

**ARBITRATOR'S JURISDICTION TO RESOLVE DISPUTES RELATING  
TO ALLEGATION OF FRAUD**

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TO ALLEGATION OF FRAUD**

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**A master's project report submitted in partial fulfillment of the  
requirements for the award of the degree of  
Master of Science in Construction Contract Management.**

**Faculty of Built Environment  
Universiti Teknologi Malaysia**

**July 2010**

*For*  
*My husband,*  
*Mohd Shukri bin Yusof,*  
*My mother,*  
*Zaherah binti Basaruddin,*  
*My daughter,*  
*Dalily Alani.*

*With love,*  
*Intan Bayani*

## **ACKNOWLEDGEMENTS**

With the name of Allah who gave me the chance, ideas and physical strength in preparing this master's project report. Without His guidance and blessing, it would have been more difficult task for me.

I am heartily thankful to my supervisor, Mr. Jamaluddin Yaakob, whose encouragement, guidance and support from the initial to the final level enabled me to develop an understanding of the subject. I am also very thankful to all the lecturers of Construction Contract Management Group for their kind help and support, motivation and advices to me throughout this program.

Not forgetting my dearest husband, parents and brothers, for always be there supporting me during the process of completing of my master course. Lastly, I would like to thank to my classmates for giving me morale support.

Last but not least, thank you to all who have made this dissertation possible.

## ABSTRACT

Arbitration has been recognised as one of the alternative dispute resolutions in construction industry. By the insertion of arbitration clause in a construction contract, it requires parties to resolve any disputes through an arbitrator instead of a judge. But in some circumstances, the parties of the contract must refer their dispute to the court. Under Arbitration Act 1952, certain disputes had been barred from arbitration including fraud related disputes. The disputant parties must apply to the High Court for fraud related dispute settlement. Currently under Arbitration Act 2005 which applied UNCITRAL Model Law, provision that takes away arbitrator's jurisdiction to deal with question of fraud has not been brought into force. Therefore, this research has been done to explore whether in the absence of express provision relating to fraud, does it really means that the arbitrator has jurisdiction to deal with this matter. The research has been conducted by analyzing relevant cases reported in Malaysian law journals and other countries that follow the UNCITRAL Model Law which included United Kingdom, India and Hong Kong. The result shows that fraud is a question of law. Subsequently, when fraud has been established as a question of law, arbitrator has no jurisdiction to deal with it. With reference to arbitration agreements in the standard forms of contract and institutional arbitration rules, there is no express provision that gives power to arbitrator to deal with fraud. In Arbitration Act 2005, does not expressly prohibits arbitrator from dealing with question of law. Therefore, if the parties, in the arbitration agreement, agree to give such power to the arbitrator, then he would have such jurisdiction.

## ABSTRAK

Timbangtara telah diiktiraf sebagai satu kaedah penyelesaian alternatif di dalam industri pembinaan. Dengan adanya klausa timbangtara di dalam kontrak pembinaan, pihak yang terlibat perlu merujuk kepada penimbangtara sebagai ganti kepada hakim untuk menyelesaikan sebarang pertikaian. Tetapi di dalam sesetengah keadaan, pihak yang berkontrak perlu merujuk pertikaian tersebut kepada mahkamah. Di bawah Akta Timbangtara 1952, terdapat pertikaian yang telah dihalang daripada timbangtara termasuk pertikaian yg melibatkan penipuan. Pihak yang bertikai perlu momohon kepada mahkamah untuk penyelesaian. Pada masa ini, di bawah Akta Timbangtara 2005 yang mengaplikasikan *UNCITRAL Model Law*, peruntukan yang mana telah menarik bidang kuasa penimbangtara untuk mengendalikan persoalan penipuan telah tidak dikuatkuasakan. Dengan itu, kajian dijalankan untuk mengetahui samada dengan ketiadaan peruntukan nyata berkaitan penipuan, adakah ini menyatakan bahawa penimbangtara boleh menyelesaikan masalah tersebut. Penyelidikan ini dijalankan dengan menanalisis kes-kes yang direkodkan di dalam jurnal undang-undang Malaysia serta dari negara yang juga mengadaptasikan *UNCITRAL Model Law* seperti United Kingdom, Hong Kong dan India. Keputusan analisis menunjukkan bahawa penipuan adalah merupakan persoalan undang-undang. Berikutnya, apabila penipuan ini dianggap sebagai suatu persoalan undang-undang maka penimbangtara tiada bidang kuasa untuk menyelesaikannya. Merujuk kepada perjanjian timbangtara di dalam borang kontrak piawai dan peraturan timbangtara yang dikeluarkan oleh institusi timbangtara, tiada peruntukan nyata kepada kuasa tersebut. Di dalam Akta Timbangtara 2005, tiada peruntukan nyata yang menghalang penimbangtara dari menyelesaikan persoalan undang-undang. Oleh itu sekiranya kedua-dua belah pihak bersetuju di dalam perjanjian memberikan kuasa kepada penimbangtara, maka ia mempunyai bidang kuasa.

