative Dispute Resolution (ADR) focusing on *Tahkīm* the Malaysian construction industry and to develop a proper and appropriate framework for such purpose.

#### **1.4. Aim and Objectives of the Research**

The aim of the research is to determine the opportunities presented in employing the *Sharī'ah* compliance Alternative Dispute Resolution (ADR) medium in the Malaysia construction industry and to develop a proper framework for referring disputes to *Tahkīm* and its processes. And to achieve such aim, these are the objectives of the study;

- 1) To identify the mechanism and practice of conventional Alternative Dispute Resolution (ADR) in the industry; i.e. of arbitration.
- 2) To identify the written evidence presented in *Sharī'ah* on the Alternative Dispute Resolution (ADR); mainly on the aspect of *Tahkīm*.
- 3) On the basis of (1) and (2), to appraise the concept of *Sharī'ah*-compliant, its value, and mechanism in order to identify any present opportunities in employing *Sharī'ah* compliance ADR in the industry.
- 4) On the basis of (3), to develop and validate a framework for the process of referring disputes to *Tahkīm* in the Malaysian construction industry.

The model to achieve the aim and objectives of this research is further explained in Figure 1 and Table 1.



**Figure I: The Research Model**

Stage	Primary Data Collection			Secondary Data Collection
<b>Objective</b>	Objective 1	Objective 2	Objective 3	Objective 4
	To identify the written evidence presented in <i>Sharī'ah</i> on the Alternative Dispute Resolution (ADR); mainly on the aspect of <i>Tahkīm</i> .	To identify the mechanism and practice of conventional Alternative Dispute Resolution (ADR) in the industry; i.e. of arbitration.	To appraise the concept of <i>Sharī'ah</i> compliance, its value, and mechanism in order to identify the framework of <i>Tahkīm</i> to be employed in the construction industry.	To propose the preliminary framework of <i>Tahkīm</i> to be implemented in the Malaysian construction industry.
<b>Method</b>	Literature review, content analysis and discussion with experts			Semi-Structured Interview
	Literature review based on statute-books, legal documents, Holy Quran, <i>Hadīth</i> , exegeses and commentaries, books on <i>fiqh</i> (Islamic jurisprudence), lexicons			Framework presented to the experts to obtain comments and reviews  <u>R1.0</u> presented to the same experts for revalidation purpose
<b>Output</b>	Initial framework from the literature review			Revised framework or <u>R1.0</u> with comments and reviews  Final framework

**Table I: The Research Methodology**

### **1.5. The Agenda of the In-Depth Interview**

As the research progressed, a preliminary or a proposal of framework is developed to cater the objective number 3. And to address the objective number 4, an in-depth interview needs to be conducted.

There are 3 main agendas to be addressed during the interview sessions:

- i. Firstly, to corroborate that the potentials and opportunities for the application of *Tahkīm* in the construction industry are exist.
- ii. To verify that the framework proposed fulfil the *Sharī'ah* requirements and to attain further clarification from the *Sharī'ah* experts which may be included to support the research.
- iii. To ensure that the framework is robust and vigorous by testing it onto the experts of arbitration and construction and to obtain their view and validation on the framework proposed.

The main agendas need to be verified in consensus manner; the data from the interview will be collated and analysed to find out what is the majority of the opinion by the experts.

# Part II

## 2.1. The Opportunities in Applying *Tahkīm* in Malaysian Construction Industry

The research was conducted because there are a few areas that can be considered as the opportunities to apply *Tahkīm* in the construction industry. The first is the similarity possessed by *Tahkīm* and the Arbitration Act 2005 as highlighted in the table below.

