

“Domestic Contracts” The Effect of Family Contracts; The Malaysian Law Perspectives

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Abstract

A domestic contract refers to agreement between persons having family relationship and despite the general rule of contract, that parties in social, domestic and family agreements do not have intention to create legal relations, domestic contracts are legally binding. In the context of family law, domestic contracts normally involves marriage contracts and separation agreements which includes among others; pre-nuptial agreement, settlement agreement, division of matrimonial property agreement and custody of children agreement. Despite the common nature and structure of domestic contract as a typical agreement, there are concerns by the 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 the contracts.

In Malaysia, there is a proposal for the formation of a Family Court to improve procedures and providing a better service to families. The main objective of the Family Court is 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 family court, it is very important for the issues on interpretation and effect of domestic contract to be highlighted. This paper discusses and compares the approaches which the courts applied in dealing with domestic contracts and commercial contracts. Research methodology adopted in this paper are statutory and doctrinal analysis.

Keyword: Domestic contract; family law; contract law; family court

Introduction

In Malaysia, the contract law is based on the 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 but when dispute arise, the court retains the power in interpreting and giving effect to terms of the contract. Other than the rules of interpretation, the common law contract also applies the principle of intention to create legal relation whereby parties of agreements which fall under family, social and domestic agreement is deemed not to have the intention to create legal relation.¹ This means, in a general sense, agreements entered between husband and wife or between parent and child are not legally binding.

However, despite the general presumption that agreement between family members does not have any intention to create legal relations, it is common under the family law that spouses entered into agreements before the marriage, during the marriage, upon divorced and after divorced. Section 56 of the Law Reform (Marriage and Divorce) Act 1976 clearly provides for 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 / commercial contracts.

Administration of Family Law in Malaysia

Malaysia exercises the dual system of family law. Family Law of Muslim and another one is of non-Muslim. The basis of this system is originated from the diversity in the components of Malaysian citizens which comprises of people from various races, religions, customs and usage in family matters. Family law is the only area of law which divided the citizens based on religions. Due to the existence of the dual system of family law, different court has been established to administer family law for Muslims and non-Muslim separately.

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. As for the non-Muslims, all these are essentially found in the Law Reform (Marriage and Divorce) Act 1976. However, there are various other enactments which deal specifically in nature, for instance the Domestic Violence Act 1994 which regulates domestic violence cases. Penal Code also contain 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, Distribution Act 1958 and Inheritance (Family Provision) Act 1971, Married Woman and Children (Maintenance) Act 1950 and Courts of Judicature Act 1964 are also applicable.

When it comes to the process and proceedings, it is more complicated. In domestic violence cases, the proceedings commenced by a wife are heard by the magistrates' courts² but at the same time the High Court may hear her petition for divorce as well. Protection orders,

¹ See *Balfour v Balfour* [1919] 2 KB 571 ; *Jones v Padavatton* [1969] 1 WLR 328 Court of Appeal

² Domestic Violence Act 1984, sections 2 & 4.

punishments and redress are dealt with by both the criminal and civil courts.³ Petition for divorce, nullity, custody, judicial separation, declaration of legitimacy,⁴ division and disputes over matrimonial property are heard at the High Court.⁵ Applications for maintenance are normally handled by the magistrates and sessions courts but the High Court has jurisdiction as well.⁶ Adoption cases are heard at either the High Court or the Sessions Courts.⁷ Applications and succession cases are heard either before the Subordinate Courts or the High court depending on the value of the estate.⁸ Finally, cases involving juvenile delinquents are brought either before the Court for Children or magistrates courts depends on the nature of the case.⁹

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 rather than solution. The parties felt that it was a forced mediation as it is mandatory for the 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 the new members appeared.¹⁰

The Muslim

As for the Muslims, there are the Administration of Family Law Enactments in various states and also the Administration of Syariah Enactments in each states dealing with the procedures. The jurisdictions of Syariah Subordinate courts and Syariah High Courts as well as Syariah Appeal courts for each state in Malaysia are also contained in different statutes based on the states. For instance, for the state of Selangor, it contains under the Selangor Administration of Islamic Enactment 1989; and for Federal Territories, the relevant law is the Administration of Islamic Law (Federal Territories) Act 1993.