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[1991] 3 MLJ 269.

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Wan Chung Construction Company Ltd v Lingnan University and P & T Architects  
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## LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
CA	Court of Appeal
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
DC	Divisional Court
FMSLR	Federated Malay States Law Reports
Hals	Halsbury's Laws of England
HL	House of Lords
PWD	Public Works Department
KB	King Bench
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PC	Privy Council
PWD	Public Work Department (Malaysia)
QB	Queen Bench
WLR	Weekly Law Report

# CHAPTER 1

## INTRODUCTION

### 1.1 Background of Research

The construction has been known to be one of the most adversarial and problem-prone industry, with claims and disputes on construction projects.<sup>1</sup> Experience elsewhere also suggests that the dispute is the construction industry ‘product’ that cannot be avoided.<sup>2</sup> Disputes can occur as a result of actions, or inactions, of the Employer, the Contractor or the various consultants.<sup>3</sup> Differing opinions on whether certain works

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<sup>1</sup> Steen, R.H.(2002). *Alternative Dispute Resolution In The Construction Industry*. *New Jersey State Bar Association’s Dispute Resolution*. pp.1; Nur Emma Mustaffa (2009). *Partnering and Problem Resolution – The Construction Industry Perspective*. *PAM CPD (Continuing Professional Development) Seminar 2009*. 7<sup>th</sup> November 2009. pp.1; Ellison, M.(2009). *Impact of Civil Justice Reform On Construction Disputes*. *Construction Law Update*. Available at <http://cannonway.com/web/page.php?page=223> as assessed on 27th May 2010.

<sup>2</sup> Teresa Cheng, Evia Wong & Gary Soo. (2004). *Construction Law and Practice in Hong Kong*. Sweet & Maxwell Asia: Hong Kong. pp. 461

<sup>3</sup> Onn, C.K. (2003). *Resolution Of Construction Industry Disputes An Overview*. A paper based on a lecture delivered to The Institution of Engineers, Malaysia (Negeri Sembilan Branch). Available at <http://www.ckoon-law.com/Paper/RESOLUTION%20OF%20CONSTRUCTION%20DISPUTES.pdf> as assessed on 27th May 2010. pp.2-3.



constitute variations within the meaning of the contract and if so their valuation; entitlement of extension of time and its quantification; certification of interim payments; the exercise of the powers of the consultants or their non-exercise thereof; delay or alleged delay in the provision of information; and many others will have their contractual implications.<sup>4</sup> It can therefore be seen that construction industry disputes will have subject matters which are highly technical in nature, involve issues of law which are highly specialized and require as modes of proof documents which may run into many volumes<sup>5</sup> and need proper mechanism to settle the disputes.

Referring disputes to court had once been the “de facto process” (by fact) in resolving dispute in construction industry<sup>6</sup> but in the recent development, there are various techniques in dispute resolution and some other techniques enable the parties to reach a settlement through their own negotiations. Dispute resolution processes are alternatives to having a court decide the dispute in a trial or other institutions decide the resolution of the case or contract.<sup>7</sup> Dispute resolution may also be referred to as alternative dispute resolution, appropriate dispute resolution, or ADR for short.<sup>8</sup> There are many types of ADR by which disputes in the construction industry can be brought to their resolution including arbitration; mediation; adjudication; expert determination; mini-trial; hybrid ADR; dispute review board; and dispute resolution advisor.<sup>9</sup> Arbitration was among the earliest forms of recognized ADR.<sup>10</sup>

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<sup>4</sup> Onn, C.K. (2003). Resolution Of Construction Industry Disputes An Overview. A paper based on a lecture delivered to The Institution of Engineers, Malaysia (Negeri Sembilan Branch). Available at <http://www.ckoon-law.com/Paper/RESOLUTION%20OF%20CONSTRUCTION%20DISPUTES.pdf> as assessed on 27th May 2010.p.3.

