The Application of Contract Law Principles in Domestic Contracts

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ABSTRACT

A domestic contract refers to an agreement between persons having a family relationship. Despite the general rule of contract, parties in social, domestic and family agreements may not have the intention to create legal relations, but domestic contracts are legally binding. In the context of family law, domestic contracts normally involve marriage contracts and separation agreements that include, among others, the pre-nuptial agreement, settlement agreement, division of matrimonial property agreement and custody of children agreement. Despite the common nature and structure of the domestic contract as a typical agreement, there are concerns from family law practitioners that domestic contracts should be interpreted differently from the commercial or other types of contract and judges should have special or additional factors of consideration in giving effect to these contracts. In Malaysia, there is a proposal for the formation of a Family Court to improve procedures and provide better service to families. The main objective of the Family Court would be to empower the parties to resolve their disputes by mutual consent and in a manner that best serves the needs of the children involved. With the proposal for the establishment of a family court, it is very important for the court to determine the approaches that shall be applied by the said family court in domestic contracts in comparison to judicial approaches in commercial contracts. This paper examines approaches of the courts in dealing with family law contracts and compares them with the judicial approaches in domestic agreements between family members under general contract law. The research methodology adopted in this paper is the statutory and doctrinal analysis.
INTRODUCTION

In Malaysia, contract law is based on English law, which focuses on the principles decided by the courts. Although the laissez-faire principle is applied, where parties are free to agree on terms of the contract, when disputes arise, the court retains power in interpreting and giving effect to terms of the contract. Other than the rules of interpretation, common law contract also applies the principle of intention to create legal relations whereby parties of an agreement which falls under family, social and domestic agreement are deemed not to have the intention to create legal relations (Balfour v. Balfour [1919] 2 KB 571; Jones v. Padavatton [1969] 1 WLR 328 Court of Appeal). This means that although Section 4 of the Married Women’s Act 1957 provides that the married woman is capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation as if she were femme sole, a general contractual agreement entered between husband and wife or between parent and child is arguably legally binding.

However, despite the general presumption that an agreement between family members does not have any intention to create legal relations, it is common under family law for spouses to enter into agreement before the marriage, during the marriage, upon divorce and after divorce. Section 56 of the Law Reform (Marriage and Divorce) Act 1976 clearly provides for a domestic agreement or arrangement to be referred to the court to express an opinion as to the reasonableness of the agreement or arrangement. It is interesting to see that there are different approaches applied by the courts in interpreting domestic contracts compared to general or commercial contracts.

ADMINISTRATION OF FAMILY LAW IN MALAYSIA

Malaysia exercises a dual system of family law, with Muslims and non-Muslims coming under different family law systems. The basis of this dual system originated from the diversity of Malaysian citizens, who come from various races, religions, customs and practices pertaining to family matters. Family law is the only area of the law which divides citizens based on religion. Due to the existence of the dual system of family law, different courts have been established to administer family law for Muslims and non-Muslims.

The Non-Muslim

In Malaysia, the family constitutes the subject matter of a number of legislative enactments for the establishment of husband-wife and child relationships. For non-Muslims, these are essentially found in the Law Reform (Marriage and Divorce) Act 1976. However, there are various other enactments which deal specifically in nature with certain areas, for instance the Domestic Violence Act 1994, which...
regulates domestic violence cases. The Penal Code also contains provisions on family matters, particularly domestic violence. For child-related cases various statutes are applicable such as the Adoption Act 1952, Guardianship of Infant Act 1961, Legitimacy Act 1961 and Child Act 2001. Other than that, the Distribution Act 1958 and Inheritance (Family Provision) Act 1971, Married Women and Children (Maintenance) Act 1950 and Courts of Judicature Act 1964 are also applicable.

When it comes to process and proceedings, it is more complicated. In domestic violence cases, the proceedings commenced by a wife are heard in the Magistrates Court but at the same time, the High Court may also hear her petition for divorce as well. Protection orders, punishments and redress are dealt with by both the criminal and civil courts (Sections 2 and 4 of Domestic Violence Act 1984). Petition for divorce, nullity, custody, judicial separation, declaration of legitimacy (Legitimacy Act 1961, section 5), division and disputes over matrimonial property are heard in the High Court (Law Reform (Marriage and Divorce) Act 1976, section 2(1). Applications for maintenance are normally handled by the Magistrates and Sessions courts but the High Court has jurisdiction as well (Section 2 of Married Women and Children (Maintenance) Act 1950, Section 2(1) & (2) of Law Reform (Marriage and Divorce) Act 1976). Adoption cases are heard in either the High Court or the Sessions Courts (Section 10 of Adoption Act 1952). Applications and succession cases are heard either before the Subordinate Courts or the High Court depending on the value of the estate (Section 2 of Inheritance (Family Provision) Act 1971).