	Conventional Arbitration (Arbitration Act 2005)	<i>Tahkīm</i>
Arbitration Agreement	<ul style="list-style-type: none"> <li>- Accommodated in the Section 9 (1) of Arbitration Act 2005.</li> <li>- May be included in the arbitration clause in commercial contract for the future disputes to be entered into arbitration.</li> </ul>	<ul style="list-style-type: none"> <li>- Arbitration agreement may only be constituted after the dispute has arisen.</li> </ul>
Criteria and appointment of arbitrator	<ul style="list-style-type: none"> <li>- Chapter 3 of the Arbitration Act 2005 discussed on the composition of arbitrator.</li> <li>- Qualification of the arbitrator is not mentioned in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>- Criteria of the <i>Hakam</i> is similar to what has been outlined in the subject of <i>Qada'</i>. (Samir Salleh in Commercial Arbitration In Arab Middle East)</li> <li>- <i>Sharī'ah</i> strictly outlines the qualifications of the arbitrator.</li> </ul>
Procedural rules	<ul style="list-style-type: none"> <li>- 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.</li> <li>- Based on equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.</li> </ul>	<ul style="list-style-type: none"> <li>- No strict provisions. <i>Sharī'ah</i> allows the parties to mould the procedures as they wanted to.</li> <li>- Promoting the concept of '<i>adl</i>' or justice that the parties shall adhere.</li> <li>- There is a "safety valve" under the <i>Sharī'ah</i> that allows concept of <i>Sulh</i> (two conciliators from each party to reconcile the dispute) to be adapted in the procedure.</li> </ul>
Place and time of arbitration session	<ul style="list-style-type: none"> <li>- Included under the provision of the Section 22 and Section 23 of the Act.</li> <li>- The parties to decide where are the seats of arbitration and when it will commence.</li> </ul>	<ul style="list-style-type: none"> <li>- No provisions in <i>Sharī'ah</i> that suggest any strict term regarding the time and place of arbitral hearings.</li> <li>- Flexible.</li> </ul>

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 <i>Sharī'ah</i> .
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>Tahkīm</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).

**Table I:** Comparison between Arbitration Act 2005 and *Tahkīm*

Apart from that, Kuala Lumpur Regional Centre for Arbitration (KLRCA) has introduced i-Arbitration Rules to cater the Islamic finance and banking disputes, thus prompted that there is probability to employ the *Sharī'ah*-compliant arbitration in the construction industry.

Furthermore, Section 48 of Islamic Family Law (Federal Territory) Act, 1984 provides the appointment of *Hakam* (arbitrator) to resolve marital and family dispute (Nora et. al., 2013) thus has set off the idea that the application of *Tahkīm* for matters outside the marital and family dispute is possible in this country.

## **2.2. Limitation of the Framework**

To suit the aim and objective of the study, the framework proposed is limited to the client-contractor dispute as outlined under the PWD Form 203A (Rev. 1/2010), PAM Contract 2006 (with Quantities) and in CIDB Standard Form of Contract for Building Works 2000 Edition.

## **2.3. Proposal of the Framework and Procedure of referring to *Tahkīm* in the Construction Industry**

This proposal is based on the court procedure proposed by Samir (2006) as illustrated in the Figure 4.1 of the thesis. The researcher has modified it to suit the construction industry's nature and particularly the Malaysian construction industry based on the process of referring to arbitration in the PWD Form 203A (Rev. 1/2010) and PAM Contract 2006 (with Quantities).

Step 1: Pre- *Tahkīm*

- Refer to Note 1

Step 2: Dispute arises between the parties

- Refer to Note 2

Step 3: The claimant and defendant agree on the name of the *Hakam*

- Refer to Note 3

Step 4: Claimant to lodge a claim, verbally or in writings to the *Hakam*

Step 5: Defendant to admit (*iqrar*) or to deny (*nukul*)

Step 6: Claimant to adduce *bayyinah* (evidence) in verbal or written

Step 7: Failure to bring evidence, claimant may pledge *yamīn* (oath) to the defendant

Step 8: The plaintiff may recite denial or not

Step 9: Award by the *Hakam*

- Refer to Note 4

# **Part III**

**(Supporting Notes)**

**Note 1:Pre-Tahkīm**

The “Pre-*Tahkīm*” focuses on the areas to be observed by the parties before they bring their dispute to be settled through *Tahkīm*. It serves as the skeletal framework regarding *Tahkīm* that must be understood and adhered before *Tahkīm* is conducted.

General Notes		
Matters	Details	Reference
Substantive Evidence on <i>Tahkim</i>	“ <i>But no, by your Lord they can have no Faith until they make you (O Muhammad) judge in all disputes between them.</i> ”	Quran (4:65)
	“ <i>If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family, and the other from hers; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things</i> ”	Quran (4:35)
	<p><i>Hadīth</i> narrated Hani ibn Yazid that the Prophet astonished by the action of Hani to reconcile disputations of his people:</p> <p>“<i>When he went with his delegation to the Apostle of Allah (PBUH), he heard them calling him by his kun-yah (surname), Abu al-Hakam. The Apostle of Allah (PBUH) called him and said: Allah is the judge (al-Hakam), and to Him the judgment belongs. Why are you given the kun-yah Abu al-Hakam? He replied: When my people disagree about a matter, they come to me, and I decide between them, and both parties are satisfied with my decision. The Prophet said: How good this is! What children have you? He replied: I have Shurayh, Muslim and Abdullah. He asked: Who is the oldest of them? I replied: Shurayh. He said: Then you are Abu Shurayh.</i>”</p>	Sunan Abi Dawud
	<p>The appointment of Sa’ad bin Mu’az by the people of Quraiza which has been endorsed by the Prophet:</p> <p>“<i>The people of Quraiza only to accept the decision of Sa'ad bin Mu'az upon them. Accordingly, the Messenger of Allah sent for Sa'ad who came to him riding a donkey. When</i></p>	Sahih Muslim