<sup>5</sup> *Ibid.*

<sup>6</sup> Kellogg, J.C. (2001). *The Contract Disputes Resolution Continuum*. KK News. p.2.

<sup>7</sup> American Bar Association.(2006). What You Need to Know about Dispute Resolution: The Guide to Dispute Resolution Processes. Available at <http://www.abanet.org/dispute/draftbrochure.pdf> as assessed on 27th May 2010

<sup>8</sup> *Ibid.*

<sup>9</sup> Onn, C.K. (2003). Resolution Of Construction Industry Disputes An Overview. A paper based on a lecture delivered to The Institution of Engineers, Malaysia (Negeri Sembilan Branch). Available at

Arbitration is an adversarial process in which the disputing parties present arguments to a neutral arbitrator, who then makes an award.<sup>11</sup> In this regard, arbitration resembles litigation as providing a forum where the parties argue against each other in an effort to convince the third party, not the other disputants, of their particular points of view.<sup>12</sup> At an arbitration hearing, the parties' present testimony and other evidence to support their claims, as they would a trial. But unlike litigation, arbitrations lack strict rules regarding admissibility of evidence.<sup>13</sup> This informality hastens the proceedings, but it can allow the arbitrator to consider evidence that might otherwise be barred in a court of law.<sup>14</sup> After the arbitrator concludes the hearing, he renders a decision in the form of an "award." Depending upon the arbitration rules, the award may include a written decision; or it may state only who pays, how much, and to whom.<sup>15</sup>

Arbitration's primary advantages are access to specialized neutrals, speed, cost and finality.<sup>16</sup> Specialized neutrals reduce the risk that an erroneous award.<sup>17</sup> In most

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<http://www.ckoon-law.com/Paper/RESOLUTION%20OF%20CONSTRUCTION%20DISPUTES.pdf> as assessed on 27th May 2010.p.3.

<sup>10</sup> Historically, the practice of arbitration can be traced as far as circa 350 BC, at the time of Plato. Plato propounded that parties in dispute must reconcile their differences before seeking a recourse from the tribal courts. From its origins leading to the Middle age and even up to the Seventeenth Century, merchants in Europe and Britain were known practitioners of the independent process of resolving disputes commonly called "arbitrement", as a matter of preference. They needed quick simple justice with readily understandable procedures.

<sup>11</sup> Riecken, G.S., Ashcraft, H.W., & Hanson. ADR: Dispute Resolution No Longer Alternative for Design Professionals.

<sup>12</sup> Jervis, B.M and Levin, P.(1988). *Construction Law Principles and Practice*. McGraw-Hill Book Company: United States. pp. 208-209.

<sup>13</sup> Green, M.Z. (2009). Article Of Interest: No Strict Rules Of Evidence In Labor And Employment Arbitration. Available at <http://lawprofessors.typepad.com/evidenceprof/2009/12/i-have-written-several-previous-posts-on-this-blog-about-cases-in-which-the-federal-rules-of-evidence-or-state-counterparts-do.html> as assessed on 7th June 2010.

<sup>14</sup> Thomas & Ataie LLP.(2007). Securities & Commodities Arbitration. Available at <http://www.paulthomaslaw.com/practices/securitiescommoditiesarbitration.html> as assessed on 7th June 2010.

<sup>15</sup> Jervis, B.M and Levin, P.(1988). *Construction Law Principles and Practice*. McGraw-Hill Book Company: United States. p. 208.

<sup>16</sup> Zulhabri Ismail, Jamalunlaili Abdullah and Rosli Mohamad Zin. *Finding Of Alternative Dispute Resolution (ADR) Application & Obstacles Towards Active Development Of ADR in The Malaysian Construction Industry*. 3<sup>rd</sup> Conference of Law and Technology; Saila Koshy. (2007). Building Confident

instances, arbitration proceeds faster than litigation,<sup>18</sup> and the shorter time frame and the limitations on discovery reduce the cost of obtaining the final award. And arbitration almost eliminates the cost of appeals, since an award is usually not appealable.<sup>19</sup>

Generally, many standard forms of construction contract have clauses on dispute resolution.<sup>20</sup> There are also other types of dispute resolution beside arbitration.<sup>21</sup> An arbitration clause in a contract requires the parties to resolve any disputes through an arbitrator instead of a judge. Many governments expressed their support for arbitration by enacting arbitration acts.<sup>22</sup> Therefore, in a contract dispute, if the contract has an arbitration clause, the dispute must be heard before an arbitrator, unless the arbitration clause is specifically challenged.<sup>23</sup> Without such a provision, the parties end up in court.<sup>24</sup>

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In Arbitration. Available at <http://thestar.com.my/news/story.asp?file=/2007/6/20/focus/18073753&sec=focus> as assessed on 22<sup>nd</sup> January 2010; Jacqueline Ann Surin (2008). It has nothing to do with loss of confidence in judiciary. The Malaysian Bar. Available at <http://www.malaysianbar.org.my> as assessed on 22<sup>nd</sup> January 2010.