Other than that, the current practice of conciliation regulated under Section 106 of the Law Reform (Marriage and Divorce) Act 1976 has been claimed to cause more problems than solutions. The parties feel that it is forced mediation as it is mandatory for a couple to refer their case to the conciliatory body before the presentation of the divorce petition. There is no specific guideline or procedures and the members of the conciliatory body are always changing. Therefore the parties have to repeat their matrimonial pain every time new members are appointed (Zaleha Kamarudin, 2005).

The Muslim

For Muslims, the Administration of Family Law Enactments in various states and also the Administration of Syariah Enactments in each state deals with procedure. The jurisdiction of the Syariah Subordinate Courts and Syariah High Courts as well as the Syariah Appeal Courts for each state in Malaysia is also contained in different statutes based on the states. For instance, for the state of Selangor, it is contained under the Selangor Administration of Islamic Enactment 1989 while for the Federal Territories, the relevant law is the Administration of Islamic Law (Federal Territories) Act 1993.
The Syariah Courts generally adjudicate cases on marriage, divorce and distribution of property. The application for divorce, judicial separation, maintenance upon divorce, guardianship of children, legitimacy, matrimonial property and distribution of property should be made to the Syariah High Court. However, the Syariah Subordinate Courts also have the same jurisdiction as the Syariah High Court and the only difference concerns the amount or value of the subject matter in dispute. Domestic violence cases involve criminal action on which the Syariah Court has limited jurisdiction. This has caused confusion and frustration to victims of domestic violence because it requires the victim to go to two different courts, which consequently results in more pain, harm and hardship for the victim (Abu Bakar Munir & Nor Aini Abdullah, 1995). These situations can create misperception on the integrity of the Syariah Court.

**Family Court**

The idea of a Family Court is based on the ground that family disputes involve different approaches compared to resolution of other civil matters. In other words, the less adversarial system is not suitable to tackle family conflicts. This is because family has its distinct features that include, firstly, future arrangement of family life after divorce; secondly, the involvement of interest of the third party, primarily the children, who will be mostly affected by the family breakdown; thirdly, the involvement of the family in court proceedings and lawyers, and fourthly, the legal process. All this is regarded as an undesirable forum for the resolution of family disputes as the disputes also concern a few non-legal issues related to life (Hale et al., 2002). The family institution is different from other social units because it possesses special characteristics: firstly, families have a shared history; secondly, families have a shared future; and finally, families have a shared biology (Copeland & White, 1991).

Family disputes also involve the parties’ proximity, emotional strains and perhaps bitter hatred against each other, which need to be resolved in a comprehensive way in order to maintain the peace and happiness of the family involved (Cheang, 1985). Therefore, not only legal issues arise, but also emotions and psychological effects that might become serious enough to affect the whole family institution. It is not proper to resolve legal issues only while other aspects are ignored. This is because the family institution is a fundamental part of society. Family is defined as a special social structure in which the principals are related to one another through blood ties or marital relationships, and whose relatedness is of such a nature as to entail mutual expectations that are prescribed by religion, reinforced by law and internalised by the individual (ÑAbd al-Óti, 1995).

Generally, Family Court is defined as an integrated and unified jurisdiction in a single court with competence over all aspects of family matters (Ain Husna
& Roslina Che Soh, 2012). It includes juvenile delinquency, divorce, nullity and separation, guardianship and custody disputes, maintenance, matrimonial property disputes, domestic violence, children issues and adoption. Instead of jurisdiction over such matters being fragmented between several courts, it is consolidated in a single court, even though specialised divisions or sections may need to be established within that one court (Brown, 1966). Besides jurisdiction being integrated in a single court, this court also collaborates with other social service units that provide their services in court. This emphasizes the holistic approach of family dispute settlements that integrate all aspects of human beings and observe the case as a whole. Most importantly, it promotes the less adversarial system of litigation by encouraging settlement through mediation, conciliation and arbitration.

**Issues of Contract**

A contract is defined as a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. One of the elements that the law requires in establishing a contract is the intention of the parties to create legal relations. The creation of legal relations is a doctrine in English contract law that states that an agreement is legally enforceable only if the contracting parties may be deemed by the court to have intended it. The requirement of intention to create legal relations in contract law is aimed at sifting out cases that are not really appropriate for court action. Not every agreement leads to a binding contract that can be enforced through the courts. In order to determine which agreements are legally binding and have an intention to create legal relations, the law draws a distinction between social and domestic agreements and agreements made in a commercial context.

