

EQUITABLE REMEDY: SPECIFIC PERFORMANCE

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requirements for the awards of the degree of
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DEDICATION

Special thanks to

My parents, Then Siaw Phin and Wong Nguok Hung

My sister, Yvonne

My brothers, Xuen and Chuen

My love, Alexander

My bosom friend, Cindy

and

Friends for their help and understanding

Thanks for Everything.....

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ABSTRACT

Contract, generally, is a binding agreement between two or more persons which creates mutual rights and duties and which are enforceable at law. Remedy will be available to the innocent parties if the other party fails to perform his part of agreement. For building contract, damages will be an adequate compensation for a breach due to majority of issues and disputes in building contract involves money. The parties nonetheless can choose to seek for specific performance. Specific performance is one of the equitable remedies where the court will ask the party to perform his part of a contract. However, the parties in a building contract do not favour this right in remedying the breach, and similarly there is not much law cases that illustrate the specific performance has been exercised especially in building contract. Hence, this master project has been done to identify the reason for not granting specific performance by the court with respect of building contract. The law cases collected from year 1980 to year 2009 is done mainly through documentary analysis of law journals and law reports via *Lexis-Nexis* website, e.g. *Malayan Law Journal*, *Building Law Report*, *Construction Law Report*, etc. The results show that there are 7 reasons in which the specific performance will not be granted to the parties in a building contract such as when there is adequacy of legal remedies, constant supervision from the court, uncertainty terms in a contract, on the ground of hardship, vacant possession of site, willingness and readiness as well as whether valid contract has exists or not. This research will shed some light in exposing what are the possible reasons that the court may refuse to grant specific performance and forms a guideline for the parties in a building contract when they resort to specific performance.

ABSTRAK

Secara umumnya, kontrak adalah satu perjanjian yang mengikat antara dua atau lebih parti untuk mewujudkan hak-hak dan kewajipan yang boleh dilaksanakan di sisi undang-undang. Bagi kontrak pembinaan, pampasan wang biasanya dituntut sebagai remedi yang mencukupi apabila berlakunya pecah kontrak kerana majoriti masalah dan pertikaian dalam kontrak pembinaan melibatkan wang. Walau bagaimanapun, pelaksanaan spesifik juga boleh dipilih sebagai alternatif kepada ganti rugi. Pelaksanaan spesifik adalah salah satu remedi yang berdasarkan ekuiti di mana mahkamah akan mengarah parti untuk melakukan kewajipannya dalam sesuatu kontrak. Namun, pihak kontrak pembinaan kurang memihak kepada alternatif ini sebagai remedi, di samping tidak banyak kes mahkamah yang menunjukkan pelaksanaan spesifik telah dipraktikkan terutamanya dalam kontrak pembinaan. Dengan itu, kajian ini telah dilakukan untuk mengenalpasti sebab mahkamah tidak memberikan pelaksanaan spesifik kepada pihak dalam kontrak pembinaan. Kes-kes mahkamah telah dikumpulkan dari tahun 1980 hingga tahun 2009 dengan cara analisis dokumentari, iaitu daripada jurnal dan laporan undang-undang seperti *Malayan Law Journal*, *Building Law Report*, *Construction Law Report*, dan sebagainya melalui laman web *Lexis-Nexis*. Kajian ini menunjukkan terdapat 7 sebab di mana pelaksanaan spesifik tidak akan dikeluarkan oleh mahkamah seperti keadaan apabila pampasan wang adalah relief yang mencukupi, keperluan penyeliaan rapi dari mahkamah, ketidaktentuan terma dalam kontrak, kesusahan, pemilikan tapak, kerelaan dan kesediaan serta kewujudan kontrak. Kajian ini akan memberi panduan yang berguna kepada pihak yang terlibat dalam kontrak pembinaan dengan merujuk kepada sebab-sebab yang berpotensi ditolak oleh mahkamah untuk mengeluarkan pelaksanaan spesifik.

