

JOINT VENTURE AGREEMENT IN
CONSTRUCTION INDUSTRY

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JOINT VENTURE AGREEMENT IN CONSTRUCTION INDUSTRY

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DEDICATION

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ABSTRACT

The term Joint Venture (JV) is one which is heard with increasing frequency and popularity in construction industry. Nowadays, it is widely practiced for large-scaled multi-disciplinary infrastructure projects as a means to share risks and resources by partners. To run a joint venture effectively and without conflict has proven impossible. It is of great importance that the parties' objectives and contributions to the venture are properly and clearly described in the joint venture documents. In view of the fact that the implementation of the Standard or Model Form of Joint Venture Agreement (JVA) is new to the Malaysian construction industry, the purpose of this research is to investigate the needs of forming a legally binding joint venture agreement, to examine the problems encountered and to attempt to develop a model form which will, at the very least, provide introductory reports as to what joint venture agreements are all about and how these can satisfactorily safeguard the interests of the joint venture parties. The methodology of this research adopts from literature review on JVA as well as analysis of the cases law findings on what needs to be incorporated in the model JVA. As a conclusion with this research, the lack of specific legislature, regulations and governing/regulatory body/authority overseeing the formation of JVs has left organizations to resort to their own devices in formulating JVs. This has given rise to, among others, bespoke agreements which have resulted in abuse and unfairness to numerous parties to JVs. Malaysia should seriously consider setting up a formal structure of governance over this form of business relationship. There should also be a standard JV Model Agreement to be used as reference and serve as guidelines during negotiations by the prospective parties to JVs

ABSTRAK

Usahasama merupakan satu terma yang makin sering didengar dan popular dalam industri pembinaan. Ia merupakan kaedah yang seringkali digunakan oleh rakan kongsi dalam projek mega yang merangkumi pelbagai disiplin pembinaan sebagai salah satu cara untuk berkongsi risiko dan sumber-sumber perniagaan. Usahasama terbukti mustahil dapat dijalankan tanpa konflik. Oleh kerana itu penting sekali untuk segala objektif dan sumbangan dari setiap rakankongsi usahasama ditulis dengan jelas dan terperinci didalam dokumen-dokumen usahasama. Tujuan kajian ini adalah untuk mengumpul maklumat dan juga masalah-masalah yang dihadapi oleh mereka yang telah menjalankan urusan secara usahasama di Malaysia dan bertujuan untuk menghasilkan satu rangka atau model Perjanjian Usahasama yang sah memandangkan masih belum ada sesuatu seumpamanya untuk industri pembinaan di Malaysia sehingga kini. Kajian ini sekurang-kurangnya akan dapat menjelaskan tentang perjanjian usahasama dan cara-cara ianya dapat menjamin kepentingan setiap pihak yang bergabung dalam sesuatu usahasama. Metodologi kajian ini mengamalkan kajian literatur pada perjanjian usahasama serta analisis penemuan kes undang-undang mengenai apa yang perlu dimasukkan di dalam model perjanjian usahasama. Sebagai kesimpulannya, kekurangan badan perundangan khusus, peraturan-peraturan dan mentadbir / badan kawal selia / pihak berkuasa yang menyelia pembentukan usahasama telah meninggalkan organisasi untuk menggunakan sesuka mereka dalam merumuskan usahasama. Ini telah menimbulkan antara lain, perjanjian yang pesan lebih dahulu yang telah menyebabkan penderaan dan ketidakadilan kepada mana-mana pihak usahasama. Malaysia hendaklah serius mempertimbangkan untuk menubuhkan struktur formal tadbir urus ke atas hubungan perniagaan seumpama ini. Seharusnya terdapat juga standard atau model perjanjian usahasama yang digunakan sebagai rujukan dan garis panduan semasa rundingan oleh pihak-pihak yang bakal untuk menjalankan usahasama

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5.0 CONCLUSION

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LIST OF ABBREVIATIONS

Anors	Anothers
All ER	All England Law Reports
Build LR	Building Law Reports
CEO/MD	Chief Executive Officer / Managing Director
CIDB	Construction Industry Development Board
CLD	Construction Law Digest
Const LJ	Construction Law Journal
Const LR	Construction Law Reports
EWHC	High Court of England and Wales Decisions
FC	Federal Court
HL	House of Lords
JKR	Jabatan Kerja Raya
JV	Joint Venture
JVA	Joint Venture Agreement
JVCo	Joint Venture Company
LR	Law Reports
MBAM	Master Builders Association Malaysia
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
MMC	Malaysia Mining Corporation Berhad
Ors	Others
REHDA	Real Estate and Housing Developers' Association M'sia
SA	Supplemental Agreement
SGHC	Singapore High Court
SLR	Singapore Law Reports
Sdn Bhd	Sendirian Berhad or Private Limited