**Social and Domestic Agreements**

For agreements under this category, the general presumption that the court applies is that the parties do not intend to have or create legal relations. In *Balfour v. Balfour* [1919] 2 KB 571, the defendant (husband) and his wife emigrated to England from Ceylon. When the defendant returned to Ceylon his wife remained in England on doctor’s advice. The defendant promised to pay his wife £30 a week during his absence until she could return to Ceylon. However, the defendant later divorced the plaintiff. She sued the defendant for the £30 per month. The Court of Appeal held that there was no contract between the parties as there was no intention to create legal relations. Atkin LJ took the view that that arrangement between the husband and wife was not contractual because the parties did not intend that it should have legal consequences.

Domestic agreements between parent and child are equally scrutinised when considering intent to create legal relations. For example in *Jones v. Padarattion* [1969] 1 WLR 328 Court of Appeal, the plaintiff worked in the USA. Her mother, the
defendant, offered to provide for expenses if the plaintiff would return to England and study for her Bar examination. The plaintiff agreed and the defendant offered to provide her a house, in which several rooms would be let out to tenants. Later, the plaintiff became uncooperative and the defendant claimed possession of the house. The plaintiff resisted on the grounds that her mother was contractually bound to the arrangement. The Court held that there was no contract between the two parties as they had no intention to enter into a contract.

In Phiong Khon v. Chonh Chai Fah [1970] 2 MLJ 114, after the death of her husband, the respondent’s mother lived together with a man i.e. the appellant. After she died, the appellant claimed that the respondent had executed a document (alleged as a transfer of land) to him. The respondent denied this. The Federal Court held that the burden of proof was upon the appellant to show that the respondent intended to execute the document of transfer of land to the appellant. As he failed to do so, the court came to the decision that there was no serious intention to create a legal relationship.

In Choo Tiong Hin & Ors v. Choo Hock Swee [1959] MLJ 67, the respondent and his wife started a farm. In due course, they adopted five sons (appellants). Everyone helped with work related to the farm, which grew into a successful family business. After the wife died, the respondent remarried, as a result of which he left the family home. The respondent brought an action claiming possession of the farm from his adopted sons and a declaration that he was the owner of the property. The appellants claimed that they were entitled to an equal share as they had helped in the creation of the family wealth. The court held that there was no intention to create legal relations. Whyatt CJ clearly stated that:

\[\text{the agreements, thus pleaded, possess all the characteristics of a private family arrangement depending for its efficacy upon a sense of filial duty and paternal responsibility on the part of the adopted sons and their father... Agreements of this character between adopted sons and their adoptive father may well work satisfactorily so long as a spirit of trust and mutual confidence prevail within the family but if this ceases to exist, then in my opinion, the sanctions of the courts are no substitute.}\]

Despite the general presumption that domestic agreements are not legally binding, to discover the true intention of the parties the court will look at the words and conduct of the parties in making the contract and a secret intention not so expressed is of no avail. For example in Merrit v. Merrit [1970] 1 WLR 1211 CA, the defendant (husband) left his wife (plaintiff) for another woman. When they met to make settlement arrangements, the husband signed a letter, which stated that the plaintiff would pay all charges on the house that they had bought until the mortgage payments were completed and the defendant would, after that, transfer...
the property to her. After the plaintiff settled the mortgage in full, the defendant refused to transfer the house to her. The Court held that the declaration made by the husband was binding and thus after having paid all the charges the wife was now the sole beneficiary of the house. The court also held that in this case, the principle in *Balfour v. Balfour* was not applicable because the husband and the wife in that case were not living in amity (friendly relationship). Thus, it can be concluded that an agreement made by a husband and wife who are separated or about to separate will be held binding by the court.

Similarly, in *Simpkins v. Pays* [1955] 1 ELR 975, the court was of the view that the existence of the third party in the contract showed that they had intention to create legal relations. In this case, the defendant, her granddaughter and a lodger (plaintiff) entered into a weekly competition run by the Sunday Empire News. The entries were sent in the defendant’s name. Each week, all three submitted entries and took turns to pay the postage fees. They agreed that if any of the entries won, they would share the winnings among them. The defendant received £250 in prize money from one of the entries but refused to share the winnings with the other two. The plaintiff brought the action to claim one third of the prize money. It was held that there was a binding contract despite the social connection as the plaintiff was also a party to the contract.

It is clear that under common law, before the court gives effect or decides on the disputed issues of the agreement, it first discusses the validity of the agreement as a binding contract. Only when the court applies the rebuttable presumption of intention to create legal relations in domestic agreements is there legal effect, while if the court applies general presumption, the agreement has no legal effect and is not binding on the parties.

**Domestic Contracts in Family Law**

An agreement or domestic contract between spouses is now very common. Section 56 of the LRA clearly provides for such an agreement or arrangement to be referred to the courts to express an opinion as to the reasonableness of the agreement or arrangement. In addition, the Rules of Court 2012, which govern all proceedings brought in the High Court, render sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered into for consideration. The agreement between spouses may assist the court to decide on relevant issues including ancillary matters such as division of matrimonial property.