Similar to the situation in civil courts, the administration is sometimes confusing. It is known that the Syariah courts generally adjudicate cases on marriages, divorces and distribution of property. The application for divorce, judicial separation, maintenance upon divorce, guardianship of children, legitimacy, *harta sepencarian* and distribution of property should be made to the Syariah High Court.¹¹ However, the Syariah Subordinate courts also have the same jurisdiction as the Syariah High Court and the only difference is regarding the amount or value of the subject matter in dispute.¹² Domestic violence cases involve criminal action that the Syariah court has limited jurisdiction. This has caused confusion and frustration to the victims of domestic violence because it requires the victim to go to two different

³ Ibid., sections 10, 11, 12, 13.

⁴ Legitimacy Act 1961, section 5.

⁵ Law Reform (Marriage and Divorce) Act 1976, section 2(1).

⁶ Married Women and Children (Maintenance) Act 1950, section 2; Law Reform (Marriage and Divorce) Act 1976, section 2(1) & (2).

⁷ Adoption Act 1952, section 10.

⁸ Inheritance (Family Provision) Act 1971, section 2.

⁹ Child Act 2001, section 2.

¹⁰ Zaleha Kamaruddin, *Divorce Laws in Malaysia (Civil and Syariah)*, (2005), Malayan Law Journal, p. 113.

¹¹ Administration of Islamic Law (Federal Territories) Act 1993, section 46.

¹² Ibid, section 47.

jurisdictions of the courts which consequently resulting to more pain, harm and hardship to the victim.¹³ These situations can create misperception on the integrity of the Syariah court.

However, due to the nature of Syariah courts that have some form of specialization in handling family matters, the application of mediation which is known as *sulh* or mediation has been successfully practiced in many states. They are able to reconcile many estranged couples and in case of divorce, peaceful negotiation can be made pertaining to the future arrangement. A specific manual for *sulh* has been provided in order to standardize the procedure carried out by the *sulh* officers.¹⁴ In the first year of its practice in the state of Selangor, there were 1529 cases registered with 1416 cases (92%) successfully concluded, out of which 1029 cases achieved settlement by means of mediation which is equivalent to 67.3%. The other 387 cases opted to go for trial by court and the other was postponed.¹⁵ Unfortunately, due to the non-uniformity of Islamic law between states, there are other states which are left behind if compared to other states, such as the state of Negeri Sembilan in which the implementation of mediation did not reach the target.¹⁶

Family Court

The idea of family court is based on the ground that family disputes involve different approaches as 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 the family life after divorced. 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 family with court proceedings and lawyers, and fourthly, the legal process 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.¹⁷ Family institution is different from other social unit because it possesses special characteristics. Firstly, families have a shared history. Secondly, families have a shared future, and finally families have a shared biology.¹⁸

Family disputes also involve parties' proximity, emotional strains and bitter hatred against each other, which need to be resolved through comprehensive approach in order to maintain peace and happiness of the family involved.¹⁹ Therefore, it is not only legal issues that arise, but also the emotional feelings and psychological effects that might become serious and ultimately affecting the whole institution of family. It is not proper to resolve legal issues

¹³ Abu Bakar Munir & Nor Aini Abdullah, "Domestic Violence and The Need For A Family Court" [1995] 4 *CLJ* lxxv (Nov), p.lxxxii.

¹⁴ See Sheikh Ghazali Abdul Rahman, "Penyelesaian Kes-kes Kekeluargaan Melalui Manual Kerja Sulh" in *Undang-undang Keluarga Islam* edited by Abdul Monir Yaacob and Siti Shamsiah Md Supi, Institut Kefahaman Islam Malaysia, 2006, pp. 243-260.

¹⁵ Nora Abdul Hak, "Family Mediation in Asia: A Special Reference to the Law and Practice in Malaysia" Vol. 15 No. 1 (2007) *IJUM Law Journal*, p.130.