	<i>he approached the mosque, the Messenger of Allah said to the people of Ansar: Stand up to receive your chieftain. Then he said (to Sa'ad): These people have surrendered to only accept your decision. Sa'ad said: Kill their soldiers and capture their women and children. (Hearing this), the Prophet said: You have adjudged by the command of God. The narrator is reported to have said: Perhaps he said: You have adjudged by the decision of a king.”</i>	
	The Prophet reconciles the tribes' disputation regarding the <i>Hajar al-Aswad</i> (Black Stone) as recorded Al-Raheeq Al-Makhtum (Sealed of the Nectar).	Al-Mubarakfuri (2006)
	<i>Majlis Tahkīm</i> between Ali bin Abi Talib and Muawiyah bin Abi Sufyan as recorded by Ibn Katsir in Al-Bidayah wa Al-Nihayah	Al-Sulami (2004)
<b>Procedural and Session of <i>Tahkīm</i></b>		
<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of <i>Tahkīm</i>	Does not necessarily to be the part of the existing contract and can bring to <i>Tahkīm</i> at any juncture when dispute happens	Oseni (2009)
Time and place of <i>Tahkīm</i>	Flexible	El Ahdab and El Ahdab (2011)
		Samir (2006)
		Oseni (2009)
	Subjected to the <i>Hakam</i> discretion and wisdom	El Ahdab and El Ahdab (2011)
		Samir (2006)
If any term agreed, <i>Hakam</i> must adhere to it or else the award would be invalid	Samir (2006)	
Contemporary view: Subjected to the <i>Mahkaamat Al-Tahkīm</i> (arbitration chamber)	Al-Nashmi (2000)	
Substantive law	<i>Sharī'ah</i>	Al-Nashmi (2000)
		Samir (2006)
		Oseni (2009)
Procedural and rules of evidence	Flexible	Oseni (2009)
		Syed Khalid Rasyid (2006)
	Verbal evidence: Testimony by the witness	Samir (2006)
Written evidence	El Ahdab and	

		El Ahdab (2011)
		Samir (2006)

**Note 2: Matters Related to Disputes**

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Nature of dispute to be referred to <i>Tahkīm</i>	Dispute must exist and clearly defined	Samir (2006)
		Oseni (2009) cited from Article 1848 of Medjella
Common causes of dispute inside the construction industry	Occur due to the specific disagreement and/or one of the parties feels that his right, needs and interest is not being fulfilled by the responding party, and the latter refuse to hold any liability against it, which the parties proceed by way of claims, counter-claims, denials and so on	Collier and Lowe (1999)
		Khairuddin (2008)
	Changes of conditions, interpretation, workplace conditions, communications, law, access to construction site and access to materials	Blake Dawson Waldron (2006)
	Management , people, communication, and contract documents	Cheung & Yiu (2006)
	Delay and unrealistic expectations	Yiu & Cheung (2007)
	Change orders, pre-award design, pre-construction, quality assurance	Killian (2003)
	Uncertainty, contractual problems, opportunistic behaviour	Mitropoulos & Howell (2001)
	Changes of conditions, changes of scope, design, unpredictability, contract documents, management, delay, communications, and unrealistic expectations.	Kumaraswamy (1997)
	Payment, performance, delay, negligence, quality, administration.	Colin et al. (1996)
	Misunderstanding, unpredictability	Sykes (1996)

	Unrealistic expectations, contract documents, communications, lack of team spirit, changes	Bristow & Vasilopoulos (1995)
	People, process, product	Diekmann et al. (1994)
	Change of scope, change in conditions, delay, distribution, acceleration, termination	Heath et al. (1994)
	Management, culture, communication, design, economics, tendering pressures, law, unrealistic expectations, contracts, workmanship	Rhys-Jones (1994)
	Acceleration, access, weather, changes	Sample et al. (1994)
	Changes, law, delay	Watts & Scrivener (1992)
	Change of scope, change of condition, acceleration, delay, disruption, termination	Hawitt (1991)

**Note 3:** Referring to Hakam

This part focuses on the appointment of the Hakam, his characteristic and the numbers of Hakam that may involved.