LIST OF CASES

CASES	PAGE
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<i>Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors [2008] 3 MLJ 530</i>	4, 59
<i>Dublee Holdings Sdn Bhd v Bluewest Realty & Development Sdn Bhd, High Court (KL) Suit No. d4-22-76[1987]</i>	4,59,63,77, 79
<i>Dumpar Tinggi Sdn Bhd v Teh Swee Seng & Anor [2000] 7 MLJ 731</i>	4,59,65,77, 80
<i>Dunlop Malaysia Industries Bhd v Pernas-Sime Darby Sdn Bhd & Ors [1985] 2 MLJ 101</i>	4, 59
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<i>PT Jaya Putra Kundur Indah and Another v Guthrie Overseas Investments Pte Ltd[1996] SGHC 285</i>	5,59,71,78, 81
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CHAPTER 1
INTRODUCTION

CHAPTER 1

INTRODUCTION

1.1 Background Studies

The construction industry is an important aspect of any country's economic development as it is essential for creating industrial and social infrastructure. Various methods are deployed in this industry in the quest to carry out construction projects successfully. Joint venture (often abbreviated as JV) is one of the more commonly adopted method as it enables partnerships to be formed either by individuals, business entities, and corporations - usually to share risks or expertise needed to successfully undertake the project¹.

A JV facilitates a combination of two or more persons to carry out a single business enterprise or a series of business enterprises for profit in which the parties combine their economic resources such as property, money, skill and knowledge to achieve such purpose. The economic resources are normally either contributed equally or in specific percentage but there is no way to measure accurately the skill and knowledge which each party brings to the JV².

¹ Syamsul Hendra Mohmud & Yu Ling Zhi, (2009). *Strategies and Obstruction of Joint Ventures in the Malaysian Construction Industry*. pg 77.

² Bettina Buchel, Christiane Prange, Gilbert Probst and Charles-Clemens Ruling, (1998). *International Joint Venture Management*. pg 15.

Today, in the Construction Industry, the JV set-up has become necessary in order to secure a large-scale multi-disciplinary project or one that is beyond an individual firm's capability and to share risks and resources by partners.

In Malaysia, local contractors often form Joint Ventures with either local or foreign contractors to bid for and undertake large and complex projects such as the North Electrified Double Tracking Project between Ipoh – Padang Besar (RM12.5 billion) by MMC-Gamuda Joint Venture Sdn Bhd (50:50), the Pahang-Selangor Raw Water Transfer Project (RM1.3 billion) by Shimizu Corporation, Nishimatsu Construction Co Ltd, UEM Builders Bhd and IJM Construction Sdn Bhd JV (30:30:20:20) and the recent tender for Klang Valley Mass Rapid Transit's tunneling work (estimated at RM40 billion) which involved bidders from MMC-Gamuda Joint Venture Sdn Bhd (50:50), Gadang Bhd-Hyundai Joint Venture and other major joint venture contenders including IJM Corp, UEM Group, MRCB, WCT Bhd and Loh & Loh Corp Bhd.

1.2 Problem Statement

The reasons for formulating JVs are numerous. More often than not, JVs are entered into because of mutual interest by two or more contracting parties in sharing and spreading the construction risk primarily associated with large, complex or long-term contracts, which could have direct consequences if all do not go as planned³.

Chow Kok Fong(1985)⁴ has identified that JVs are not the easiest forms of organization entities to manage and operate, largely on account of the fact that the parties

³ William Cheatham, (2004). *Bonding Joint Ventures*. pg 1.

⁴ Chow Kok Fong, (1985). *Construction Joint Ventures in Singapore*. Singapore: Butterworths. pg 4.

have to frequently accept a new set of working relationship. This relationship, in most instances, is difficult to define in a manner satisfactory to all parties involved.

To date, there is no standard JV. While most are prime and limited in scope to a single job, a JV can be incorporated or even left open indefinitely with the ability to take on new projects all the time. Some JVs are silent, with only one party appearing on the contract, although this does not lessen the silent party's duty to perform or indemnify all of the contractual obligations. The structure a JV takes is often determined by the nature of work, size, duration of the contract, skills and qualifications of each JV partner.