<sup>17</sup> If a construction case is heard by a judge who have a limited or no construction knowledge related to the issues in the dispute, it is generally the best and most convincing presentation that will be the winner, not necessarily who is right or wrong.

<sup>18</sup> The timeframe to resolve litigation cases as stated by Chief Justice Tun Zaki Azmi, indicates that the cases now usually take 6 to 15 years to run. Underlying timeframe at an average (and excluding appeals) takes between 3 and 4 years for a matter to be concluded at trial at the High Court and between 2 and 3 years at the Subordinate Courts, though it may sometimes be quicker. It may take between 1½ and 2 years for an appeal to be heard at the Court of Appeal and about 1 year for an appeal to be heard at the Federal Court.

<sup>19</sup> Jervis, B.M and Levin, P.(1988). *Construction Law Principles and Practice*. McGraw-Hill Book Company:United States.p. 208.

<sup>20</sup> Clause 41, *JCT form*; Clause 66, *ICE form*; Clause 54, *Standard Form of Contract (P.W.D. Form 203A (Rev.10/83))*; Clause 55, *I.E.M. Condition of Contract For Mainly of Civil Engineering Construction (1989)*; Clause 46 *CIDB Standard Form of Contract for Building Works (2000)*

<sup>21</sup> Clause 47 *CIDB Standard Form of Contract for Building Works (2000)*, mediation; Clause 34 *PAM 2006*, adjudication and mediation.

<sup>22</sup> As example, Federal Arbitration Act (United States); Arbitration Act 1996 (United Kingdom); Arbitration Act 2005 (Malaysia); Arbitration Ordinance 1997- Chapter 341(Hong Kong); Arbitration and Conciliation Act 1996 (India); Arbitration Act 2001(Singapore).

<sup>23</sup> Section 10 Arbitration Act 2005 provides that a court has powers to stay an action commenced in court by one of the parties to arbitration and instruct the parties to go ahead with the arbitration proceeding instead.

<sup>24</sup> Eiseman, N.(2010). Picking the Best Forum to Resolve Disputes - Is Your Construction Client Better Off in Arbitration or Court? The Bergen Barrister. Available at <http://www.goetzfitz.com/ResourceDetail.aspx?ArticleId=10> assessed on 27th May 2010.

Courts have been consistently reluctant to entertain parties' claims in court where the parties had made provision for arbitration.<sup>25</sup> This reluctance must not be viewed in a negative manner as if the arbitration agreement ousted the court's jurisdiction.<sup>26</sup> It is merely that arbitration was and still is a consensual dispute resolution mechanism, and the court in its reluctance is merely portraying this concept and exercising its discretion to ensure that the parties are kept to their promise.<sup>27</sup>

But in limited circumstances, the court may allow a party to an arbitration agreement to refer a dispute direct to court. For example, where the issues are all pertaining to matters of law, then a court of law would be the better forum of the two.<sup>28</sup> Among the situation are certain issues are not within the jurisdiction of the arbitrator, where the party, for instance, alleges that a fraud had been committed<sup>29</sup> or there is no dispute among the parties<sup>30</sup> or where the court considers that the suggested defence advance by the defendant is unarguable.<sup>31</sup> Such cases would be outside the purview of the arbitrator and the only the courts have the jurisdiction to decide the matter.<sup>32</sup> . Issues of law are and always have been subject to review by the courts and arbitrators are known as master of the facts.<sup>33</sup>

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<sup>25</sup> Xavier, G.(2001). *Law and Practice of Arbitration in Malaysia*. Sweet & Maxwell Asia: Petaling Jaya, Selangor.pp.69.

<sup>26</sup> *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269.

<sup>27</sup> *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181.

<sup>28</sup> The matters involving morality, status and public policy cannot be referred to arbitration such as insolvency matters, such as adjudication of a person as an insolvent, criminal proceedings, dissolution or winding up of a company. (The list is not intended to be exhaustive).