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Appointment of <i>Hakam</i>	Must be appointed and agreed by name by the parties	Oseni (2009) cited from Article 1848 of Medjella
		Oseni (2009) cited from Article 1848 of Medjella
	To recite the agreement of appointment to the <i>Hakam</i> ( <i>Sīghah</i> )	Nora et. al. (2013)
Characteristic of <i>Hakam</i>	Muslim	Al-Sa'di (2002)
		Samir (2006)
	Modern jurists of the Hanafis allow a non-Muslim to be a <i>Hakam</i> to the extent that his jurisdiction confined to the financial and commercial matters on the basis that the restriction of a Muslim to be <i>Hakam</i> only	El Ahdab and El Ahdab (2011)

	mentioned in the matters related to family law  El-Ahdab & El Ahdab (2011) however recognised the appointment of the non-Muslim as arbitrator in the family disputes if the wife is a non-Muslim, to the extent that the arbitration council is made by two arbitrators, a Muslim and a non-Muslim.	
	Male  Hanafis however stand lenient and accepts women to deliver judgement on the matters outside the <i>Sharī'ah</i> fixed punishment ( <i>hadd</i> ) and criminal sanction ( <i>Qīṣaṣ</i> ); and that women can be the <i>Hakam</i> in the case of dispute concerning property and issues that specifically related to women.	Samir (2006)
		Nora et. al. (2013)
	<i>Mukallaf</i> (Accountable)	Al-Sa'di (2001)
	' <i>Adl</i> (Fair)	Al-Sa'di (2001)
		Al-Sulami (2004)
		Samir (2006)
		Nora et. al. (2013)
	Intelligent	Samir (2006)
	<i>Ijtihād</i>	Nora et. al. (2013)
	Have knowledge in <i>Sharī'ah</i>	Samir (2006)
	Have knowledge on the case	Al-Sa'di (2002)
	Attained adulthood and have <i>Husn al-'Aql</i> (sensible mind)	Al-Sa'di (2002)
		Nora et. al. (2013)
Numbers of <i>Hakam</i>	Two for family and marital disputes	<i>Al-Nisaa</i> verse 35
	One	Oseni (2009)
	Panel of <i>Hakam</i>	Oseni (2009)

**Note 4: Award**

<b>Matters</b>	<b>Details</b>	<b>Reference</b>
Form of award	Orally or in writings	Samir (2006)
Nature of Award	Binding	Samir (2006) Oseni (2009)
	Res judicata	Samir (2006)

# Part IV

## QUESTIONS TO THE INTERVIEWEE

These questions serve as “triggering questions” to elicit opinions from the experts.

1. “Do you think that there are potentials present to employ *Tahkīm* in the construction industry?”
2. “What is your opinion regarding the framework that has been proposed in the document? Can it be applied to the current setting of the industry in this country?”

### **Additional question for the *Sharī’ah* Experts:**

1. “Do you think that the framework contains the appropriate *Sharī’ah* substantiation and does it comply with what has been outlined by the *Sharī’ah*?”

# Part V

# VALIDATION SHEET

**NAME:**

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**ORGANISATION/INSTITUTION:**

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**VALIDATION:**

APPLICABILITY VALIDATION	FRAMEWORK VALIDATION
<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO

**COMMENTS:**

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**INITIAL:**

**DATE:**

# APPENDIX G

## Original Scripture

### Quranic Text

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنفُسِهِمْ حَرَجًا مِّمَّا قَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا (النساء : 65)

وَإِنْ حِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقُ اللَّهُ بَيْنَهُمَا إِنْ اللَّهُ كَانَ عَلِيمًا خَبِيرًا (النساء : 35)

### Prophetic Text

حَدَّثَنَا الرَّبِيعُ بْنُ نَافِعٍ عَنْ يَزِيدَ - يَعْنِي ابْنَ الْمُقَدَّامِ بْنِ شُرَيْحٍ - عَنْ أَبِيهِ عَنْ جَدِّهِ شُرَيْحٍ عَنْ أَبِيهِ هَانِيٍّ أَنَّهُ لَمَّا وَفَدَ إِلَى رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مَعَ قَوْمِهِ سَمِعَهُمْ يَكُونُونَ بِأَبِي الْحَكَمِ فَدَعَاهُ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَقَالَ « إِنَّ اللَّهَ هُوَ الْحَكَمُ وَإِلَيْهِ الْحُكْمُ فَلِمَ تُكْنَى أَبَا الْحَكَمِ ».