The joint venture agreement (JVA) is not subject to regulations, laws or guidelines imposed by any professional body and hence, there is no standardized JVA. It is drafted to reflect the requirements of the JV partners being the contract parties of the project they intended to venture into. Parties to the JV would generate different versions of JV As to protect their own interests⁵.

The above events will form the inconsistencies and even the ambiguities of terms and conditions imposed in the JVA. Thus, the issues derived here are how the conditions that permeate JVAs specifically with regard to the construction industry in Malaysia can be clearly specified so that this research can become a form of guideline to future JVAs.

The methodology is akin to those adopted in exploratory research i.e. case law methodology, in which when searching in the *Malayan Law Journal*, out of a 100 cases found by using the stated keyword of "JV" and followed by "JVA", only sixteen (16) cases were applicable to the development and construction industry are perused to arrive at a conclusion as to its effect on JV companies. It is envisaged that a list of the do's and don'ts may possibly be derived from this exercise.

⁵ Lee Swee Seng, (2010) .*Understanding Commercial Agreements-Loans, Sale of Shares, Joint Ventures Agreement*. pg 66 -69

Based on the findings in the related cases law, the most critical issue has arose from the JV projects of which 8 cases out of a total of 16 cases law or i.e. 50% are involved the disputes or conflicts arise from the supplemental to the initial JVA itself. Kindly refer to Table 1.1 for better illustration.

In view of these findings, this study would be in depth focusing on the specific areas of dispute in the private joint venture agreement.

Table 1.1: List of Cases law found in the Joint Venture projects

Case No	Cases	Type of disputes related to			
		JVA	SA	Non SA	Other
1	<i>BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore [2010] 5 MLJ 778</i>	√	√		
2	<i>Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors [2008] 3 MLJ 530</i>	√		√	
3	<i>Dublee Holdings Sdn Bhd v Bluewest Realty & Development Sdn Bhd, High Court (KL) Suit No. d4-22-76[1987]</i>	√	√		
4	<i>Dumpar Tinggi Sdn Bhd v Teh Swee Seng & Anor [2000] 7 MLJ 731</i>	√	√		
5	<i>Dunlop Malaysia Industries Bhd v Pernas-Sime Darby Sdn Bhd & Ors [1985] 2 MLJ 101</i>	√		√	
6	<i>Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors [2010] 8 MLJ 749</i>	√			√
7	<i>Grandbase Sdn Bhd v Pioneer Concrete Services (M) Sdn Bhd & Anor [2007] 3 MLJ 561</i>	√		√	

Table 1.1: List of Cases law found in the Joint Venture projects (cont'd)

Case No	Cases	Type of disputes related to			
		JVA	SA	Non SA	Other
8	<i>Kuan Chit & Ors v Daro (M) Sdn Bhd [2009] 9 MLJ 661</i>	√		√	
9	<i>Maraputra v Kumagai [1999] MLJU 679</i>	√	√		
10	<i>Omar Bin Mat Ziki v Moktar Bin Amin [1996] 2 MLJ 687</i>	√		√	
11	<i>Padiberas Nasional Bhd v Formula Timur Sdn Bhd [2009] 5 MLJ 439</i>	√		√	
12	<i>Poh Boon Construction Sdn Bhd v Aw Boon Hwa [2009] 5 MLJ 624</i>	√	√		
13	<i>PT Jaya Putra Kundur Indah and Another v Guthrie Overseas Investments Pte Ltd [1996] SGHC 285</i>	√	√		
14	<i>Sabah Urban Development Corporation Sdn Bhd v Tokojaya Sdn Bhd & Anors CSK.22-108-2009-II</i>	√	√		
15	<i>Skarf Development Sdn Bhd v KM Engineering Development Sdn Bhd, High Court (Kuala Lumpur) Suit No S-2-22-397 of</i>	√	√		
16	<i>Zasalim Development Sdn Bhd v Lum Siew & Sons Sdn Bhd [2002] 7 MLJ 119</i>				√
	<i>Total in No.</i>	16	8	6	2
	<i>%</i>		50%	38%	12%

Denote :

1. JV Entity

- a) scope & roles & responsibilities
- b) parties to the JV
- c) parties to the JV
- d) shareholding structure
- e) BOD
- f) Management Group
- g) Profit/loss/liability distribution structure

2. Finance

- a) Working capital
- b) Project financing, Bridging loan
- c) Project accounts
- d) Taxation etc

3. Legal

- a. governing law
- b. contracts
- c. dispute management
- d. legal restrictions on parties to JV
- e. special conditions (if any)

4. Project Management (working level)

- a) Project personnel (HR)
- b) Technology transfer
- c) Budget monitoring
- d) Documents & record keeping

1.3 Objective of the Study

The objective of this study is to prepare the guidelines in establishing a model joint-venture agreement with a comprehensive checklist in formulating joint-venture contracts in construction industry.

