

A REVISED PROPOSED METHODOLOGY TO INVESTIGATE SHARI'AH COMPLIANCE IN THE FORMATION OF CONSTRUCTION CONTRACT

**Siti Nora Haryati Abdullah Habib and Khaiyruddin Abdul
Rashid²**

Department of Quantity Surveying, Kulliyah of Architecture and
Environmental Design,

International Islamic University, P.O. Box 10, Jalan Gombak,
50728 Kuala Lumpur, Malaysia.

ctnora@iiu.edu.my¹, khaiyruddin@iiu.edu.my²

ABSTRACT

A study is being currently undertaken to examine the current practice of construction procurement with specific reference to contract formation and appraises the practice in terms of its compliance with the Shari'ah. The focus of this paper is on the methodology being proposed i.e. to study the practice of the offer and acceptance during contracting out construction works whereby the research model is presented herein.¹ The study is expected to determine whether the current practice of the offer and acceptance in the formation of construction contract in compliance or otherwise with the Shari'ah. The proposed methodology combines two key data sources, i.e. (i) literature review; and (ii) series of focus group discussions with people who are considered as experts in the fields of

¹ This paper follows the other two papers presented elsewhere i.e. *Proposed Methodology to Investigate Shar'ah Compliance in Construction Procurement (with specific reference to contract formation) (2007)* and *Shari'ah Compliant Construction Contract: A Research Proposal (2008)*.

construction procurement and fiqh al-muamalat. Comments and recommendations are needed in order to improve the methodology.

Keywords

Shari'ah Compliant, Construction, Contract, Istisna'

INTRODUCTION

According to Siti Nora Haryati and Khairuddin (2008), Construction Industry Development Board (CIDB) recorded that more than 37,000 government and private construction contracts with value more than RM 380 billion have been awarded to contractors since the year 2000 until June 2007 (CIDB, 2007). This statistic embraces projects from different categories i.e. residential, non-residential, mix development, social amenities, infrastructure and others. Notwithstanding the value of construction contracts awarded, there is no known literature has been found discusses on whether the practices in the formation of construction contracts comply or otherwise with the *Shari'ah*.

Islam acknowledges the importance of commercial transactions in fulfilling the needs of human being. Commercial transactions, which inclusive of exchange of commodities, buying, selling, pawn, mortgage, lending, hire, leasing, debt, etc., is included as one of the branches of *mu'amalat* under *Shari'ah* (Faizah Ismail, 1995; Abdurrahman Raden Aji Haqqi, 1999). However, commercial transaction under *Shari'ah* is differ from the conventional commercial transaction in the sense that it is not solely to gain individual profit but most importantly, it is also contents obligation towards Allah s.w.t as well as emphasizes on securing benefits of people and preventing harm from people. Consequently, commercial contract which is in compliance with *Shari'ah* underlines the elements of justice, accountability and transparency, thus it is compatible to be used whether by Muslim or non-Muslim.

In Malaysia, the application of Islamic commercial dealing is well-known in the areas of banking, insurance and capital market (Khairuddin Abdul Rashid, 2007). The materialization of Islamic Banking Act 1983 and Takaful Act 1984 leads to the establishment of Islamic financial system in Malaysia (Nik Norzrul Thani, Mohamed Ridza Mohammad Abdullah & Megat Hizaini Hassan, 2003; Bank Negara Malaysia, 2005). With the support from the government, Malaysia is now

leading towards becoming a global hub for Islamic finance. It is reported that Malaysia is the largest *sukuk* (Islamic bond) insurer in the world accounting for about US\$47 billion (RM157.54 billion) equal to two-thirds of total Islamic bonds outstanding worldwide (The Edge Daily, 12 December 2007). Islamic banking in Malaysia is also the largest in Asia (The Edge Daily, 12 December 2007) with assets accounting RM147 billion (US\$43.8 billion) for the year ending 2007 (Berita Harian, 30 January 2008).

The tremendous performances of banking and financial systems give positive effects to the other sectors of the economy. In relation to the construction industry, such systems affect the way facilities being procured specifically in financing construction projects. Clients and construction industry players frequently employ products such as *bay' bithaman ajil* (deferred sale contract), *bay' al mudharabah* (profit sharing contract), *bay' al-istisna'* (manufacturing contract) and *sukuk* (debt securities) in financing projects. Moreover, it is also common in the industry to insure against risks through one of the many products available under the various *takaful* schemes (Khairuddin Abdul Rashid, 2007). New Pantai Expressway and Kuala Lumpur International Airport are examples of construction projects that involve Islamic debt securities during their execution (Khairuddin Abdul Rashid, 2007). Islamic financing given to construction sector also showing increment, for example, Bank Muamalat reported that Islamic financing to construction in the year 2007 reaches RM 859 million as compared to year 2006, about RM 659 million (Bank Muamalat, 2008).