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LIST OF ABBREVIATION

AC	Law Reports: Appeal Cases
AIR	All India Reporter
Ala	Alabama Reports (United States)
All ER	All England Law Reports
Atk	Atkyns' Chancery Reports (England)
Bro CC	Brown's Chancery Cases (England)
Ch	Cases in Chancery
Ch Cas	Cases in Chancery (England)
Ch D	The Law Reports, Chancery Division
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
De GF & J	De Gex, Fisher & Jones' Chancery Reports (England)
Eq Ca Abr	Equity Cases Abridged (England)
ER	Equity Reports
Hare	Hare's Reports
H & N	Hurlstone & Norman's Exchequer Reports (England)
H & Tw	Hall & Twell's Chancery Reports (England)
Illinois	Illinois Reports (United States)
KB	King Bench
K & J	Kay & Johnson's Vice Chancellor's Reports (England)
Lloyd's Rep	Lloyd's List Reports
LR Eq	Law Reports; Equity Cases
LR HL	Law Reports; House of Lords Reports
LT	Law Times Reports (England)

Mer	Merivale's Chancery Reports (England and Wales)
MLJ	Malayan Law Journal
NS	New Series
NSWR	New South Wales Law Reports
NZLR	New Zealand Law Report
Pa	Pennsylvania (United States)
P Wms	Peere-William's Chancery & King's Bench Cases
QB	Queen Bench
Sim & St	Simons & Stuart's Vice Chancellor's Reports
SR	State Reports
Ves	Vesey Junior's Chancery Reports
WLR	Weekly Law Report
Y & CC	Younge & Collyer's Chancery Reports

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CHAPTER 1

INTRODUCTION

1.1 Background Studies

Contract, generally, is a binding agreement between two or more persons which creates mutual rights and duties and which are enforceable at law.¹ If a contracting party fails to perform an absolute duty owed under a contract, it is considered as breach of contract.² The innocent party may require remedy from a breaching party.

Remedy is defined as “*the manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual.*”³ In short, remedy means to recover a right or to obtain redress for a wrong in respect of innocent parties.

¹ Chappell *et al.*, 2001. *Building contract dictionary*. 3rd ed. London: Wiley-Blackwell.

² Cheeseman, H.R., 2004. *Business Law: E-Commerce and Digital Law, International Law and Ethics*. 5th ed. WA: Prentice-Hall.

³ West's Encyclopedia of American Law, 2005. *Remedy*. Available from: <http://www.encyclopedia.com/doc/1G2-3437703735.html> [Accessed 04 May 2010].

In legal term, remedy can be the relief that may be given or ordered by a court or other tribunal for a wrong if the contract is null and void, the remedy is to rescind and to put the parties in the position in which they were prior to the attempted agreement.⁴

The law of remedies is concerned with the character and extent of relief to an individual who is entitled to have a substantive right that has been infringed by the defendant.⁵ In Malaysia, the law of remedies can be found in various sources which include statutory provisions⁶ and common law principles.

Remedies, basically, can be classified into two types which are Substitutionary remedies and Specific remedies. Substitutionary remedies occur when plaintiff receives money as a substitute for the right which was violated whereas Specific remedies operate to restore to plaintiff the exact item or state of being of which she was wrongfully deprived.⁷ Specific and substitutionary reliefs are not necessarily alternatives; it is often necessary to award both specific and substitutionary relief in order to make plaintiff completely whole.⁸

Categorized according to their purpose, the judicial remedies are further classified by Professor Barenson (2002) into four basic types, i.e. damages, restitution, coercive remedies, and declaratory remedies as described in the following:

1. Damages - Damages are substitutionary remedies⁹ and it is the basic remedy available for a breach of contract. The remedy of damages is generally intended to compensate the injured party for any harm he or she has

⁴ Merriam-Webster's Dictionary of Law, 2001. *Remedy*. Available from: <http://research.lawyers.com/glossary/remedy.html> [Accessed 04 May 2010].

⁵ The Free Dictionary. *Remedy*. Available from: <http://legal-dictionary.thefreedictionary.com/remedy> [Accessed 04 May 2010].

⁶ See in Contracts Act 1950 and the Specific Relief Act 1950.

⁷ Prof. Berenson, 2002. *Remedies*. US: Thomas Jefferson School of Law.

⁸ *Ibid*

⁹ Prof. Berenson, 2002. *Remedies*. US: Thomas Jefferson School of Law.

suffered.¹⁰ It is a common law remedy that can be claimed as of right by the innocent party.¹¹

2. Restitution – Restitution is either substitutionary or specific remedies. It is designed to restore the plaintiff to the position he or she occupied before his or her rights were violated. It is ordinarily measured by the defendant's gains, as opposed to the plaintiff's losses, in order to prevent the defendant from being unjustly enriched by the wrong.¹²
3. Coercive remedies - Coercive remedies are specific remedies and are capable of being enforced through the court's contempt power.¹³ Coercive remedies are orders by the court to refrain from doing something to the plaintiff or to force the defendant to do specific action.¹⁴ The purpose of coercive remedies is to prevent irreparable harm before it occurs.
4. Declaratory remedies - Declaratory relief is neither substitutionary nor specific, in that no court order or directive results from the action.¹⁵ The goal or purpose of declaratory relief is simply to determine an individual's rights, obligations or legal relationship in a particular situation.