1.4 Scope of the Research

The approach adopted in this research is case law based. The study follows the following scope:

- a. The implementation of JV Model Agreement within construction industry.
- b. Cases in relation to JV in construction projects or development industry⁶.
- c. General contemplation is for two-party JV only. Multi-party JV's are more complex, particularly with regard to corporate governance, supermajority requirements, dilution and exit rights.

⁶ Cases law are obtained in *Malayan Law Journal* via the legal online database LexisNexis and other law journals (from 1985 to 2011)

1.5 Significance of the Research

In view of the fact that the implementation of the Standard or Model Form of Joint Venture Agreement is new to the Malaysian construction industry, it is the intention that with this research, significant information and knowledge will be contributed to the construction industry players. This study will, at the very least, provide introductory reports as to what JVAs are all about and how these can satisfactorily safeguard the interests of the JV parties.

1.6 Research Methodology

The choice of method used during research is important. A good choice saves time and the likelihood that the researcher presents a good result increases. In this chapter different methodological approaches will be described followed by a presentation of our approach chosen.

Stage 1: Initial Study

The first stage of research involves initial study. Firstly, initial literature review was done in order to obtain the overview of the concept of this topic. At the same time, discussions with supervisors, lecturers, as well as construction industry players, were undertaken to garner more ideas and knowledge relating to the topic. After the initial study, the rough idea of the research issue was obtained. The objective and scope of the research were then identified. Subsequently, a research outline will be prepared in order to identify what kind of data will be needed in this research. Sources of data will be identified as well.

Stage 2: Data Collection

Collection of relevant data and information can be started at this stage. Generally, there are two types of data being collected, namely primary data and secondary data. Data will be collected mainly through documentary analysis. All collected data and information will be recorded systematically

Stage 3: Data Analysis and Interpretation

At this stage, all the collected data, information, ideas, opinions and comments will be arranged, analysed and interpreted. This process is to digest and convert the data collected into information that is useful for the research. Arrangement of data tends to streamline the process of writing paper.

