NULL AND VOID, INOPERATIVE OR INCAPABLE OF BEING PERFORMED OF AN ARBITRATION AGREEMENT

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A 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

August 2016

DEDICATION

Special thanks to my parents, my sisters and brothers, my supervisor and friends for their endless helps, support and understandings

Thanks for Everything.

ACKNOWLEDGEMENT

First of all, I would like to take this opportunity to express my deepest gratitude to my supervisor Assoc. Prof. Sr Dr. Maizon Bte Hashim for her advice, assist and guidance. The supervision and support that she gave truly help the progression and smoothness of this research.

Thanks also to all the lecturers in course of Master of Science (Construction Contract Management), Assoc. Prof. Sr Dr. Maizon Bte Hashim, En. Jamaludin Yaakob, Dr Norazam Othman, Dr. Nur Emma Mustaffa, Dr Muzani Bin Mustapa for their patient and kind advice during the process of completing the master project.

Furthermore, I would like to forward my appreciation to my family for their care, moral support and understanding. Last but not least, I want to thank my friends who direct or indirectly assist me in completing this study.

Thank you very much.

ABSTRACT

The parties must have a written arbitration agreement before referring their dispute to arbitration. The party might refuse to refer their dispute to arbitration on the ground that the arbitration agreement is "null and void, inoperative or incapable of being performed". This research is conducted to identify the circumstances that the arbitration agreement is "null and void, inoperative or incapable of being performed". Thus, this research investigated eleven cases from Malayan Law Journal where the courts held that the arbitration agreement is "null and void, inoperative or incapable of being performed". This can be a guideline for the parties who want to resolve their dispute by arbitration. The methodology of this study is based on documentary analysis with the assistance of Nvivo 11. From the analysis, there are five circumstances which led to the arbitration agreement to be "null and void". First, the agreement does not have a clear wording to refer arbitration clause in another document. Second, there is no acceptance by a party on the arbitration agreement. Third, the parties in dispute are not the parties in the arbitration agreement. Fourth, the agreement does not show intention to refer arbitration clause in another document. Fifth, the dispute does not within the scope of the arbitration agreement. Besides, there are two circumstances which led to the arbitration agreement to be "inoperative". First, the party fails to comply with the time frame stipulated in the arbitration agreement. Second, the arbitration agreement incorporated the permissive word and there is another clause which conflicts with the arbitration clause.

ABSTRAK

Pihak-pihak mesti mempunyai perjanjian timbang tara bertulis sebelum merujuk pertikaian mereka kepada timbangtara. Pihak itu mungkin enggan untuk merujuk pertikaian mereka kepada timbang tara atas alasan bahawa perjanjian timbang tara itu "batal dan tidak sah, tidak berkuat kuasa dan tidak berupaya untuk dilaksanakan". Kajian ini dibuat untuk mengenal pasti keadaan perjanjian timbang tara itu "batal dan tidak sah, tidak berkuat kuasa dan tidak berupaya untuk dilaksanakan". Oleh itu, kajian ini menyiasat sebelas kes dari Malayan Law Journal yang mahkamah memutuskan perjanjian timbang tara itu "batal dan tidak sah, tidak berkuat kuasa dan tidak berupaya untuk dilaksanakan". Kajian ini boleh menjadi satu garis panduan bagi pihak-pihak yang ingin menyelesaikan pertikaian mereka melalui timbang tara. Metodologi kajian ini adalah berdasarkan analisis dokumentari dengan bantuan Nvivo 11. Dari analisis, terdapat lima keadaan menunjukkan bahawa perjanjian timbang tara adalah "batal dan tidak sah". Pertama, perjanjian itu tidak mempunyai kata-kata yang jelas merujuk fasal timbang tara dalam dokumen lain. Kedua, tidak ada penerimaan kepada perjanjian timbang tara. Ketiga, pihak-pihak yang bersengketa bukan pihak-pihak dalam perjanjian timbang tara. Keempat, perjanjian itu tidak menunjukkan niat untuk merujuk fasal timbang tara dalam dokumen lain. Kelima, pertikaian itu tidak dalam skop perjanjian timbang tara. Selain itu, terdapat dua keadaan menunjukkan bahawa perjanjian timbang tara itu "tidak berkuat kuasa". Pertama, parti itu tidak mematuhi tempoh masa yang ditetapkan dalam perjanjian timbang tara. Kedua, perjanjian timbang tara itu mempunyai perkataan permisif dan ada klausa lain yang bercanggah dengan fasal timbang tara .