While using *Shari'ah* compliant banking and finance products become so common in the construction industry, many clients are still continuing practicing conventional mode in contracting out construction works to consultants, contractors and suppliers in which the compliance of such practice with the *Shari'ah* is still in question. At present, there is no legislation or directive that governs or instructs the formation construction contracts to be in conformity with *Shari'ah*. Indeed, *Shari'ah* at the moment does not constitute as one of the applicable sources in the Malaysian construction law (Singh, 2002a). Observing such gaps, this study attempts to examine the current practice in construction procurement with specific reference to contract formation and appraises the practice in terms of its compliance with the principles of *Shari'ah*.

Two presentations on the proposed methodology including the research model of the study have been done in MICRA 2007 and *Shari'ah* Compliant Construction Contract Conference 2008 (Siti Nora Haryati & Khairuddin, 2007; Siti Nora

Haryati & Khairuddin, 2008). During the presentations, feedbacks and comments from participants have been received. Based on the responses given by the participants, proper examination has been done by the authors. Consequently, necessary amendments and corrections was done leading to the revised version of the proposed methodology of the study. Therefore, the aim of this paper is to present the revised version of the proposed methodology considered appropriate to investigate *Shari'ah* compliance in the practice of offer and acceptance during contracting out construction works. The authors expect comments and feedbacks in order to further improve the methodology. This paper is to support dissertation for Master degree conducted by the first author.²

THE SHARI'AH

Definition And The Importance Of *Shari'ah*

The word '*shariah*' is not a term created by people but a term revealed by Allah s.w.t. (Haron Din, 2003). Al-Quran stated:

"Then We put you on the (right) Way of Religion, so follow you that (Way), and follow not the desires of those who know not." (Al-Jathiyah: 18).

Abdullah Yusuf Ali (2006, pg 1082) in his commentary mentions that the word '*shariah*' in this verse is best translated as the '*right way of religion*', which is "...wider than the mere formal rites and legal provisions, which mostly came in the Medina period, long after this Makkan verse had been revealed." Thus, '*Shari'ah*' in the context during the revelation of this verse, is the opposition of the ancient pagan beliefs of the people in Mecca who used to worship idols and believe in superstitions (Mohamad Hashim Kamali, 2006).

There are many interpretations given by Muslim scholars as well as orientalist in defining the technical meaning of the word '*Shari'ah*'. A comprehensive technical meaning of '*shari'ah*' can be deduced from the definitions given by Mohamad Akram Laldin (2006, 3):

"... the total of Islamic teaching and system, which was revealed to Prophet Muhammad s.a.w., recorded in the Qur'an as well as deducible

² The study is on-going and the second author is the supervisor of the research.

from the Prophet's divinely guided lifestyle called the Surnah... 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."

Shari'ah is important to be implemented in human daily lives as the primary objective of the Shari'ah (*maqasid Al-Shari'ah*) is the protection on five basic aspects of human life (*al-Kulliyat al-Khams*) i.e. religion, life, mind, lineage and property. The transgression against any of these is prohibited by Islam as these elements are the foundation of the harmonious and peaceful society (Haron Din *et. al.*, 2003; Mohamad Akram Laldin, 2006). According to Mohamad Hashim Kamali (2006, pg 12):

"Shari'ah refers to commands, prohibitions, guidance and principles that God has addressed to the mankind pertaining to their conduct in this world and salvation in the next. The basic purpose of this and all other divine guidance is to enable man to forsake the dictates of hawa (desires), that is, the untrammelled lust and proclivity to evil, to lead him to righteousness and truth; to make him upright and worthy of assuming the divine trust of khilafah, the vicegerency of God in the earth."

Sources of Shari'ah

There are various Muslim scholars' interpretations on the sources of Shari'ah and their categorizations. There are scholars classified the sources according to their origins; originated from *nass* (revealed textual sources) or from the power of reasoning or *'aql* (non-textual sources). There are also scholars classified the sources based on the Muslim scholars' agreement of the acceptance on their utilization (Liaquat Ali Khan Niazi, 1991; Abu Ameenah Bilal Philips, 1995; A. Monir Yaacob, 1998; Zamri Hashim, 1998; Abdurrahman Raden Aji Haqqi, 1999; Mohamad Akram Laldin, 2006). In this context, the study refers to the sources identified by Haron Din *et. al.*, (2003) which considered as the main sources of Shari'ah accepted by the Muslim scholars (see Table 2).