<sup>29</sup> *Russell v Russell* [1880] 14 Ch. D. 471; *Malaysia Government Officers' Co-operative Housing Society Ltd. v. United Asia Investment Ltd & Ors* (1972) 1 MLJ 113; *Tan Kok Cheng & Sons Realty Co. Sdn. Bhd. v. Lim Ah Pat (t/a Juta Bena)* (1995) 3 MLJ 273; *Hashim bin Majid v. Param Cumarsaswamy* (1993) 2 MLJ 20; *Lai Siew Wah Sdn Bhd v. Ng Chin* (1988) 1 MLJ 393.

<sup>30</sup> The famous case involved an application of summary judgment in building contract is case of *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd.* [1974] 2 MLJ 94

<sup>31</sup> *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*[1977]2 All ER 463; *Ryoden Engineering Co Ltd v Paul Y Construction co Ltd* [1994] 2 HKC 578.

<sup>32</sup> Section 25(2) Arbitration Act 1952.

<sup>33</sup> *Georgas SA v Trammo Gas Ltd (the Baleares)* {1993} 1 Lloyd's Rep 215 at 228, an English Court of Appeal decision.

However, referring to recent development in arbitration law, refusal to refer to arbitration disputes involving fraud has been abandoned in England<sup>34</sup> and in almost all jurisdictions.<sup>35</sup> The English Arbitration Act 1996 contains no provision whereby courts can refuse reference of a dispute regarding allegations of fraud to arbitration. In the absence of this provision,<sup>36</sup> the court is loathed to interfere and the matters were within the power of the arbitrator.

## 1.2 Problem Statement

Disputes that bring to arbitration may relate to question of law<sup>37</sup> or question of fact<sup>38</sup> or both combination of questions of law and fact<sup>39</sup>. It is a part of the arbitrator's

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<sup>34</sup> Badrinath Srinivasan. (2009). Arbitrability Of Claims Relating To Fraud:Recent Developments In India. Available at <http://ssrn.com/abstract=1530182> as assessed on 19th May 2010.pp.7.

<sup>35</sup> Davidson, W.S.W.(2005). The Malaysian Arbitration Scene The relationship between the Courts and the Arbitral Tribunals in the 21st Century. *13th Biennial Malaysian Law Conference*.16th – 18th November 2005.

<sup>36</sup> The court under the recent enactment would have had the power under section 86 to stay arbitration in cases of allegations of fraud .

<sup>37</sup> Halsbury's Law of Malaysia. (2002). *Arbitration*. Vol.13. Malayan Law Journal Sdn. Bhd.: Kuala Lumpur, Malaysia.p.18. A dispute as to whether the contract was void ab initio for illegality; a dispute as to whether there was consideration for the contract; a dispute as to whether the contract was void for uncertainty; a dispute as to whether the parties have agreed to treat the contract as if it had never existed; a dispute as to whether a subsequent contract was an accord and satisfaction substituting wholly new rights and obligations for those under the original contract.

<sup>38</sup> Fernn, P and Gameson, R.(1992). *Construction Conflict Management and Resolution*.E & F N Spon: London. pp. 209-218. Disputes caused by the determination of the agreement; disputes caused by the payment issues; disputes caused by site and execution of work issues.

<sup>39</sup> Halsbury's Law of Malaysia. (2002). *Arbitration*. Vol.13. Malayan Law Journal Sdn. Bhd.: Kuala Lumpur, Malaysia.p.18. Disputes including whether there has been a repudiation of the contract by one party and, if so, whether that repudiation has been accepted by the other party; whether the contract has been frustrated; whether the making of the contract was induced by misrepresentation; whether the contract is voidable on the ground of non-disclosure; whether the contract is binding on the parties despite the failure of a condition precedent to the contract; whether one party is able to escape

duty to determine matters both of fact and of law.<sup>40</sup> Generally, arbitrator may only decide on question of facts and where factual matters are in dispute.<sup>41</sup> Where a dispute involves question of law or the arbitrator requires a decision on question of law, the Arbitration Act sets out express provision in relation thereto.<sup>42</sup> In Malaysia, under former Arbitration Act 1952, if the parties or the arbitrator requires a decision on question of law, they may seek a determination of the questions by the court, as case statement under section 22 and if either party apply to court to stay of proceeding under section 6, the court may not grant the application if the issue relates to question of law.<sup>43</sup>

One of the issues relates to question of law is case involving serious allegation of fraud.<sup>44</sup> Whenever a dispute involves fraud, then, a party may invoke case state procedure or apply to court under section 25 (2) Arbitration Act 1952. This section stated that:

*Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court.*

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liability under the contract by relying on a termination provision in the contract; a claim in tort where the tortious claim has a sufficiently close connection with the contractual claim; an undisputed claim.