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LIST OF ABBREVIATIONS

ABBREVIATIONS	FULL NAME
DAB	Dispute Adjudication Board
ICC	International Chamber of Commerce
KBK	Kejuruterean Bintai Kindenko Sdn. Bhd.
SIAC	Singapore International Arbitration Centre

LIST OF CASES

CHAPTER 1

INTRODUCTION

CHAPTER 1

INTRODUCTION

1.1 Background of Study

Disputes in business are inevitable and this situation is similarly applied in the construction industry. Construction industry is high risk in nature. This is because construction industry involved a lot of parties, information and monies. This situation results in a complex and dynamic project environment. Besides, projects are usually long-term transactions. Hence, it is impossible for the parties involved to solve every detail and forecast every possibility or contingency at the beginning of the project. Consequently, disputes will easily occur in the construction industry. Disputes can arise within this sector for all sorts of reasons and it can be resolved by several possible ways.

Construction disputes are generally resolved by litigation or arbitration or adjudication. There is some standard forms in Malaysia provide arbitration as dispute resolution mechanisms. There are clause 47.3 for CIDB (2000), clause 34.5 form PAM 2006 and clause 66 for PWD 203(Rev.1/2010). In clause 66.1 under PWD 203A (Rev.1/ 2010), once dispute occurs, the first means of resolving it is the officer named in

Appendix. If the dispute is not resolved by the officer named in Appendix, such dispute shall be referred to arbitration[1].

Arbitration is an alternative dispute resolution where the contractual parties agree to find a neutral third person to listen and make a decision or award from the facts (Sundra Rajoo, 2016)[2]. The common features of an arbitration are consensual process, enforceable agreement, private and confidential, final and binding award and cross application of laws and rules. The first arbitration act in Malaysia was Arbitration Act 1952 and later substituted by Arbitration Act 2005. This change is needed to follow the requirements of the user and the new decade.

In certain situation, a party may not refer the dispute to arbitration, but choose to refer to court. Based on section 10 under the Arbitration Act 2005, another party may apply for a stay of proceedings to court. The Court is bounded by Arbitration Act 2005 to grant for the stay. "Null and void, inoperative or incapable of being performed" is one of the conditions that the court would consider when making a decision for the stay.

[1] PWD 203A (Revision 2010), Clause 66.3.
[2] Sundra Rajoo, 2016. *International Commercial Arbitration - Basic Concepts and Introduction to Practice and Procedure*, Kuala Lumpur: KLRCA.

1.2 Statement of Problem

Malaysian Arbitration Act 2005 was a long-awaited and would bring changes to the arbitration practice in Malaysia. Arbitration Act 2005 come into operation on 15th March 2006. Parliament intended to encourage the parties to resolve their disputes through arbitration as well as to control the Court's participation in reviewing and setting aside arbitral decisions. Until now this Act is still in its infancy as the jurisprudence surrounding it is still developing (Ashok Kumar Mahadev Ranai, 2011)[3]. As it developed, there were various explanations of the provisions and diverse approaches taken by the courts (Ashok Kumar Mahadev Ranai, 2011)[4]. One of the reasons for these different approaches is due to the courts being unfamiliar with the arbitration process and the UNCITRAL Model Law (Ashok Kumar Mahadev Ranai, 2011).

The parties must have consent to arbitration and such consent is expressed through an arbitration agreement. However, when a dispute arises, a contractual party may refer the dispute to court. Another contractual party may subsequently apply for a stay of proceedings to court in order to resolve the disputes in arbitration. In this circumstance, the applicant who applies for the stay of proceeding is needed to find evidence to show that the arbitration contract is valid[5] while the respondent needs to prove that the arbitration is "null and void, inoperative or incapable of being performed".