Table 2: Brief explanation on the sources of *Shari'ah*

Source	Description
Al-Qur'an	<ul style="list-style-type: none"> The book contains the speech of Allah S.W.T revealed to the Prophet Muhammad S.A.W and transmitted to us by continuous testimony. The authenticity is agreed by all scholars; however, there are some differences in interpreting some of the verses (Mohamad Hashim Kamali, 2000; Mohamad Akram Laldin, 2006).
As-Sunnah	<ul style="list-style-type: none"> Refers to all narration (<i>Hadith</i>) from the Prophet (his acts, sayings, whatever had been approved) and reports which described his physical attributes and character. Some classifications were established by the scholars to administer the acceptance and application of <i>Hadith</i> (Mohamad Hashim Kamali, 2000; Mohamad Akram Laldin, 2006).
Ijma'	<ul style="list-style-type: none"> Refers to consensus of agreement of opinion among the Muslim scholars after the life of Prophet S.A.W. on problem which is not determined definitely and directly in Al-Qur'an and As-Sunnah (Abdurrahman Raden Aji Haqqi, 1999; Mohamad Akram Laldin, 2006).
<i>Ijtihad</i>	<ul style="list-style-type: none"> Continuous process of reasoning to interpret and harmonize the Divine messages with the changing nature of the life of Muslims community. The manifestations of <i>ijtihad</i> includes <i>Qiyas</i> (analogical deductions), <i>Istihsan</i> (juristic preference), <i>Al-Masalih al-Mursalah</i> (consideration of public interest), <i>Al-Istishab</i> (presumption of continuity) etc. which slight variations of the terminology and gaps on their acceptance of utilization according to <i>madzhab</i> (school of thought in <i>fiqh</i>) (Abu Ameenah Bilal Philips, 1995; Mohamad Hashim Kamali, 2000).

Table 2: Brief explanation on the sources of *Shari'ah* (cont'd)

THE CONCEPT OF *SHARI'AH* COMPLIANT

The concept of *Shari'ah* has been discussed by Siti and Khairuddin (2008). Therefore, concept of *Shari'ah* compliant refers to any activities or affairs which is

made or done according to *Shari'ah* rules and standards derived from its sources (Al-Qur'an, As-Sunnah, Ijma', Ijtihad) and not in contravene with the objectives of *Shari'ah* (*maqasid al-Shari'ah*).

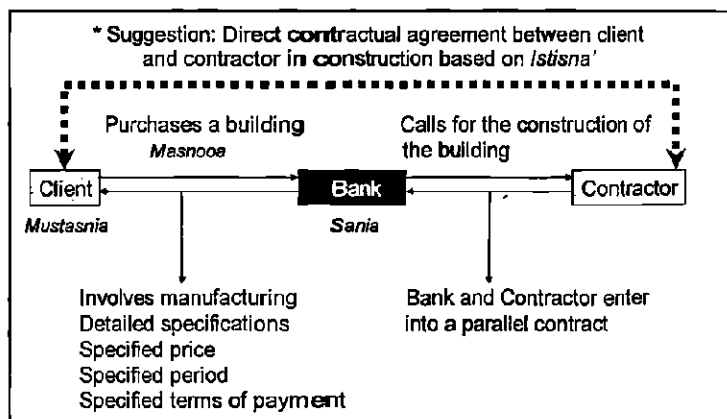
PRELIMINARY STUDY ON THE FORMATION OF SHARI'AH COMPLIANT CONSTRUCTION CONTRACT WITH SPECIFIC REFERENCE TO THE OFFER AND ACCEPTANCE

Formation Of *Shari'ah* Compliant Construction Contract

In Islam, it has been agreed by scholars that *Istisna'* is considered as the most appropriate *Shari'ah* compliant contract agreement to be used for construction (Wahbah Al-Zuhayli, 2002; Muhammad Al-Amine, 2001). *Istisna'* is commission to manufacture contract which it is a contract to purchase item to be manufactured by the manufacturer who provides raw materials and labour in producing the final products as specified in the contract. However, this contract is not only restricted to the traditional production but also can be extended to the construction sector (Wahbah Al-Zuhayli, 2002). However, currently, *Istisna'* contracts are mostly used to finance construction projects by financial institutions whereby the financial institutions act as the middle man between clients and contractors. Therefore, there are no direct contractual agreements between contractors and clients (see Figure 1). Khairuddin (2008) has suggested that, for the contractual relationships between clients and the contractors in construction to be *Shari'ah* compliant, the arrangement should be based on the *Istisna'*. In fact, Saudi Arabian General Investment Authority (2005) reports that *Istisna'* contract in construction has been practised in Saudi Arabia since 1998.