¹⁶ See Wan Siti Asmak bt Wan Dollah, "The Importance of Mediation in Settling Divorce Cases" in *Islamic Family Law: New Challenges in the 21st Century*, edited by Zaleha Kamaruddin, Research Centre, IIUM, 2005, p. 172.

¹⁷ Dame Brenda Hale, David Pearl, Elizabeth J. Cooke & Philip D. Bates (2002). *The Family, Law and Society Cases and Materials*, 5th Edition, Lexis Nexis, p.227.

¹⁸ Anne P. Copeland & Kathleen M. White, *Studying Families*, SAGE Publications, 1991, p. 4.

¹⁹ See Molly Cheang [1985]. "Family Court: Let's Have It". *MLJ* Jan-Jun cxlviii, cxlix.

only while other aspects are ignored. This is because family institution is the fundamental part of society. Family is defined as a special kind of structure whose principles are related to one another through blood ties or marital relationships, and whose relatedness is of such nature to entail mutual expectations that are prescribed by religion, reinforced by law and internalized by the individual.²⁰

Generally, family court is defined as an integrated and unified jurisdiction in a single court with competence over all aspects of family matters.²¹ 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 there may need to have specialized divisions or sections within that one court.²² Besides the jurisdiction being integrated in a single court, this court also collaborates with other social services unit that provides their services in the court. It would emphasize on the holistic approach of family dispute settlement whereby it integrates 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.

The Issues of Contract

Malaysia Law 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 which the law requires in establishing a contract is the intention of the parties to create legal relations. Creation of legal relations is a doctrine in English contract law that states 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 which are not really appropriate for court action. Not every agreement leads to a binding contract which 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 agreement under this category, the general presumption that the court applies is that the parties do not intend to have or create legal relation. In *Balfour v Balfour*²³, the defendant (husband) and his wife migrated to England from Ceylon. When he went back to Ceylon his wife stayed in England on doctor's advice. The defendant promised to pay his wife £30 a week during his absence until she can go back to Ceylon. However, later the defendant

²⁰ Hammudah, ÑAbd al-Óti (1995). *The Family Structure in Islam*, American Trust Publications, 19.

²¹ Ain Husna and Roslina Che Soh, *Matrimonial Property. Establishment of a Unified Family Court in Malaysia: Implication on the National Family Policy*, in Zuhairah Ariff and Norlia Ibrahim (ed). 2012. *Contemporary issues in Matrimonial Property*. IIUM Press

²² L. Neville Brown, "The Legal Background to the Family Court," vol. 6 (1966) *The British Journal Of Criminology*, 140.

²³ [1919] 2 KB 571

divorced the plaintiff and she sued the defendant for the L30 per month. The Court of Appeal held that there is no contract between the parties as there is no intention to create legal relation. Atkin LJ took the view that that arrangement between husband and wife are not contract because the parties did not intend that it should have legal consequences.

Domestic agreements between parent and child are equally scrutinized when considering intent to create legal relations. For example in *Jones v Padaraton*,²⁴ the plaintiff worked in the USA. Her mother, the defendant, offered to provide the expenses if the plaintiff would return back to England and study for her Bar program. The plaintiff agreed and the defendant offered to provide her a house where some of the rooms to be let to the tenants. Later, the plaintiff became uncooperative and the defendant claimed the possession of the house. The plaintiff resisted on the ground that her mother was contractually bound to the arrangement. The Court held that there is no contract between the two parties as they have no intention to enter into a contract.

In *Phiong Khon v Chonh Chai Fah*,²⁵ 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. The Federal Court held that the burden of proof is 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 comes to the decision that there is no serious intention to create legal relationship.

In *Choo Tiong Hin & Ors v Choo Hock Swee*,²⁶ the respondent and his wife started a farm. In due course, they adopted five sons (appellants). Everyone helped in the farm which grew into a successful family business. After the wife died, the respondent remarried and 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 “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

²⁴ [1969] 1 WLR 328 Court of Appeal

²⁵

²⁶ [1959] MLJ 67

Merrit v Merrit,²⁷ 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 will pay all charges on the house which they bought until all the mortgage payment completed and then the defendant will transfer the property to her. After the plaintiff fully paid the mortgage, the defendant refused to transfer the house to her. The Court held that declaration made by the husband is binding and thus after paying all the charges the wife was now the sole beneficial 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 the husband and wife who are separated or about to separate will be held binding by the court

It is clear that under the Common law contract, before the court gives effect or decide on the disputed issues of the agreement, the court would first discuss the validity of the agreement as a binding contract. Only when the court applies the rebuttable presumption of intention to create legal relation in domestic agreements that it shall have legal effect whilst if the court applies the general presumption, the agreement shall have no legal effect and not binding on the parties.