The contractual parties cannot refer their disputes to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed". This can be shown in the Articles of New York Convention and UNCITRAL Model Law. Article II (3) of New York Convention demonstrated that a seized court shall refer the dispute

[3] Ashok Kumar Mahadev Ranai. 5 Years since the Enactment of Arbitration Act 2005 and the Arbitration (Amendment) Bill 2011. *Berita Timbangtara*. 2011. PP11580/04/2010 (023947): 23-28.
[4] *Ibid.*
[5] *Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd* [1990] 1 MLJ 305

subject to an arbitration clause to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed" and Article 8 of UNCITRAL Model law stipulated that:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."[6]

However, both New York Convention Article II (3) and UNCITRAL Model law Article 8 do not clarify how the court could find the arbitration agreement invalid (Emmanuel Gaillard & Yas Banifatemi, 2002; Zheng, 2014).[7] This is because New York Convention and UNCITRAL Model law do not provide rules to decide the validity of an arbitration agreement (Zheng, 2014).[8] Bingham; Taylor LJJ in the case of *Gatoil International Incorporated v National Iranian Oil Company*[9] also agreed that the meaning of inoperative is not clear. The learned judge said:

> "…Arbitration agreements are not to be enforced if they are null and void -- a point which may appear obvious; nor are they to be enforced if the arbitration agreement is "inoperative". The meaning of that expression may not be entirely clear, although Mustill & Boyd suggest some examples on page 464 of Commercial Arbitration."[10]

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[6] Article 8 of UNCITRAL Model Law
[7] Emmanuel Gaillard & Yas Banifatemi, 2002. Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators. *Int'l Arb. Rep.*, 17(1), p. 27.
Zheng, S. T., 2014. *Jurisdiction and Arbitration Agreement in International Commercial Law*. New York: Routledge, see also Emmanuel Gaillard & Yas Banifatemi, 2002. *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*. Int'l Arb. Rep., 1(17), p.27.
[8] *Ibid.*
[9] [1990] Lexis Citation 3088
[10] *Ibid.*

In Malaysia, there is a similar provision as stated in Section 10 (1) of Arbitration Act 2005, the court shall allow a stay unless the arbitration agreement is "null and void, inoperative or incapable of being performed". "Null and void, inoperative or incapable of being performed" of an arbitration agreement is a condition that affects the court's decision regarding the stay of proceeding. If the arbitration agreement "null and void, inoperative or incapable of being performed" the court would not grant for stay of proceeding. As a result, the disputes needed to solve by the court rather than an arbitrator. But the Arbitration Act 2005 also does not clarify how the court could find the arbitration agreement "null and void, inoperative or incapable of being performed".

However, it is difficult to identify the invalidity of the arbitration agreement. The arbitration clause is considered as defective arbitration clause when the venue is unclear (Surya Prakash; Albin, 2012).[11] However, there is not necessary that the unclear venue in an arbitration clause will cause the arbitration agreement to become "null and void, inoperative or incapable to be performed". This can be shown in the case of *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd*,[12] although the place of arbitration was unclear, the Court considered the arbitration clause valid since the arbitration clause gives clear intention of the parties to arbitrate.

Besides, in the case of *Rightmove Sdn Bhd v YWP Construction Sdn Bhd & Anor*,[13] the defendant had fulfilled the pre-condition in Section 10(1) of Arbitration Act 2005 and apply a stay. The plaintiff could only challenge if he could show that the arbitration agreement was "null and void, inoperative or incapable of being performed". However, the plaintiff failed to show that the arbitration agreement was invalid and the Court finally granted a stay of proceeding.

[11] Surya Prakash; Albin, G. T., 2012. *Critical Issues In International Commercial Arbitration,* Bhopal: Centre For Business And Commercial Laws (CBCL).
[12] [1993] 1 HKC 404
[13] [2015] 7MLJ 687.