Istisna' is promoted by the Hanafis and stated in the *Mejelle* (see Art. 124, 388, 92, 389, 390, 391 which defined and described rules of *Istisna'*). The seventh session of the Islamic *Fiqh* Academy also recognized *Istisna'* based on the interests of people and its important role in the economy; hence the academy has decreed several important rules pertaining to *Istisna'* (see Resolution No.65/3/7, Islamic Development Bank, 2000).

Figure 1: Istisna' financing contract and suggestion for the agreement in construction between client and contractor to be based on *Istisna'*



(Source: Khairuddin, 2008)

The following are the key requirements pertaining to the formation of *Istisna'* contract under *Shari'ah* as extracted from scholars (Muhammad Al-Amine (2001), Muhammad Rawwas Qal'ahji (2006), and Al-Baraka Banking Group in Khairuddin, 2007; The Mejelle; Islamic Fiqh Academy Resolution 1992, Wahbah Al-Zuhayli, 2002; Ilyana Ilyas, 2007, Joni Tamkin Borhan, 2002; Khairil Azmin Mokhtar, 1993; Hasbullah Abdul Rahman, 2001; Razali Nawawi, 1999; Mohd Ali Baharum, 1999; Abdurrahman Raden Aji Haqqi, 1999; Mohd Ma'sum Billah, 2003; Syed Qutb, 2000; Taqi Usmani, 2008):

1. The contract is established based on mutual consent;
2. The contracting persons are people who attain legal capacity (people who are sane, able to discern, evaluate, and negotiate and also somehow able to protect himself from force, deception, mistake and injustices, and not a bankrupt);
3. The process of offer (*ijab*) and acceptance (*qabul*) takes place in *majlis of 'aqd*
4. The subject matter has commercial value and beneficial and lawful under *Shari'ah*;

5. The contract must be free from the element of *gharar* and must be fair for both parties.

Offer And Acceptance In *Shari'ah* Compliant Construction Contract

The Mejlle (2003, pg 16) in Art. 101 defines *Ijab* (offer) as "... the word first spoken for making a disposition of property (*tasarruf*) and the disposition is proved by it." The definition represent the opinion of the Hanafis. Mohd Ali Baharum (1999, pg 72) further mentions that, Malikis, Hanbalis and Shafi'ees were of the opinion that "*Ijab* is any statement put forward by the owner of the subject matter to the contract." As compared to the former definition, the later definition given by the Malikis, Hanbalis and Syafi'ees does not give priority for the first statement given by contracting parties to become an offer as what hold by the Hanafis. What is important in these three schools of fiqh, is the position of the contracting parties. The owner or the seller is always considered as the party who makes the offer even though it is the buyer who initiates his intention to buy. In addition, counter offer (*'Ard al-Muqabil*) also can happen if the offeree's reply to the offeror by introduces new term(s) or varies term of the offer. In such cases, the reply made by the offeree is not treated as acceptance but as an offer itself, which can be accepted or rejected by the original offeror (Mohd Ali Baharum, 1999; Mohd Ma'sum Billah, 2003).

As for the term 'acceptance', Art. 102 of the Mejlle (2003, pg. 16) defines 'acceptance (*qabul*)' as "...the word spoken in the second place for the making of disposition of property, and the agreement becomes complete by it." According to Mohd Ali Baharum (1999, pg72), acceptance (*qabul*) in Shafi'ees, Malikis and Hanbalis is "any statement given by the party that will own the subject matter offer to him." Comparing the both definitions, the term 'acceptance' (*qabul*) under Shafi'ees, Malikis and Hanbalis is not focusing on when the statement of acceptance is given whether in first or second place. The principle is similar as what have been discussed earlier in the term 'offer'. The buyer can initiate his intention to buy or to own a property prior to the expression of offer by the seller and if the contract executed, the buyer is still considered as the acceptor in the eyes of the three schools. To make the definition of 'acceptance (*qabul*)' clearer, the study prefers to refer to the definition given by Liaquat Ali Khan Niazi (1990, pg 65) who defines acceptance (*qabul*) as "... an act whereby a party agrees to a proposal, terms or offer made to him, or undertakes a trust, office or duty. In contract it is the indication by a person to whom an offer has been made by mode

or conduct that he assents to the offer made to him. If unqualified, a binding contract is thereupon concluded.”