فَقَالَ إِنَّ قَوْمِي إِذَا اخْتَلَفُوا فِي شَيْءٍ أَتَوْنِي فَحَكَمْتُ بَيْنَهُمْ فَرَضِيَ كِلَا الْفَرِيقَيْنِ. فَقَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - « مَا أَحْسَنَ هَذَا فَمَا لَكَ مِنَ الْوَلَدِ ». قَالَ لِي شُرَيْحٌ وَمُسْلِمٌ وَعَبْدُ اللَّهِ. قَالَ « فَمَنْ أَكْبَرُهُمْ ». قُلْتُ شُرَيْحٌ قَالَ « فَأَنْتَ أَبُو شُرَيْحٍ ». قَالَ أَبُو دَاوُدَ شُرَيْحٌ هَذَا هُوَ الَّذِي كَسَرَ السُّلْسِلَةَ وَهُوَ مِمَّنْ دَخَلَ تُسْتَرَ. قَالَ أَبُو دَاوُدَ وَبَلَغَنِي أَنَّ شُرَيْحًا كَسَرَ بَابَ تُسْتَرَ وَذَلِكَ أَنَّهُ دَخَلَ مِنْ سِرْبٍ. (سنن ابي داود، باب في تغيير الاسم القبيح)

حَدَّثَنَا سُلَيْمَانُ بْنُ حَرْبٍ حَدَّثَنَا شُعْبَةُ عَنْ سَعْدِ بْنِ إِبْرَاهِيمَ عَنْ أَبِي أَمَامَةَ - هُوَ ابْنُ  
 سَهْلِ بْنِ حُنَيْفٍ - عَنْ أَبِي سَعِيدِ الْخُدْرِيِّ - رَضِيَ اللَّهُ عَنْهُ - قَالَ لَمَّا نَزَلَتْ بَنُو قُرَيْظَةَ  
 عَلَى حُكْمِ سَعْدٍ - هُوَ ابْنُ مُعَاذٍ - بَعَثَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - ، وَكَانَ  
 قَرِيبًا مِنْهُ ، فَجَاءَ عَلَى حِمَارٍ ، فَلَمَّا دَنَا قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - «  
 قُومُوا إِلَيَّ سَيِّدِكُمْ » . فَجَاءَ فَجَلَسَ إِلَى رَسُولِ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَقَالَ لَهُ  
 « إِنَّ هَؤُلَاءِ نَزَلُوا عَلَى حُكْمِكَ » . قَالَ فَإِنِّي أَحْكُمُ أَنْ تُقْتَلَ الْمُقَاتِلَةُ ، وَأَنْ تُسَبَى  
 الدُّرَيْيَةُ . قَالَ « لَقَدْ حَكَمْتَ فِيهِمْ بِحُكْمِ الْمَلِكِ » (صحيح البخاري، باب إذا نزل  
 العدو على حكم رجل : صحيح مسلم ، باب جواز قتال من نقض العهد وجواز إنزال  
 أهل الحصن على حكم حاكم عدل أهل للحكم)

#### Fatwā

الْفَصْلُ الثَّامِنُ { فِي التَّحْكِيمِ } وَمَعْنَاهُ أَنَّ الْخَصْمَيْنِ إِذَا حَكَّمَا بَيْنَهُمَا رَجُلًا وَارْتَضِيَاهُ  
 لِأَنَّهُ يَحْكُمُ بَيْنَهُمَا فَإِنَّ ذَلِكَ جَائِزٌ بِالْكِتَابِ وَالسُّنَّةِ وَاجْتِمَاعِ الْأُمَّةِ ، وَلِأَنَّ مَتَى لَمْ نُجْزِ  
 التَّحْكِيمَ لَصَاقَ الْأَمْرُ عَلَى النَّاسِ ؛ لِأَنَّهُ يَشُقُّ عَلَى النَّاسِ الْخُضُورُ إِلَى مَجْلِسِ الْحُكْمِ  
 فَجَوَّزْنَا التَّحْكِيمَ لِلْحَاجَةِ (معين الحكام)