Remedies are also categorized as equitable or legal in nature.¹⁶ Monetary damages awarded to a plaintiff because they adequately compensate him or her for the loss are considered as legal remedy. An equitable remedy is one in which a recovery of money would be an inadequate form of relief.¹⁷

¹⁰ West's Encyclopedia of American Law, 2005. *Remedy*. Available from: <http://www.encyclopedia.com/doc/1G2-3437703735.html> [Accessed 04 May 2010].

¹¹ Anon, 2010. *Breach of Contract & Remedies*. Available from: <http://www.goldsmithibs.com/resources/free/Breach-of-Contract/notes/Breach-of-Contract-Remedies.pdf> [Accessed 04 May 2010].

¹² West's Encyclopedia of American Law, 2005. *Remedy*. Available from: <http://www.encyclopedia.com/doc/1G2-3437703735.html> [Accessed 04 May 2010].

¹³ Prof. Berenson, 2002. *Remedies*. US: Thomas Jefferson School of Law.

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ The Free Dictionary. *Remedy*. Available from: <http://legal-dictionary.thefreedictionary.com/remedy> [Accessed on 04 May 2010].

¹⁷ *Ibid*

According to Martin (2002), equitable remedies mean which are granted by equity to redress a wrong¹⁸ and are discretionary in nature.¹⁹ The main equitable remedies consist of injunction and specific performance.²⁰

In Malaysia, injunction is governed by the Specific Relief Act 1950. An injunction is ‘a judicial remedy by which a person is ordered to refrain from doing or to do a particular act or thing’.²¹ Injunctions may be classified as ‘interim’ (interlocutory) or ‘final’ (perpetual) in section 50 of Specific Relief Act 1950.²² By further classification an injunction may be found to be different types such as mandatory injunction, prohibitory injunctions, injunctions quia timet and freezing injunctions (formerly Mareva injunction).²³

On the other hand, several sections lay down the provisions of specific performance under Chapter II of Specific Relief Act 1950.²⁴ Pettit (2009) describes specific performance as ‘*an order of the court directing a party to a contract to perform his obligations according to its terms*’.²⁵ In brief, specific performance is an equitable remedy where court will ask the party to perform his part of agreement instead of asking him to pay damages to other party.²⁶

Specific performance is a discretionary remedy for the enforcement of the contracts to compel the defendant to perform his part of the agreement.²⁷ In principle, the court has discretion to order specific performance of certain contracts by virtue of

¹⁸ Martin, E.A., 2002. *A Dictionary of Law: equitable remedies*. 5th ed. New York: Oxford University Press.

¹⁹ *Lamare v Dixon* (1873) L.R. 6 H.L. 414.

²⁰ See Spry, *Equitable Remedies*.

²¹ Law of Malaysia, 2006. *Specific Relief Act 1950*. Malaysia: The Commissioner of Law Revision; *Sarkawi bin Sadijo v. BMG Music (M) Sdn. Bhd. & Ors.* [1996] 4 MLJ 515.

²² *Ibid*

²³ Hudson, A., 2007. *Equity and Trusts*. 5th ed. Oxon: Routledge-Cavendish.

²⁴ For examples, section 11, 12, 20 and etc in Specific Relief Act 1950.

²⁵ Pettit, P.H., 2009. *Equity and the Law of Trusts*. 11th ed. UK: Oxford University Press. See generally Spry, *Equitable Remedies*, 6th ed, ch 3.

²⁶ Law of Malaysia, 2006. *Specific Relief Act 1950*. Malaysia: The Commissioner of Law Revision.