The effectiveness of such agreements has been discussed in a number of cases. The court will only uphold the spouse’s agreement if it is found that the terms of the concluded agreement do not transgress the provision stated in Section 76 of the LRA. For example, in the Singapore case of *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688, the parties had, in the course of divorce proceedings, entered into an agreement dealing with *inter alia*, the
disposition of their matrimonial property. The question then arose as to whether the settlement should be upheld. The Court of Appeal held that precautions needed to be observed in considering the agreement for the purpose of preventing a violation of the relevant provisions. However, since the concluded settlement in this case did not transgress the directions in section 106 of the Women’s Charter, the matrimonial property was ordered to be divided according to the terms of the settlement.

Another interesting point to note is that the power of the court to consider the agreement is discretionary. The court may ignore the agreement completely and exercise its power under Section 76 of the LRA. The test that the court should apply is to see whether the agreement provides for a reasonable division. The viability of the spouses’ agreement is well supported by the court’s decision in the case of Wong Kim Fong Anne v. Ang Ann Liang [1993] 2 SLR 192. After their separation, the parties entered into an agreement that stated that the wife was the legal and beneficial owner of the matrimonial home and that the husband had no interest in it. However, the husband claimed for an order under Section 106 of the Women’s Charter, and the wife alleged that the agreement was binding and thus, should be complied with. The court in deciding the case said that the onus was on the husband who was seeking to disclaim the effectiveness of the deed. Since the husband failed to do so, his claim was dismissed.

The effectiveness of the agreement was also discussed in Lim Beng Choo v. Tan Pau Soon [1996] 3 SLR 177. The wife’s application to divide the proceeds of sale of the matrimonial flat was allowed by the court despite the fact that there was an agreement concluded seven years before to give up her share. In allowing the application, the High Court emphasised that the agreement between the parties as to how the matrimonial property should be divided did not oust the jurisdiction of the court to divide the property. Thus, the decision suggests that if an agreement fails to provide justice to either party, the court can ignore it despite the fact that it was validly entered into by both parties.

One important question that is usually asked is whether the validity of the agreement is challengeable. The High Court had a chance to deal with this matter in the case of Wong Kam Fong Anne v. Ang Ann Liang [1993] 2 SLR 192. The court explained that there were probably few reasons to challenge the agreement. Apart from being unfair to any of the parties, it would also be considered weak if proven that they had not understood the provisions when the agreement was signed, or it was concluded by persuasion or influence by the solicitor in charge at the time.

The validity of the spousal agreement was also challenged in the case of Lim Thian Kiat v. Teresa Haesook Lim [1988] 2 MLJ 103. The court held that the agreement entered into was perfectly valid as the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice.
The above discussion suggests that jurisdiction of the court cannot be ousted by a private agreement between the parties. The fact that there might be an agreement entered into by both parties does not preclude the court from exercising its power under the existing provisions if an injustice will be caused by holding the parties to its terms. Furthermore, an agreement drafted previously may not be relevant with the passing of time and the changing needs of the parties.

In *Aishah Bee v. Mohd Noor bin Aman Shah* (1979) 1 JH (2) 71, the existence of an agreement deterred the court from dividing matrimonial property. Before the divorce, the husband and wife signed an agreement as to the distribution of their household property. However, after the divorce, the wife brought an action claiming her share of matrimonial property in the house, a radiogram and a television. The learned chief judge dismissed the wife’s claim by quoting the saying of the Prophet (pbuh) that Muslims are bound by their own agreement. Therefore, since an agreement is entered into voluntarily by the parties, they are bound by the agreement.

**CONCLUSION**

It is clear that despite the general presumption under Contract Law that family and social agreements have no legal effect, the judges in the cases discussed in this paper generally did not question the validity of the agreements. Although the court retained discretionary power in interpreting the agreements, in most cases, the courts seemed to acknowledge the agreement rather than question whether the agreement was an enforceable contract in the first place, with exception to cases where a party to the contract raised the issue of validity of the contract.

It is perceived that if Family Court is established in Malaysia, the doctrine of intention to create legal relations would be less invoked by the courts as that seemed to be the approach adopted by the courts in dealing with domestic contracts in family law. Nonetheless, it is worth highlighting that issues in the above discussion are mainly about settlement on common/personal matrimonial property such as houses, vehicles and savings. It would be interesting to see what the approach of the court would be if the parties disputed something of commercial value such as shares, business assets, rights in management or directorships in company. A more thorough study should be carried out to analyse whether the courts’ decisions on domestic contracts related to family issues are the right approach or if the courts should first invoke the doctrine of intention to create legal relations prior to acknowledging the validity of the terms of the agreements. It would be interesting to see what would happen if the court in the first place put the burden of proof on the parties claiming the contract and challenged the validity of such agreements as they are made between husband and wife or between family members.
REFERENCES