In the context of construction contract, general rules pertaining to the practice of offer and acceptance during contracting are presented in Table 3 (Muhammad Al-Amine (2001), Muhammad Rawwas Qal'ahji (2006), and Al-Baraka Banking Group in Khairuddin, 2007; The Mejelle; Islamic Fiqh Academy Resolution 1992, Wahbah Al-Zuhayli, 2002; Ilyana Ilyas, 2007, Joni Tamkin Borhan, 2002; Khairil Azmin Mokhtar, 1993; Hasbullah Abdul Rahman, 2001; Razali Nawawi, 1999; Mohd Ali Baharum, 1999; Abdurrahman Raden Aji Haqqi, 1999; Mohd Ma'sum Billah, 2003; Syed Qutb, 2000; Taqi Usmani, 2008).

Table 3: Rules pertaining to offer and acceptance for *Shari'ah* compliant construction contract as extracted from scholars³

Classifications	Rules
Particulars need to be specified	<ul style="list-style-type: none"> o The particulars of the subject matter must be clearly defined (nature, type, amount, required specifications, and dimensions must be specified during contracting) and understood; o The location of delivery must be specified.
Declaration of offer and acceptance	<ul style="list-style-type: none"> o Declaration of offer and acceptance must be done in the <i>majlis al-aqad</i>. For contracting inter presentes, <i>majlis al-aqad</i> is a place where an offer and acceptance are made. While for contracting inter absentes, <i>majlis al-aqad</i> is a place where an offer is communicated (see Table 10)
Price and Cost	<ul style="list-style-type: none"> o Method of payment must be specified (may be paid in advance, totally deferred or scheduled according to pre-determined installments and specific due dates.
Time	<ul style="list-style-type: none"> o The time limit of completion must be specified.
Contract Agreement	<ul style="list-style-type: none"> o The contract is established based on mutual consent o Liquidated damages and the effect of circumstantial changes during the execution of contract must be agreed prior agreement between the parties to a contract.

³ At the time of writing this paper, the research is ongoing. The rules presented here are the preliminary findings for the research.

Signing contract	<ul style="list-style-type: none"> o At the time of writing up this paper, no literature found that discuss about the requirement of signing contract. o Presence of witnesses who also attain legal capacity (some scholars treat this as not compulsory, but the authors contended that this element is a must based on interpretation of verse 282, Surah Al-Baqarah by Syed Qutb (2000, translated version pg. 173).
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Shari'ah recognized two kinds of situations when concluding contract i.e. contracting *inter presentes*, where the parties in the presence of each other in a same place during contracting, and contracting *inter absentes*, where the parties not in a same place during contracting. However, the principles of contracting in both situations are different according to the concept of the meeting place or session of contract which is named as *majlis al-'uqd*.

PROPOSED METHODOLOGY OF THE STUDY

Aims and Objectives of the Study

The study aims to examine the current practice of construction procurement with specific reference to contract formation and appraise the practice in terms of its compliance with the *Shari'ah*. The focus of the study is on the practice of the offer and acceptance during contracting as offer and acceptance are the most essential elements for a contract to be bound.

The objectives of the study are:

1. To identify the requirements, processes, procedures and activities associated with the practice of offer and acceptance in the formation of construction contracts through the conventional mode by focusing on the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82) ;
2. To identify the requirements, processes, procedures and activities associated with the practice of the offer and acceptance in the formation of contracts under *Shari'ah*;

3. On the basis of (1) and (2), to appraise the current practice of the offer and acceptance in the formation of conventional construction contracts focusing on the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82), on whether they comply or otherwise with the *Shari'ah*;
4. On the basis of (3), if any aspect of the practice is found not in compliance with *Shari'ah*, to make recommendations on how to make such aspects *Shari'ah* compliant.

Areas to research pertinent to subject *Shari'ah* compliant construction contract has been explored by Khairuddin (2008). This study only concerns on one of the areas i.e. the formation of construction contract in terms of offer and acceptance.