²⁷ Anon, 2008. *Judicial Circumvention of Doctrine of Privity – Promisee’s Remedies for Breach of Contract*. Available from: <http://dspace.fsktm.um.edu.my/bitstream/1812/612/7/chap%204-21aug08.pdf> [Accessed on 04 May 2010].

the Specific Relief (Malay States) Ordinance 1950.²⁸ The court's discretion, however, cannot be fettered by the contract.²⁹ Court will not order specific performance merely because it is lawful to do so.³⁰

In some circumstances, specific performance will be denied where money would adequately compensate the plaintiff for the loss. As a general rule, specific performance is available only when the common law does not provide an adequate remedy.³¹ Furthermore, specific performance is denied where courts would be unduly burdened with the task of supervising the performance.³²

Notwithstanding there are many rules and laws governing the awarding of specific performance, specific performance can be granted by the court when the court thinks that it is proper and just to grant it. More complete and perfect justice is achieved by compelling the parties to perform exactly what they had agreed to perform.³³ The discretionary nature of the remedy is well illustrated by a consideration of the matters such as the conduct of the plaintiff which the court may consider as a bar to specific performance.³⁴ Under the circumstances, justice will be done between the parties.

²⁸ Law of Malaysia, 2006. *Specific Relief Act 1950*. Malaysia: The Commissioner of Law Revision; *Mohamed v. Ho Wai* (1961) MLJ 7.

²⁹ Meagher *et al.*, 2002. *Equity: Doctrines and Remedies*. Australia: Butterworths LexisNexis. See also, *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442 at 451.

³⁰ Section 20(1) of Specific Relief Act 1950.

³¹ Meagher *et al.*, 2002. *Equity: Doctrines and Remedies*. Australia: Butterworths LexisNexis.

³² Beatson, J., 2002. *Anson's Law of Contract*. 28th ed. New York: Oxford University Press.

³³ Anon, 2010. *Specific Performance*. Available from: <http://law.jrank.org/pages/10415/Specific-Performance.html> [Accessed on 05 May 2010].

³⁴ Martin, J. E., 2005. *Modern Equity*. 17th ed. London: Sweet & Maxwell Ltd.

1.2 Problem Statement

Over time, law and equity merged. Today, there is only one common law court system that has the power to determine and apply both legal and equitable remedies.³⁵ Specific performance is one of the equitable remedies which defined as court order that forces a defendant to perform his or her part of a contract, instead of imposing a fine.³⁶ An important advantage to this remedy is that, since it is an order of an equity court, it is supported by the enforcement power of that court. If the defendant refuses to follow that order, she can be cited for criminal contempt and even imprisoned.³⁷

The specific performance considered as a residual, discretionary remedy when damages are inappropriate and it was explained by Lord Hoffmann³⁸ where specific performance is traditionally regarded in English Law as an exceptional remedy.³⁹ Specific performance relates to the performance of contracts.⁴⁰ The remedy may be displaced in situations when the performance is impracticable.⁴¹

In relation to building contract, damages are the basic remedy available for a breach of contract. It is a common law remedy that can be claimed as of right by the innocent party.⁴² Due to majority of issues and disputes in building contract involves money where the court contended that damages will be an adequate compensation in building contract.⁴³ Sometimes, however, damages are not an adequate remedy and

³⁵ Charne, J., 2006. *Famous Last Words September06*. Available from: <http://www.igda.org/famous-last-words-september06> [Accessed on 05 May 2010].

³⁶ Vohrah, B. and Wu, M.A., 2000. *The Commercial Law of Malaysia*. 2nd ed. Malaysia: Longman.

³⁷ The Free Dictionary. *Specific performance*. Available from: <http://legal-dictionary.thefreedictionary.com/Specific+performance> [Accessed 09/03/2010].

³⁸ *Cooperative Insurance v Argyll* [1997] 3 All ER 297; [1998] AC 1.

³⁹ Hudson, A., 2007. *Equity and Trusts*. 5th ed. Oxon: Routledge-Cavendish. See also *Cooperative Insurance v Argyll* [1997] 3 All ER 297; [1998] AC 1.

⁴⁰ Hudson, A., 2007. *Equity and Trusts*. 5th ed. Oxon: Routledge-Cavendish.

⁴¹ *Ibid*

⁴² Anon, 2010. *Breach of Contract & Remedies*. Available from: <http://www.goldsmiths.com/resources/free/Breach-of-Contract/notes/Breach-of-Contract-Remedies.pdf> [Accessed on 04 May 2010].