a. Primary Data

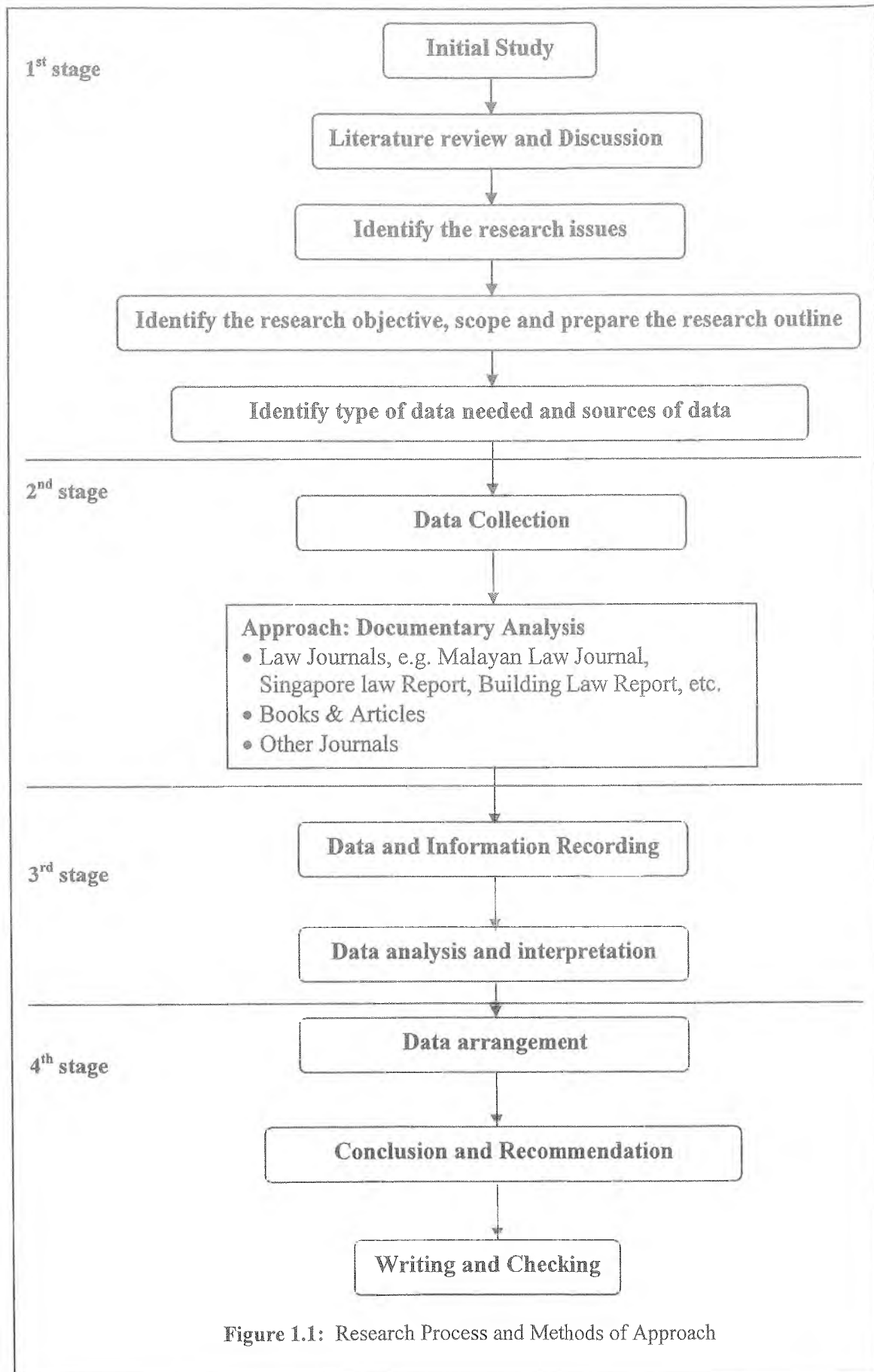
Primary data is collected mainly from the Malayan Law Journal, Current Law Journal, Singapore Law Reports, Building Law Reports, Construction Law Reports and other law journals. It is collected through the Lexis-Nexis legal database. All the cases relating to the research topic will be sourced from the database. Important cases will be identified, collated and used for the analysis at the later stage.

b. Secondary Data

Sources of secondary data consist of books, article reports, seminar papers, newspapers as well as other information from the internet. Books are the main secondary data sources. Books relating to JV partner's obligation and interpretation will be read to know in depth the theories relating to the research field. All the relevant books will be obtained from the library of *University Teknologi Malaysia*. Seminar papers, articles, reports and newspapers will be the sources utilised to strengthen the theories found in books. All sources are important to complete the literature review chapter.

Stage 4: Conclusion and Recommendation

The last stage of the research process mainly involves the writing up and checking of the written paper. Conclusion and recommendations will be made based on the findings during the stage of analysis.



1.7 Organization of the Report

This report covers five (5) chapters as follows:

Chapter 1: Introduction

This chapter sets the background of the study, problem statement, objective of the study, scope and limitation of the study, significance of the study, research methodology and the organization of the chapters.

Chapter 2: Joint Venture

In this chapter, the brief detail of the definition, objectives, background, feature and problems in the construction JV in particular to its rights, roles, responsibilities and liabilities will be discussed in general, which will be useful to enhance the understanding when reading the subsequent chapters.

Chapter 3: Legal Principal of Joint Venture

This chapter mainly discusses the interpretations for the Legal Principal and Contractual provision for this phrase and other similar phrase will be discussed in detail in this chapter. Interpretation of implied, express term, assignment and vicarious performance under the Law of Contract Act and Partnership Act will also be discussed generally in this chapter.

Chapter 4: Analysis of the Cases Law

This chapter analyses legal perspective of ‘what constitute a disputed issue’ in JV agreement from the various court cases chosen in order to achieve the objective of this project report. It is done mainly through documentary analysis of law journals and law reports, e.g. *Malayan Law Journal*, *Singapore Law Report*, *All England Report*, *Building Law Report*, *Construction Law Report*, etc. so that the conclusion is whether it may affect JV companies in Malaysia’s construction industry, together with probably a list of the do’s and don’ts.

Chapter 5: Conclusion and Recommendations

This chapter is the final chapter that summarises the findings of the study according to the research objective. It also contains the problems encountered during the study as well as the recommendations for future study.

CHAPTER 2
JOINT VENTURE (JV)



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