It seems that it was difficult to prove that the arbitration agreement is "null and void, inoperative or incapable of being performed". However, in Malaysia, there are cases held that the arbitration agreement is "null and void, inoperative or incapable of being performed" because the arbitration clause has used permissive word "may". This can be seemed in the case *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd*[14] and *Sime Engineering Sdn Bhd v Ahmad Zaki Resources Berhad & Others.*[15]

However, even the arbitration clause contains the permissive word "may", the court might decide the arbitration clause is valid. This can be shown in High Court case of *Majlis Perbandaran Alor Gajah v Sunrise Teamtrade Sdn Bhd*[16] had held that the permissive word "may" in an arbitration clause have a mandatory effect and the arbitration agreement will not become "null and void, inoperative or incapable of being performed".

Kaplan J in the case of *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd*[17] stated that the disputes might happen because of the poor drafting of the arbitration agreement. Kaplan J also highlighted that many contracts have the difficulty in drafting an arbitration clause. Kaplan J said

> "This not the first case with which I have had to deal where the arbitration clause has left something to be desired. Many contract drafters seem to have difficulty in the fairly simple task of drafting an arbitration clause or even replicating a standard form clause. Arbitral institutions and associations go to the trouble of drafting standard form arbitration clauses

[14] [2011] 2 MLJ 606.
[15] [2011] MLJU 370.
[16] [2014] 7 MLJ 570
[17] [1993] 1 HKC 404.

> and disseminating them for the benefit of users, yet in far too high a percentage of cases, something goes wrong."[18]

This would cause both parties waste a lot of time and money. Kaplan J in the case of *Lucky-Goldstar International (HK) Ltd c Ng Moo Kee Engineering Ltd* [19] also stated that "A badly drafted clause leads to disputes and wasted costs, both of which are anathema to the arbitral process."[20]

To sum up, the arbitration agreement is important in enforcing the arbitration. Basically, arbitration not enforceable unless the parties have an arbitration agreement (Stephenson, Arbitration For Contractors, 1987).[21] Therefore, an arbitration agreement is vital since there cannot be a valid arbitral process without an arbitration agreement (Seriki, 2015). [22]

[18] *Ibid.,* at page 408.
[19] *Ibid.*
[20] *Ibid.,* at page 409.
[21] Stephenson, D. A., 1987. *Arbitration For Contractors.* 2nd ed. London: International Thompson Organisation.
[22] Seriki, H., 2015. *Injunction Relief And International Arbitration.* New York: Informa Law. ,pp. 1.

1.3 Research Questions

From the problem statement, some questions can be found. Those questions are listed as follows:

(a) What are the circumstances that the arbitration agreement is “null and void, inoperative or incapable of being performed”?
(b) What is defective arbitration clause?
(c) In what situation an arbitration clause will become defective?

There are some other questions that can be asked related to the issue, but for the purpose of this study, the main focus is only on question no.1 i.e. What are the circumstances that the arbitration agreement is “null and void, inoperative or incapable of being performed”?

1.4 Research Objective

From the problem statement, the research objective of this research is to identify the circumstances that the arbitration agreement is “null and void, inoperative or incapable of being performed”.

1.5 Scope of Research

This research is limited to the cases related to the discussion of "null and void, inoperative or incapable of being performed" of arbitration agreement recorded in Malaysian Law Journal. Significant cases that the court held the arbitration agreement is "null and void, inoperative or incapable of being performed" would be collected for the purpose of case analysis. There is no time frame limitation as to the data collection. This is because the issue of "null and void, inoperative or incapable of being performed" of arbitration agreement can be raised from both Arbitration Act 1952 and Arbitration Act 2005.

1.6 Significance of the Research

Arbitration is one of the preferred dispute resolutions in the construction industry. There are standard forms of contract that are adopted in Malaysia for example, the PAM 2006 Form and PWD 203A (Rev. 2010) provide the provision for arbitration as dispute resolution.

Understanding which conditions that an arbitration agreement is classified as "null and void, inoperative or incapable of being performed" is important when both parties having different opinions on the method to resolve the dispute. Both the contracting parties would want to know the circumstances that the arbitration agreement is "null and void, inoperative or incapable of being performed". Whether the application is granted or refused is important for the parties to know which kind of step amount to "null and void, inoperative or incapable of being performed" of arbitration agreement as per Arbitration Act 2005 section 10(1).