⁴³ Samuels, B. M., 1996. *Construction Law*. US: Prentice Hall.

this is where the equitable remedies such as specific performance may be awarded.⁴⁴ Section 20 (1) (a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money.⁴⁵

Thus, it is apparent from the above discussions that in the event of breach damages are always the main remedy for the parties in building contract⁴⁶, while the equitable remedy, i.e. specific performance will not normally granted in certain situations.⁴⁷ Specific performance is exceptional,⁴⁸ extraordinary and less common.⁴⁹ Court will consider various aspects before issuing decree for specific performance.⁵⁰ It is made available only in limited circumstances.⁵¹ *But, what are those circumstances?* Likewise, in a building contract cases for instance in the case of *Koek Tiang Kung v Antara Bumi Sdn Bhd & Anor*⁵², *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd*⁵³, *Zaibun Sa Binti Syed Ahmad v Loh Koon Moy & Anor*⁵⁴ and so on, the judges would always asked the question of “*Whether specific performance should be granted in this case?*” when evaluating the remedy of specific performance for parties in a building contract.

Nevertheless, the parties do not favour this right in remedying the breach and there are not much law cases which granted the specific performance in a building contract. It is rare in construction disputes because building contracts by their nature cannot be specifically enforced by way of the procedures readily available to the

⁴⁴ Anon, 2010. *Breach of Contract & Remedies*. Available from: <http://www.goldsmithibs.com/resources/free/Breach-of-Contract/notes/Breach-of-Contract-Remedies.pdf> [Accessed on 04 May 2010].

⁴⁵ Law of Malaysia, 2006. *Specific Relief Act 1950*. Malaysia: The Commissioner of Law Revision.

⁴⁶ Samuels, B. M., 1996. *Construction Law*. US: Prentice Hall.

⁴⁷ Duddington, J., 2007. *Equity and Trusts*. England: Pearson Education Limited.

⁴⁸ Samuel, G., 2007. *Contract Law: Cases and Materials*. 1st ed. London: Sweet & Maxwell Limited.

⁴⁹ Paterson *et al.* 2005. *Principles of Contract Law*. 2nd ed. Melbourne: Thomson Law Book Co.

⁵⁰ Specific Relief Act, 1963.

⁵¹ Paterson *et al.* 2005. *Principles of Contract Law*. 2nd ed. Melbourne: Thomson Law Book Co; Beale, H., 1980. *Remedies for Breach of Contract*. London: Sweet & Maxwell.

⁵² [2005] 4 MLJ 525.

⁵³ [1989] 2 MLJ 155.

⁵⁴ [1982] 2 MLJ 92.

courts.⁵⁵ Hence it is important and necessary for us to understand the reason or circumstances for not granting the specific performance by the courts in a building contract. With the awareness, parties in the building contract would have some idea on what contracts which cannot be specifically enforced and how they could succeed in the application for specific performance. Consequently, this research is formed on the basis of the aforesaid issue which intends to identify the closest answers of it.

1.3 Objective of Research

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

1. To identify the reason for not granting specific performance with respect of building contract.

1.4 Scope of Research

The following are the scopes for this study: -

1. Law cases related to the building contract.
2. Law cases reported are those arising therein, therewith and relation to specific performance.

⁵⁵ Robinson *et al.*, 1999. *Construction Law in Singapore and Malaysia*. 2nd ed. Singapore: Butterworths Asia; Wilmot-Smith, R., 2006. *Construction Contracts: Law and Practice*. New York: Oxford University Press Inc. See Specific Relief Act 1950 s 20.

1.5 Importance of Research

The significance of the research envisaged is to give an insight of the equitable remedy, i.e. specific performance, available to the parties in a construction industry. The parties will aware on what contracts which cannot be specifically enforced and how could succeed in the application for specific performance available to them once they assess this research. This study will be guidelines for parties regarding both the successful and unsuccessful applications for specific performance when they resort to it.

1.6 Research Process and Methods of Approach

Research process and method of approach is vital to exercise as guidelines in preparing the research so that the research could be done in an organized way to achieve the research objective. Figure 1.1 shows the flow chart of the research process and the methods of approach used for this research. The research process generally consists of 4 stages as described below:

1.6.1 1st Stage

First stage of research is about initial study. It involves the process to identify the area of study by discussion with lecturers and friends, and some initial literature review to get research issues. After this, research topic is obtained and the research objective is fixed then. Further studies will then make out the research scope and outline as well.

1.6.2 2nd Stage

Second stage of research is the data collection phase. Prior to the process of collection data, there is a need to prepare a 'research design' to identify the following:

a) Types of data/information

Data to be collected are the cases relating to research topic, i.e. specific performance. The cases will be then sorted to building cases, cases relating to land matters, etc.

b) Data resources

Resources of data and information will be mainly from the LexisNexis database. It includes Malayan Law Journal, Building Law Report, Construction Law Report and other law journals. Others sources also obtained to complete the literature review chapter such as reference books, seminar papers, articles and act.

c) Method of data collection

Methods used to analysis data is mainly through documentary analysis.