Domestic contracts in family law

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 court to express an opinion as to the reasonableness of the agreement or arrangement²⁸. Besides, the Rules of the High Court 1980 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 for consideration. Therefore, the spouse's agreement may assist the court to decide the relevant issues including ancillary matters such as a division of matrimonial property.

The effectiveness of the agreement 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.²⁹ For example in the Singapore case of *Wee Ah Lian v. Teo Siak Weng*³⁰, 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. In delivering the judgement of the Court of Appeal, Karthigesu J, said that;

“We must still decide whether in the exercise of our discretion under section 106 of the Women's Charter (Cap 353) we ought to uphold the settlement.

²⁷ [1970] 1 WLR 1211 Court of Appeal

²⁸ Section 56 of the LRA reads: “Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to any court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think desirable to do so, to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit.

²⁹ Section 76 of the LRA dealing with the power for court to order division of matrimonial property.

³⁰ [1992] 1 SLR 688.

Section 106 does not specifically provide for the validation of agreements honestly negotiated by the parties but it does give jurisdiction to the court to order a division of matrimonial assets when granting the decree of divorce. ...

In our view it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention.”³¹

From the above quotation, it is clear that the Court of Appeal lays down the broad framework, which serves as a guide in enforcing the agreement entered into by the spouses. There are precautions that need to be observed in considering the agreement for the purpose of preventing a violation of the relevant provisions. Therefore, since the concluded settlement in this case did not transgress the directions in section 106 of the Women's Charter³², 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 exercises 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*.³³ The parties had, after their separation, entered into an agreement which 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 Charter³⁴ while the wife alleged the agreement was binding and thus, it 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 therefore dismissed.

The effectiveness of the agreement has also been discussed in *Lim Beng Choo v. Tan Pau Soon*.³⁵ 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 ago 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 does 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 then 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

³¹ Ibid, at p 698

³² Section 106 of the Women Charter is a previous provision governing a division of matrimonial property in Singapore. The provision which is in *pari materia* with section 76 of the LRA has been amended and replaced by a new provision in section 112 of the Women Charter.

³³ [1993] 2 SLR 192.

³⁵ [1996] 3 SLR 177.

challengeable. The High Court had a chance to deal with this matter in the case *Wong Kam Fong Anne v. Ang Ann Liang*,³⁶ The court explained that there are probably few reasons to challenge the agreement. Apart from being unfair to any of the parties, it will also be considered weak if proven that they did not understand the provisions when it was signed, or it was concluded by persuasion or influence by the solicitor in charge at that particular time.

The validity of the spousal agreement was also challenged in the case of *Lim Thian Kiat v. Teresa Haesook Lim*.³⁷ 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 judge said that:

“These terms were performed by the petitioner, and I do not accept the sudden recent change of heart by the respondent in attempting to vary the terms of the agreement on matrimonial assets, when she had for the last seven years, quite comfortably and without much complaint, accepted and lived by the terms stated in the deed of separation.”³⁸

Thus, from the above quotation it is obvious that an agreement which has been concluded properly with competent legal advice should not be displaced unless there are good substantial grounds to do so. The court therefore, would be minded to adopt the terms relating to the division of the matrimonial property stated in the deed of separation, as it is a perfectly valid agreement between the petitioner and the respondent.

The above discussion also suggests that the jurisdiction of the court cannot be ousted by a private agreement between the parties. Despite the fact that there is an agreement entered into by both parties, this will not preclude the court from exercising its power under the existing provisions if an injustice will be caused by holding the parties to its term. Furthermore, an agreement drafted few years back may not relevant with the passing of time and the changing needs of the parties.