The Impetus and Significance of the Study

Billions of money have been spent and allocated for construction projects all over Malaysia to meet the demand of the growing economy and growing population of Malaysia. The role of construction as the backbone of civilization and one of the tools in generating income for Malaysia is undeniable. Despite such facts, it is hardly heard strong intention voiced out to investigate how far practices in construction industry comply or otherwise with *Shari'ah*. It is seemed that this important element of life has been neglected in efforts of hunting for development and prosperity.

The amazing growth of Islamic financial system is a real eye-opener of the positive impacts of applying the concept of *Shari'ah* compliant in business dealings. The endeavor which is continuously made by Muslim jurists and professional in establishing *Shari'ah* concept and principles for contracts in the Islamic financial system in Malaysia has generated the authors' idea that the same trend might as well appropriate to be applied in construction procurement. Subsequently, a small survey has been conducted among construction industry professionals to seek their views about having *Shari'ah* compliant formation of construction contract in the construction industry. Amazingly, about 76% of the respondents agreed on the importance of formation of construction contract to be in conformity with *Shari'ah*.⁴

⁴ The detail of the study is reported in Siti Nora Haryati A.H & Khairuddin A.R (2008). The Understanding of Quantity Surveyors on *Shari'ah* Compliant in the Formation of Construction

Therefore, by drawing attention to the need of research in this area, the study attempts to investigate *Shari'ah* compliance in the formation of construction contract. This study is not only to fulfill the demand of the industry as translated through the said survey, but most importantly it is to fulfill our obligation towards Allah s.w.t which requires us to identify the *halal* (lawful) and *haram* (prohibited) in our everyday dealings. The Prophet Muhammad s.a.w mentioned:

"A son of Adam is not to escape on the Day of Judgment in front of Allah s.w.t unless he has been asked on five matters: About his age on how he had spent, about his youth on how he had used, about his properties from where they came and how they were spent, and about his knowledge on how it was used." (Riwayat At-Tirmidzi, No. 2416 in Zaharuddin Abd Rahman, 2008)

It is also stated in Al-Qur'an:

"And say: Work (righteousness), soon will Allah observe your work, and His Messenger, and the Believers, soon will you be brought back to the Knower of what is hidden and what is open, then will He show you the truth of all that you did." (Al-Taubah: 105)

The Research Model

The focus of the study is on the practice of the formation of construction contract for projects using traditional lump sum procurement system as this type of procurement system is mostly used in the construction industry (see CIDB (2007) at pg. 29). Special attention is given to the practice of offer and acceptance in public sector, under the standard form of contract PWD 203A Rev 1/83, as their procedures and processes are known as very procedural and systematic as well as the documents involved are standardized and easily available. As the practice of offer and acceptance in public sector involve variety sets of documents, this study is only focusing on the requirements, processes, procedures and activities associated with the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82). This is because both forms are used to officially declare offer and acceptance, thus, they become the most important documents in the practice of offer and acceptance.

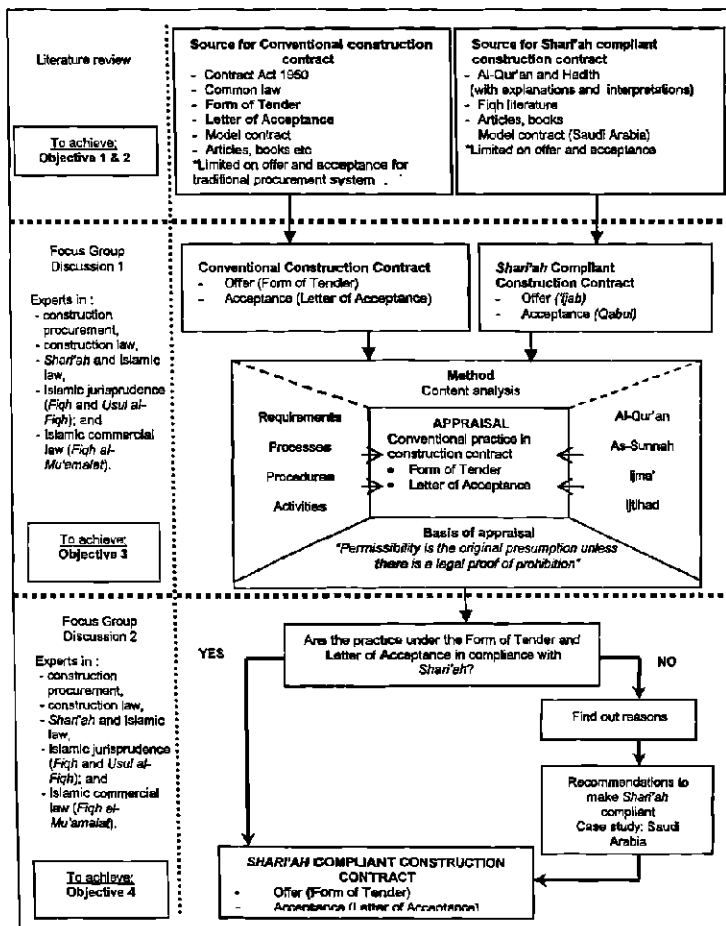
Contract. A paper presented in *Shari'ah Compliant Construction Contract Conference*, Kuala Lumpur, 16 April 2008.

