

LAW OF EQUITY & TRUST IN MALAYSIA

INTRODUCTION

In Malaysia, the principle of trusts are generally not as common as those which were already long existed in the United Kingdom and other Commonwealth countries where one would have known or understand the concept of trusts and the purpose behind it. This is most probable due to its highly legalistic framework as well as its hard to understand nature. Thus, in order for one to understand the principle and development of trust law in Malaysia, it is necessary to trace back the history of the development of laws in Malaysia.

HISTORICAL BACKGROUND AND DEVELOPMENT OF TRUSTS IN MALAYSIA

Before the independence of Malaysia in year 1957, the laws in our country were directly or indirectly, influenced by the British during its colonisation. However, after the attainment of independence in Malaysia, the Federal Constitution of Malaysia was adopted and the matters of trust law are then regulated under List II of the Federal Constitution, which stated that: -

“Except with respect to the Federal Territories, Islamic law and personal and family law of persons professing the religion of Islam including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable **trusts**; wakafs and the definition and regulation of charitable and religious trusts, the **appointment of trustees** and for the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, **trusts**, charities and charitable institutions operating wholly within the State...”

This has clearly shown that unlike the UK where trust law was developed from the principle of equity in land matters and are then regulated by the Lord Chancellor; Malaysian trust law was

however specified only after independence and the creation of the Federal Constitution of Malaysia. Thus, all matters relating to trusts in Malaysia are now regulated by the Federal Constitution and the State Enactments in which it is only to be dealt with by the civil courts rather than the then Malay customs and Syariah law, which is also known as wakaf.

WHAT IS A TRUST?

Generally, a trust is an arrangement whereby property or assets, be it real, personal, tangible or intangible, are transferred from an individual (“the settlor”) to another individual (“the trustee”) to hold the property for the benefit of a specified list or class of persons (“the beneficiaries”). This trust relationship usually arises through the creation of a trust deed between the parties that sets forth the powers of the trustees, the terms and conditions upon which the trustees may hold and manage the trust assets as well as outlining the rights of the beneficiaries.

DUTIES OF TRUSTEES

A trustee is the legal owner of the trust property and the relevant duties of the trustees can be clearly seen in the Trustees (Incorporation) Act 1952 whereby Section 9 of the Act is found *pari materia* with Section 3 of the UK Trustee Act 1925 that all powers conferred on the trustee shall be carried out in accordance to his discretion but are subject to consent or direction.

The obligation of a trustee including the administration of the affairs of trust on behalf of the beneficiaries, such as investing the trust assets, accounting for transactions related to the trust assets, varies interests of the beneficiaries, reporting to the beneficiaries and filing tax returns on behalf of the trust. It is thus well to say that the trustee owes a fiduciary duty to the beneficiaries who are the equitable owners of the trust property and are legally obliged to manage the trust property to the benefit of the beneficiaries.

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Trust law in Malaysia imposes a relatively strict obligations and rules on the trustees in which they are subject to very strict rules governing the way in which their powers and discretion may be exercised. There is a basic rule which states that a trustee may not derive any advantage, directly or indirectly, from a trust unless expressly permitted and allowed by the trust. The courts regard a trust as creating a special relationship between the trustees and beneficiaries in which it places the most serious and onerous obligations on the trustee. Therefore, the trustees are required to at all times follow the trust deed, act prudently in the management of the trust property, as well as exercise their powers in the best interests of the beneficiaries of the trust. A breach of trust is deemed to occur in the event that there is a failure on the trustees to exercise proper care and/or a requisite level of care towards the trust property and subsequently causes trust fund to suffer losses, for which the trustees will be liable to compensate the beneficiaries.

TRUSTEE ACT 1949

Regarding the legislation which governs and regulates trust law in Malaysia, it is well-knowingly that Trustee Act 1949 is the main statute which is being used and referred to until to-date. Trustee Act 1949 is a legislation that covers and focuses on all matters of trusts, executorships as well as administratorships in Malaysia. Due to its enactment for about 70 years ago, Trustee Act 1949 may not be as good as the law in the UK, i.e. Trustee Act 2000 which is now well recognised as the most comprehensive trust law in England and Wales.

In order to have a clearer view on the current aspect of trust law in Malaysia, it is crucial to take note that the judiciary in our country does not only apply the Trustee Act 1949 as our sole source of law, but judges were also relying and referring to the UK common law and cases when it comes to deciding cases relating to trust law. Section 3 of the Civil Law Act 1956 allowed the Malaysian judiciary to apply UK common law and the rules of equity in a situation when it is

appropriate and provided that it is confined to the cut-off date. Thus, the UK common law and authorities are always permitted to be referred to as long as the Trustee Act 1949 is unable to assist the judges in deciding the cases or when there are some loopholes in the local law and that the judges think it is fit and appropriate to do so. As for instance, in the case of *Liew Choy Hung v Fork Kian Seng* [2000] 1 CLJ 369, the judge referred to *Springette v Defoe* [1992] 2 FLR 388, *Pettit v Pettit* [1970] AC 777 and *Halsbury's Law of England* in dealing with the issue of trust.

TYPES OF TRUSTS

Generally, there are various types of trust in Malaysia and the common trusts such as an inter-vivos trust (living trust), testamentary trust, express trust, implied trust (constructive trust and resulting trust), fixed trust, discretionary trust and bare trust, are discussed as follows:-

1

Inter-vivos Trust (Living Trust)

An inter-vivos trust which is also known as a living trust is created during the lifetime of the settlor by a trust instrument. This trust comes into effect within the period the trust is created and it can entail the distribution of assets to the beneficiary during or after the settlor's lifetime.



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2 Testamentary Trust

A testamentary trust which is also known as a will trust is a trust created in an individual's will. As a testamentary trust comes into effect only upon the death of the settlor/testator, this type of trust is generally created at or following the date of the testator's death, which unlike a living trust as discussed above.

3 Express Trust

An express trust arises when there is a clear intention that the settlor is to create a trust, over his assets, either during his lifetime or after his later death. This type of trust is contrasting with that of implied trust (constructive or resulting trust), where an express trust is created by signing a trust document, either a will or a trust deed, which stated clearly through their direct language of the objects of the trust and the trust properties involved. Typically in an express trust situation, the beneficiaries are clearly identifiable and a trustee is appointed in order to manage the specific properties according to the terms laid down by the settlor in the trust instrument.

5 Fixed Trust

Under a fixed trust, the trustee has no discretion at all in the delegation or distribution of the trust property/assets to the beneficiaries as the entitlements of the beneficiaries have been fixed by the settlor. For instance, a trust can be created for a minor beneficiary where the property in question is to be transferred to the minor when he/she attains the age of majority; or beneficiaries of the trust have a pre-determined and fixed interest in a specific portion of the income or capital of the trust.

4 Implied Trust

Unlike an express trust, an implied trust is not created expressly by an agreement between a settlor and trustee but an intention on behalf of the parties to create a trust can be presumed to exist.

i) Constructive trust

A constructive trust is essentially an "equitable remedy" imposed by the law to work out justice between the parties, regardless of the parties' intentions. It generally occurs when the court decided that there is a wrongdoing in a party who acquired legal title to the properties and cannot in good conscience be allowed to benefit from it and thus order the wrongdoer to deliver the particular properties to the person who rightfully should have them.

ii) Resulting trust

A resulting trust is a form of implied trust which is not created intentionally by the settlor, but implied by the court to work out the presumed intentions of the parties, however it does not take into consideration of their expressed intent.