Syariah Court

Under section 94 of the Syariah Court (Civil Procedure) Selangor Enactment 2003:

“Where the agreement of the parties an action has been settled, the court may, at any time by consent of the parties, record the fact of such settlement with the term thereof. The record of settlement shall afford a defense by way of res judicata to subsequent proceeding”.

It is clear that the above provision requires the recording of settlement reached in any proceeding including sulh where by virtues of the section, settlement agreed by sulh will be recorded. The same requirement is reiterated in section 131 of the Syariah Court (Civil Procedure) Selangor Enactment, 2003 which provides for a Consent Judgement. By virtues of section 131 of the Enactment, judgement based on consent or agreement to the parties,

³⁶ [1993] 2 SLR 192.

³⁷ [1988] 2 MLJ 103

³⁸ Ibid, Per James Foong J., at p. 115.

including parties in sulh, may be recorded by the Court at any time.

There are few cases which discussed about the position of agreement between the parties. In the case of *Aishah Bee v Mohd Noor bin Aman Shah*³⁹ the existence of agreement has deters the court from dividing the harta sepencarian. Before the divorce both the husband and wife in this case has signed an agreement as to the distribution of their household property. However, after a divorce, the wife brought an action claiming her share of harta sepencarian in a house, radiogram and television. The learned chief Kadi is dismissing the wife's claiming quoting the saying of the Prophet to the effect that muslim are bound by their own agreement. Therefore, since the agreement in this case has been voluntarily entered into without any compulsion, both parties are bound to follow.

In another case of *Haminah Bee v Samsudin*,⁴⁰ the wife after the divorce claim for her share of harta sepencarian. The husband however alleged that she has agreed not to claim anything should the husband divorce her but unable to produce evidence to prove that. Thus, the court upheld the claim made by the wife.

The above discussion suggests that the jurisdiction of the court cannot be ousted by private agreement between the parties. Despite the fact that there was an agreement entered into by both parties, it will not preclude the court from exercising its power under the existing provisions if an injustice will caused by hoilding the parties to the terms of the agreement. Furthermor, agreement which has been drafted few years back may not be relevant with the change of time and needs of the parties.

In *Zailan bt Mohamad v Mohd Ariff b Ali* (Unreported Civil case No 12/2000, Syariah Court Petaling Jaya) the plaintiff apply for fasakh divorce due to several reasons including that the failure of the defendant to maintain the plaintiff and their four children. During the trial both counsels advised the plaintiff and the defendant to settle the dispute through sulh which led to amicable settlement. The Syariah Counsel's role in advising the parties to settle the family disputes by way of sulh which subsequently led to a consent judgment in which the parties have to come into an agreement between them.

Observation

From the above discussion, it is obvious that despite the general approach / principle under the law of contract that domestic and social agreement are not binding and has no legal effect, the judges in deciding domestic agreement related to family law issues did not question the validity of the agreement in the first place. Although the court still retain the discretionary power in interpreting the agreements, the courts seemed to automatically acknowledge the effect of the agreement rather than questioning whether the agreement is an enforceable contract in the first place. In fact, the consent judgment is often given by the court to acknowledge and recognize settlement agreement or sulh under the Islamic law whereby the spouses/ divorced parties' mutual agreement are recognized as the mechanism to resolve issues in dispute.

³⁹ (1979) 1 JH (2) 71

⁴⁰ (1979) 1 JH (2) 71.

It is perceived that if the family court is established in Malaysia, the doctrine of intention to create legal relation might not be invoked by the courts as that seemed to be the approaches adopted by the courts in dealing with domestic contract under family law. Nonetheless, it worthy to highlight 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 would be the approach of the court if the parties disputed something which is commercially valued such as shares, business assets, rights in management or directorships in company. A general assumption is that the same approach would be adopted by the court but a more thorough study could be carried out to analyze whether the direct recognition by courts on domestic contracts related to family issues is the right approach or the court should first invoke the doctrine of intention to create legal relations prior to acknowledging the validity of terms of the agreements. It is interesting to see what would happen if the court in the first place challenges the validity of such agreements as they are made between husband and wife or between family members.

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