The research strategy to be used in this research is qualitative research. This is because the information required for the study is subjective in nature which requires opinions and views from experts in order to appraise the practice of the formation of contract in conventional construction contract in terms of its compliance with *Shari'ah*. Under this qualitative research strategy, exploratory research will be used with the purpose of examining the current situation in the practice of the formation of conventional construction contract, finding aspects which are not in compliance with *Shari'ah* and subsequently providing recommendations to make such aspects *Shari'ah* compliant.

It is important to mention in the first place that the authors have not possessed the essential skills to deduce sanctions (*hukm*) from Islamic juridical materials. Due to the absence of such skills, the study will employ methodology that combines theoretical and fieldwork approaches in order to try the best to develop the understanding on the concept of *Shari'ah* compliant contract, and to accurately appraise current practice of the offer and acceptance in the formation of construction contract. For this reason, the methodology combines two key data sources, i.e. (i) literature review; and (ii) series of focus group discussions.

In reference to the research model presented in Figure 2, firstly, the study intends to identify the requirements, processes, procedures and activities associated with the practice of offer and acceptance in the formation of construction contract in the conventional mode and formation of contract in *Shari'ah*. Literature review will be conducted in order to achieve these two objectives of the study. The former requires the authors to review legislations governing the practice of the formation of contract in Malaysia, applicable common law from court judgments, and documents such as main standard forms of contract in use and models of construction contract. Treatises discussing the issue in the offer and acceptance will also be referred. Most important part of this stage is the review of two critical documents mentioned earlier i.e. the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82). Consequently, a list of the key requirements, processes, procedures and activities associated with the practice of offer and acceptance in the formation of construction contracts through the conventional mode will be developed.

Figure 2: The research model



The second objective of the study will be addressed by identifying the *nass* (textual sources), *aql* (reasoning) and *hukm* (rules) pertaining to the formation of construction contract in *Shari'ah*. The main references to be reviewed will be related verses and *hadith* from *Al-Qur'an* and *As-Sunnah*. As for *As-Sunnah*, priority will be given but not limited to the *hadiths* compiled in the *Sunnan Sittah*⁵ (the Sound Six) as the *Sunnan Sittah* are known as the most authentic and comprehensive compilations of *hadith* (Abu Ameenah Bilal Philips, 1995; Mohamad Akram Laldin, 2006). Due to the absence of skills in working knowledge of Arabic which is the necessity in Islamic studies, the authors will only refer to the translations and commentaries of *Al-Qur'an* and *As-Sunnah* done by the experts, translated *fiqh* (Islamic jurisprudence) literature as well as books and articles discussing the subject. Advice and discussions with the experts and people in such areas will also be part of this stage of research in order to have clearer understanding and to avoid misinterpretation during reviewing such references. This study also attempts to obtain model contracts from the Saudi Arabian construction industry so as to make those models as our case studies. Consequently, a list of the key requirements, processes, procedures and activities associated with the practice of offer and acceptance in the formation of contracts under *Shari'ah* will be identified.

The data which are obtained from the literature review will provide basis to achieve the third and fourth objectives of the study by conducting focus group discussion with the experts. Focus group discussion (FGD) is a method in qualitative research. It is an organized discussion but structured in flexible way which is participated between 6 to 12 participants and the researchers as the facilitators. In FGD, the comments from a participant can generate comments from other participants, thus ideas and opinions pertaining to the subject of research can be developed and explored deeply (Ernwaca, 2007). In relation to the study, the authors decided to use this kind of approach due to the authors' lack of skills in deducing and identifying *Shari'ah* rulings as mentioned earlier. Hence, the experts to be involved in the discussions are people that shall at least either have qualification or possess necessary knowledge, expertise or experience in the following areas:

⁵ The *Hadith* books of *Al-Bukhari*, *Muslim*, *Abu Daud*, *At-Timidzi*, *An-Nasai*, *Ibn Majah*

1. Construction procurement,
2. Construction law,
3. *Shari'ah* and Islamic law,
4. Islamic jurisprudence (*Fiqh* and *Usul al-Fiqh*); or
5. Islamic transaction/commercial law (*Fiqh al-Mu'amalat*).