<sup>40</sup> Stephenson, D.A. (1993). *Arbitration Practice in Construction Contracts*. 3<sup>rd</sup> ed. E & FN Spon : London. p.57.

<sup>41</sup> *Ibid*.

<sup>42</sup> Arbitration Act 1952(Act 93), section 22: Statement of case; English Arbitration Act 1979, Section 5: Determination of preliminary point of law.

<sup>43</sup> *Malaysia Government Officers' Co-operative Housing Society Ltd. v. United Asia Investment Ltd. & Ors* (1972) 1 MLJ 113; *Hashim bin Majid v Param Kumaraswamy* [1993] 2 MLJ 20; *Bina Jati Sdn Bhd v. Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71

<sup>44</sup> *Malaysia Government Officers' Co-operative Housing Society Ltd. v. United Asia Investment Ltd. & Ors* (1972) 1 MLJ 113; *Lai Siew Wah Sdn Bhd v Ng Chin* (1988) 1 MLJ 393; *Hashim bin Majid v Param Kumaraswamy* [1993] 2 MLJ 20; *Bina Jati Sdn Bhd v. Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71.

In cases involving allegation of fraud, the High Court has ample powers under section 25(3) of the Arbitration Act 1952 to grant necessary reliefs. In *Lai Siew Wah Sdn Bhd v Ng Chin*<sup>45</sup>, the Supreme Court comprising Wan Suleiman, Hashim Yeop A. Sani and Wan Hamzah SCJJ has held that once the court is satisfied that there is a *bona fide* allegation of fraud against the appellants, then the discretion given to the judge under section 25(3) of the Arbitration Act 1952 was indeed properly exercised.

The court will refuse stay of proceedings where the matter in dispute involves a charge of fraud against one of the parties to the arbitration agreement. But a mere making of a charge of fraud would not entitle a person to call upon the court to exercise its discretion to refuse a reference to arbitration. It is also establish that from the case of *Russell v Russell*, the court will not exercise its discretion against the applicant for stay if there is no prima facie evidence of fraud.

The decision of the entire case cited above are reflected the same principal in English law cases. For the court's power to be invoked under these provisions (section 25), it is necessary that the dispute involves the question whether any party to the arbitration agreement has been guilty of fraud. To satisfy this requirement, a "concrete and specific issue of fraud" must be raised. There must be "sufficient prima facie evidence of fraud" with "convincing evidence to support the allegations", not a mere bandying about of allegations as portrayed in the case of *Russell v Russell*<sup>46</sup>; *Camilla Cotton Oil Co. v Granadex S.A.*<sup>47</sup>; *Cunningham-Reid v Buchanan Jardine*.<sup>48</sup> Indeed, under Arbitration Act 1952, the authorities were very clear that if fraud was pleaded then an arbitrator has no jurisdiction to hear the matter.

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<sup>45</sup> [1988] 1 MLJ 393

<sup>46</sup> (1880) 40 Ch D 471 at 481

<sup>47</sup> [1976] 2 Lloyd's Rep 10 at 16

<sup>48</sup> [1988] 1 WLR 678 at 6(1B-C).

Currently, the governing arbitration law is under Arbitration Act 2005. Repealing the Arbitration Act 1952, the 2005 Act adopts the UNCITRAL Model Law on International Commercial Arbitration Rules 1985. Under 2005 Act, the old 'fraud' rule (s. 25(2) of the 1952 Act) that takes away arbitrator's jurisdiction to deal with question of fraud had be abolished. This provision, which was originally founded on the principle that a party accused of fraud should have the right to trial by jury, has now been abolished in almost all jurisdictions including in United Kingdom<sup>49</sup> and India. Those countries are also followed UNCITRAL Model Law.

There are suggestions that, in view of the Model Law, the arbitrator should have jurisdiction to resolve fraud related dispute. In the opinion of Merkin<sup>50</sup>,

*The agreement of the parties to refer future dispute to arbitration ought to prevail over the right of the public defence, and that there was in any event no reason to believe that arbitrators were incapable of dealing with issues of fraud on their merits and reaching appropriate conclusions.*

Previously, Woolf LJ also had expressed his opinion in the case of *Cunningham-Reid and another v Buchanan-Jardine*<sup>51</sup> :

*There is no difficulty in this day and age in appointing an arbitrator who is well capable of properly determining and trying an issue of fraud of this sort, indeed many members of both sides of the profession now have very considerable experience as recorders of trying just such issues.*

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<sup>49</sup> In England, the provision of the Arbitration Acts 1950 (Section 24(2)) and 1979 providing for stay of arbitral proceedings in case of the allegations of fraud have been not been carried into the Arbitration Act 1996.