Furthermore, it can be a guideline for the court to identify the circumstances that the arbitration agreement is “null and void, inoperative or incapable of being performed”.

Finally, this research can use as a reference for students which study on the subject of arbitration. This research will increase the knowledge of students in the arbitration.

1.7 Research Methodology

Research Methodology is essential to attain objective of study. It is vital to ensure work schedule is followed closely throughout this study. According to Naoum (2007), research design and methodology explain about how the problem addressed in the study will be investigated and the tools applied in studying the problem. Figure 1.1 shows the stages that had been used by the researcher to complete this study.

Stage 1: Development of Research Proposal

The main purposes for this stage is to determine the research area, issues, scope and significance of the study. Besides, the from the reading of literature materials such as articles, reports and books, discussing with supervisor and friends and referring other current dissertations and journal, the researcher can also determine the topic and subsequently write up a research proposal.

Stage 2: Development of Theory Framework (Literature Review)

Literature review is an importance process to develop theory for this research. At this stage, the researcher has read various types of materials to appraise and analyse the knowledge, suggestions and theories that had been developed by other researchers. These materials are including books from library of UTM (Perpustakaan Sultanah Zanariah Universiti Teknologi Malaysia), online articles and law cases from database provided by UTM, articles from others website and previous dissertations.

Stage 3: Data Collection

For data collection, law cases are collected as primary data. The primary data are the cases laws which the arbitration agreement had been held as "null and void, inoperative or incapable of being performed". The main sources for the primary data of the research were abstracted from the Malayan Law Journal (MLJ) via the Lexis-Malaysia website through the Perpustakaan Sultanah Zanariah, Universiti Teknologi Malaysia subscriber. The primary data were based on the court cases that had been decided in the Malaysian Court judicial throughout the year. There is no timeframe limitation for the court case selection. The law cases would be collected for the purpose of case analysis on the next stage.