The objective of the focus group discussion is principally to help the researchers to appraise the requirements, processes, procedures and activities associated with the practice of offer and acceptance under the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82) in terms of their compliance with *Shari'ah*. The basis of the appraisal is the well-known legal maxim established by Muslim jurists i.e. "*Permissibility is the original presumption unless there is a legal proof of prohibition*". Therefore, every requirements, processes, procedures and activities in the current conventional practice of formation of construction contract are considered as *Shari'ah* compliant unless there is evidence from Al – Qur'an, As-Sunnah, Ijma' and Ijtihad that determined otherwise. The method of the appraisal is content analysis whereby the practice of offer and acceptance under the Form of Tender (PWD 203B Rev 1/82) and Letter of Acceptance (PWD 203D Rev 1/82) will be critically examined to see their compliance with the rules extracted from Al-Qur'an, As-Sunnah, Ijma', and Ijtihad.

If in the first FGD, there are aspects in the formation of conventional construction contract found not to be in compliance with *Shari'ah*, second FGD will be organized to develop recommendations in order to make such aspects *Shari'ah* compliant. In developing the proposal for recommendations, model contract from Saudi Arabia will be reviewed as a case study and any relevant and applicable elements will be considered to be incorporated in the proposal.

The findings obtained from FGD 1 and FGD 2 will be analyzed. Consequently, the study is expected to produce the following outcomes:

1. The assertion of the status of the current practice in the offer and acceptance in the formation of construction contract whether in compliance or otherwise with *Shari'ah*.
2. If there are aspects which are found as non-*Shari'ah* compliant, the study is expected to come out with recommendations on how to make such aspects *Shari'ah* compliant.

There are many considerable anxieties regarding the research model that are important to be highlighted. Firstly, the study involves reviews on Islamic juridical materials which are mostly written in Arabic. Due to the absence of skills in working knowledge of Arabic, the authors will only refer to the published English or Malay translated versions as well as obtain assistance from Arabic translators and interpreters. However, there are also possibilities for misinterpretation and misunderstanding. Thus, the reviews should always be done under the guidance of experts in such areas.

Secondly, as the study involves focus group discussions with the experts, there are several possible shortcomings that should be concerned. Most importantly is on how to gather all the experts at a possible time and date, as it is always known that, the experts are usually very important person in his organization, thus they might have very tight schedules. Moreover, the researchers might have less control over the focus group discussions, thus the data are tough to analyze because the talking is in reaction to the comments of other group members.

Another anxiety is the availability of model contract from Saudi Arabia during the research is conducted. At the time of writing this paper, it has been observed that their standard forms of contract are in Arabic have not been uploaded in the net. Therefore, the authors need to request the model contract directly from people in Saudi Arabia. Other alternative is by acquiring model if Shari'ah compliant contracts from Islamic financial institutions and use such model contracts in developing the proposal for recommendations.

CONCLUSION

This paper presents the revised proposed methodology to investigate Shari'ah compliance in the formation of construction contract. The focus of the study is on the practice of the offer and acceptance during contracting out construction works. The research model has been presented herein which includes three stages of research i.e.:

- | | | |
|----|---------|--|
| a) | Stage 1 | Literature review |
| b) | Stage 2 | Appraisal through focus group discussion on the conventional practice of offer and acceptance in construction contract whether in compliance or otherwise with <i>Shari'ah</i> . |
| | | Method of appraisal : Content analysis |

Basis of appraisal : *“Permissibility is the original presumption unless there is a legal proof of prohibition”*

Subject of appraisal : Form of Tender (PWD 203B Rev 1/82) and Letter

of Acceptance (PWD 203D Rev 1/82)

- c) Stage 3 Developing recommendations through focus group discussion in order to make aspects which are found non - *Shari'ah* compliant as *Shari'ah* compliant.
Case study : Model contract from Saudi Arabia

The study is limited with the constraints that the authors have not possessed the essential skills to deduce sanctions (*hukm*) from Islamic juridical materials, thus requires assistance from people who are experts in *Shari'ah*, Islamic law and *Fiqh al-Muamalat*. The authors call for comments in order to further improve the methodology.

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