<sup>50</sup> Merkin, R.(2004). *Arbitration Law*. LLP : London. pp. 85-86.

<sup>51</sup> [1988] 2 All ER 438.



Therefore, the issue is in the absence of express provision relating to fraud, does this really mean that under Arbitration Act 2005, the arbitrator has jurisdiction to resolve fraud related dispute where the origin was under the court's jurisdiction?

### **1.3 Objective of Research**

From the problem statement, the following is the objective of the study:

1. To determine the arbitrator's jurisdiction to resolve disputes relating to allegation of fraud under Arbitration Act 2005.

### **1.4 Scope of Research**

This research will review the existing legislations on arbitration. This research will also review the relevant published case law on arbitration and discussed the relevant decisions of the courts on the subject of the staying of proceeding. In relevant with the application of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration in Arbitration Act 2005, cases applying the UNCITRAL *Model Law Articles 8: Arbitration Agreement and Substantive Claim Before Court* also being discussed.

## **1.5 Significant of Research**

There is no local law cases cited on arbitrator's jurisdiction on fraud allegation based on Arbitration Act 2005 in Malaysia yet. The possible analysis conduct is by referring to the other countries cases. This research intent to give information whether fraud can be arbitrates by arbitrator in Malaysian law. By this information, the parties to the contract must decide what matters they what to take to arbitration or court.

## **1.6 Research Methodology**

In order to achieve the research objective, a systematic method in conducting this research had been organized. Basically, this research methodology inclusive of four major stages. Stage 1: initial study and finding the research topic, objective, scope and outline; Stage 2: collecting data and research design; Stage 3: analyzing and interpreting data and Stage 4: writing-up.

### **1.6.1 Stage 1: Initial Study and Finding the Research Topic, Objective, Scope and Outline**

Stage 1 of the research involves initial study which by discussion with friends and lecturers regarding what research topic can be done. Literature review on the issue of this research also obtained from the journal to seek for related research done previously. After the determined the issue, the objective and scope of the research are prepared as well as the research outline is formulated to guide the process of the whole research. After this, a research outline will be prepared in order to identify what kind of data will be needed in this research.

### **1.6.2 Stage 2: Collecting Data and Research Design**

Collection of all relevant data and information is done during this stage. After identifying all the background and relevant issues through literature review, information and legal cases from various courts which are related to the research issue will be collected. There are two types of data being collected, namely primary data and secondary data.

#### **1.6.2.1 Primary Data**

Primary data collected mainly from Malayan Law Journal, Current Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals. It is collected through the Lexis-Nexis online database. All the cases relating to

the research topic will be sorted out from the database. Important cases will be collected and used for the analysis at the later stage.

#### **1.6.2.2 Secondary Data**

Secondary data is data obtained from research done by third parties other than the writer. Sources of secondary data consist of books, act, articles, research paper and seminar papers. These sources are important to complete the literature review chapter.

#### **1.6.3 Stage 3: Analyzing and Interpreting Data**

This stage of research involves data analysis, interpretation and data arrangement. This process is to convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process writing of the paper.

#### **1.6.4 Stage 4: Writing-up**

This stage is the final stage of the research process. It involves mainly the writing up and checking of the writing. Conclusion and recommendations will be made based on the findings during the stage of analysis. Essentially, the whole process of the study is reviewed to identify whether the research objective has been achieved. This can be illustrated in Figure 1.