1.6.3 3rd Stage

Third stage of research is analysis phase. It involves data analysis, interpretation and data arrangement. Data collected will be process, interpret and analyze. All the analyzed data will then rearrange for the writing purposes.

1.6.4 4th Stage

Fourth stage of research is the writing up phase. After the data have been analyzed and arranged, writing up will be started. Summary and conclusion will then be done.

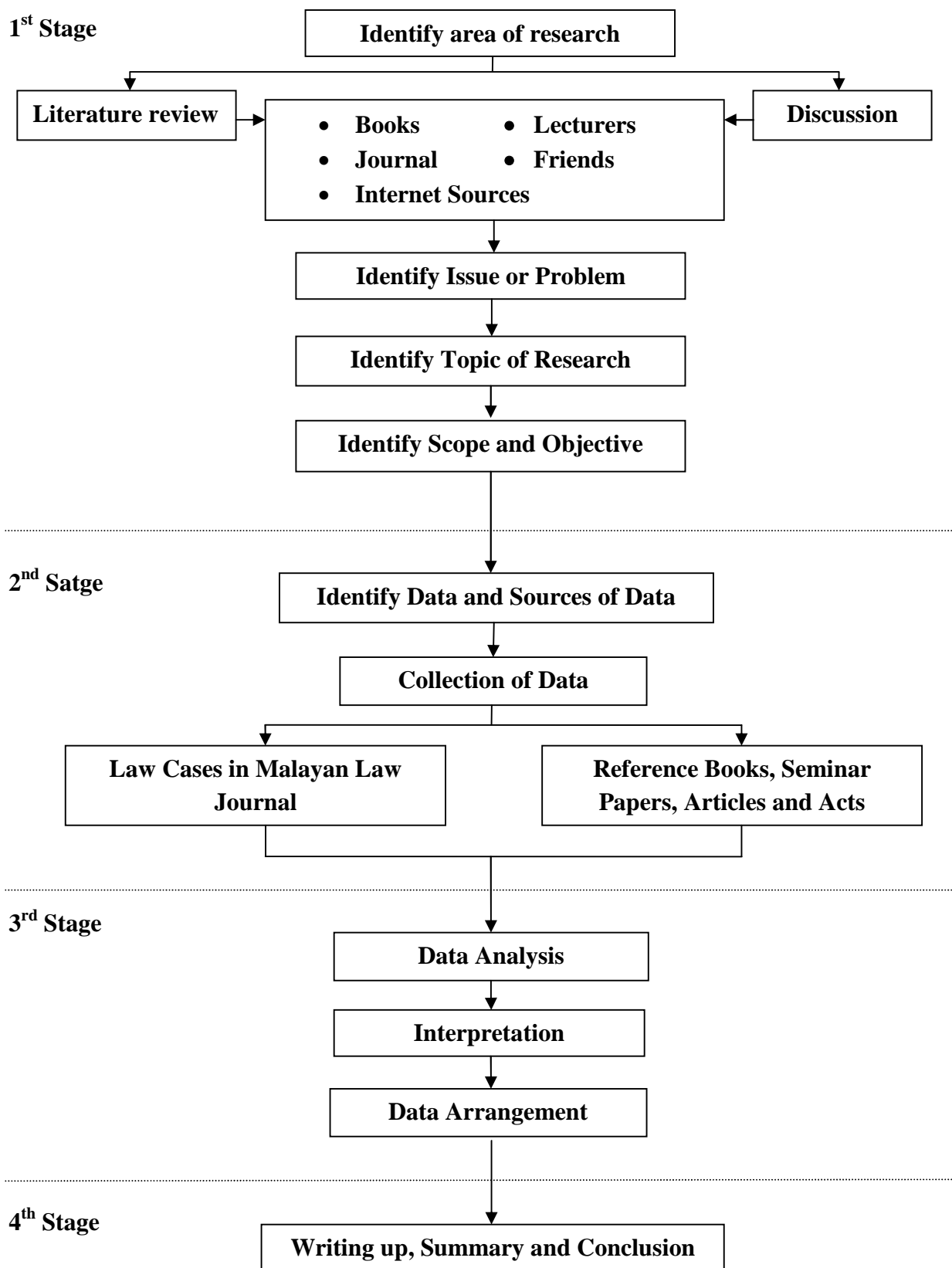


Figure 1.1 Research Process and Methods of Approach

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