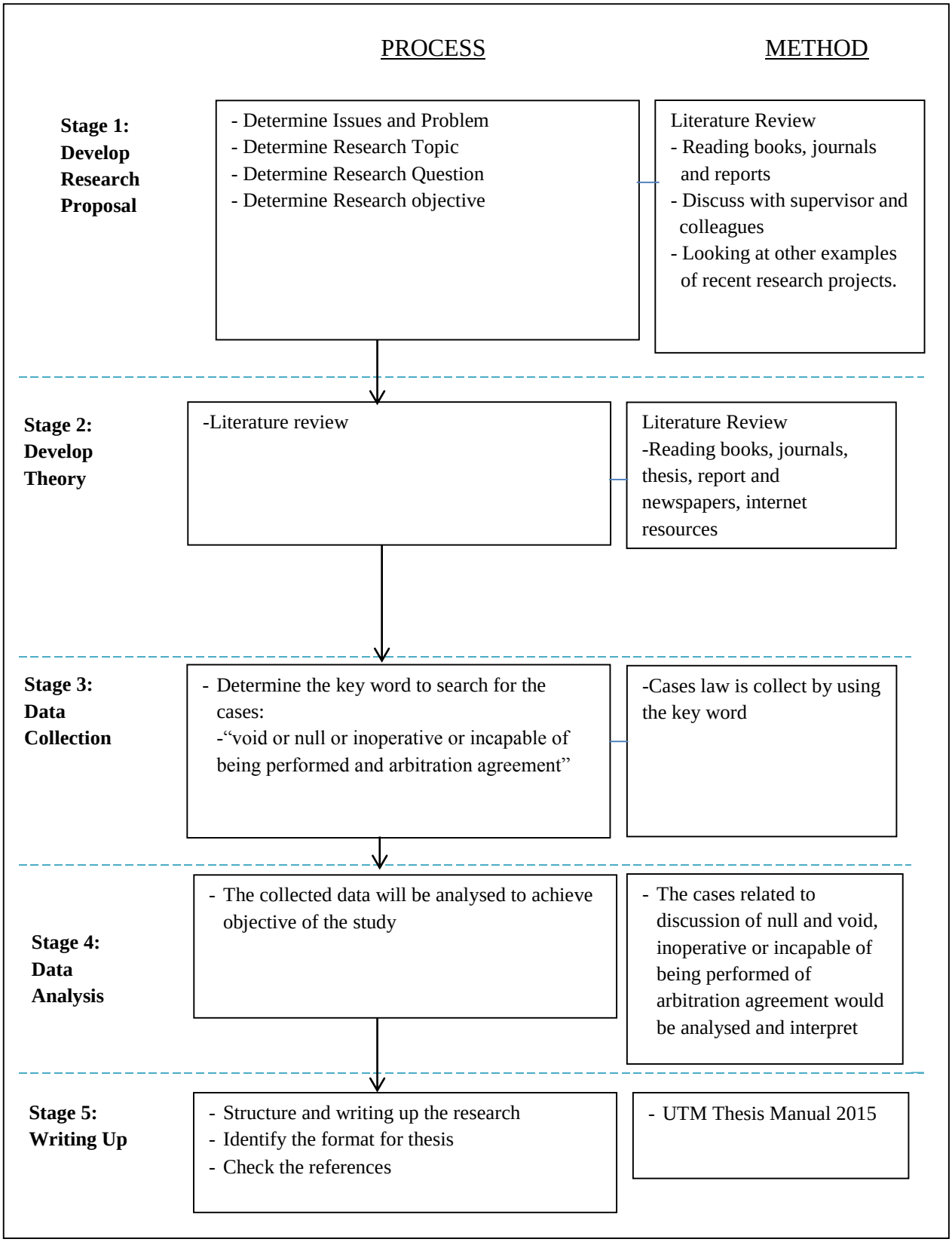
Stage 4 Data Analysis

Documentary analysis of the relevant case law was the main activity to be completed in the data analysis stage. The case law had been carefully reviewed, with special attention paid to the facts of the case, the issues and the judicial interpretation by the courts through their judgements.

Stage 5: Writing Up

At this stage, all the results of analysis are write up in the report in the structure and format in accordance to the manual provided by UTM (UTM Thesis Manual 2015).

Figure 1.1 Research Methodology Flow Chart



1.8 Chapter Organisation

This research involves 5 chapters as follow:

Chapter 1: Introduction

Chapter 1 provides an overview of the background of the study, problem statement, research question, research objective, scope and significance of the research.

Chapter 2: Literature Review

This chapter provides comprehensive background information about the research to the readers. Chapter 2 contains theories and definitions for arbitration, arbitration agreement and "null and void, inoperative or incapable of being performed. The circumstances that the arbitration agreement is "null and void, inoperative or incapable of being performed" are discussed in this section. Besides, this chapter also explains about the elements of arbitration agreement, the importance of arbitration agreement, incorporation arbitration clause by reference and defective arbitration agreement.

Chapter 3 Research Methodology

Chapter 3 provides an overview of how the research is planned to be conducted. This chapter explains in details regarding the research methodology used and the methods used to collect data. Method used to analyse data are described in this section.

Chapter 4 Data Analysis

This chapter shows the findings and discussion in accordance with the data collected. All the data collected are analysed by using Nvivo 11.

Chapter 5 Conclusion and Recommendation

Chapter 4 involves the summary outcome of the study, limitations of the study and recommendation for future research.

1.9 Conclusion

In conclusion, if an arbitration agreement is “null and void, inoperative or incapable of being performed”, the court will not grant a stay of proceeding. However, there are some cases as discussed in problem statement shown that there are people still confused with which circumstances that an arbitration agreement can be considered “null and void, inoperative or incapable of being performed”. Hence, it is important to identify in which circumstance that the arbitration agreement can be considered as “null and void, inoperative and incapable to be performed”.

There are five stages in order to achieve the objective which including the development of research proposal, development of theory framework, data collection, data analysis and writing up.

The following chapter will discuss the development of theory framework (literature review) which comprising the definition, and concept or theory about the “null and void, inoperative or incapable of being performed” of an arbitration agreement.

CHAPTER 2

LITERATURE REVIEW

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