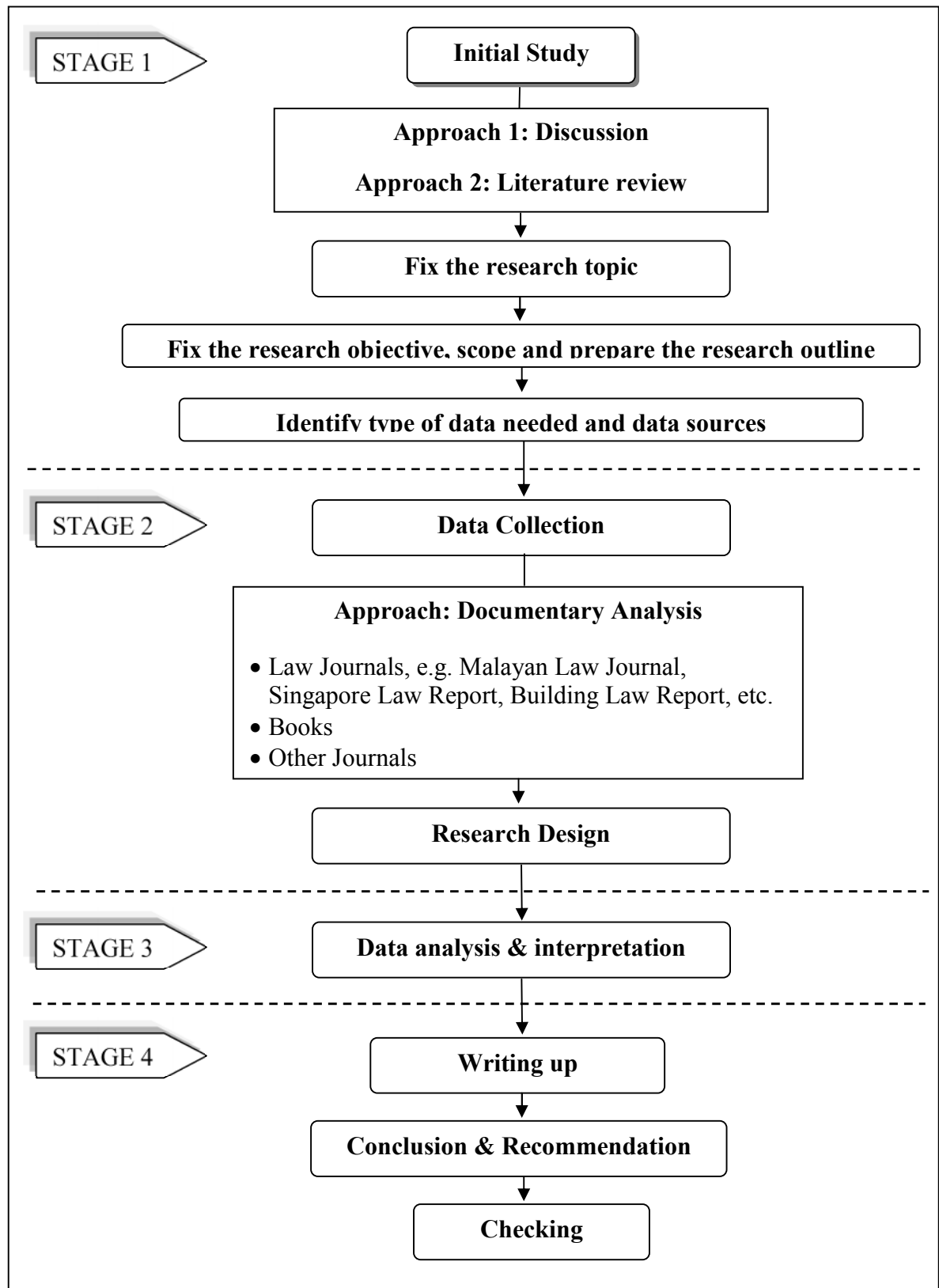


Figure 1: Research Methodology Flowchart

## **1.7 Structure of Research**

This dissertation is divided into five (5) chapters and each chapter covered different scope of studies. The outlines for each chapter are as follows:

### **1.7.1 Chapter 1- Introduction**

First Chapter is basically an introduction on the topics, problem statement, objectives and scope of research, significance of research, research methodology and outline of structure of research.

### **1.7.2 Chapter 2 – Selection of Arbitrator**

Second Chapter is basically literature review about arbitrator including the definition of arbitrator, criteria, appointment and jurisdiction and power of an arbitrator.

### **1.7.3 Chapter 3**

Third chapter is basically literature review about arbitrator's jurisdiction including the meaning of jurisdiction, sources of jurisdiction, competence of arbitrator to rule on its jurisdiction based on Arbitration Act 2005 and also jurisdiction to arbitrate fraud related disputes.

### **1.7.4 Chapter 4**

Forth chapter is basically focusing on the court cases review. Analysis conducted by comparing cases that applied stay of proceeding in challenging arbitrator's jurisdiction on fraud allegation in order to determine the possibility of fraud to be arbitrate in Malaysian law.

### **1.7.5 Chapter 5**

Fifth chapter comprises of the discussion on findings and interpretation of the data collected, conclusion and recommendation. The findings and analysis, conclusion and recommendation are utilized in order to answer the objectives of the research.



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