CHAPTER ONE

HISTORICAL BACKGROUND

Prior to 1786, the year when the British took control of Penang, the laws that prevailed were those of the adat perpateh in Negri Sembilan and adat temanggong in most of the other states. Based on Malay customary laws, they show relics of ancient Hindu law as well as considerable Muslim influence.

The subject of the reception of English law, and therefore the law of trusts, shall be dealt with in the following sequence:-

1. Penang,
2. Malacca in which a Dutch system of law existed prior to its cessor to England,
3. the Federated Malay States,
4. the Unfederated States of Malaya, and
5. Sarawak and Sabah.

Penang

There is very little evidence as to the law which prevailed in Penang in the earlier part of the 18th Century.

In 1807, a Charter of Justice was granted to Penang which is believed to have introduced the law of England as at 25th March, 1807 into the Settlement, with the necessary modifications. Following the incorporation of Penang, Malacca and Singapore into the Straits Settlements, a new Charter was granted in 1826 which extended the jurisdiction of the Court of Judicature of Prince of Wales Island (Penang) to Singapore and Malacca. This Second Charter of Justice 1826 contained almost identical provisions as the First Charter and can be said to have introduced the common law and the rules of equity, as administered in England on 27th November 1826, into all the three Settlements.

A Third Charter of Justice 1855 raised the question whether English law developments from 1826-55 were introduced into the Straits Settlements. It was held in Regina v Willans[1] that the Third Charter, unlike the preceding ones, did not effect another introduction of English law, but merely reorganised the existing courts.

It is a well-known fact that English law was introduced into the Straits Settlements "subject in its application to the various races to such modifications as are necessary to prevent it from operating unjustly and oppressively." While the concept of trusts is an English one, inasmuch as it does not operate unjustly and oppressively," it is not surprising to find that as regards the law of trusts, the practice and judicial pronouncements show little divergence from English principles and practice; the main area where diversity and divergence is quite apparent being that of charitable trusts.

With the dissolution of the Straits Settlements in 1946, the Penang became a component state, successively, of the Malayan Union in 1946, the Federation of Malaya in 1948 and Malaysia from 1963 to the present time.

Finally, by virtue of section 3(1) of the Civil Law Ordinance 1956 there is yet another reception accorded to the "common law of England and the rules of equity" as at 7th April 1956, subject to local circumstances and provisions made by any written law in force in the Federation of Malaya. It follows therefore that the English law of Trusts received (subject to the above limitations) is that of England as at 7th April 1956.

The Civil Law Ordinance 1956, was revised as the Civil Law Act 1956 (Revised 1971 [redacted]), and extended, with amendments, to Sabah and Sarawak with effect from 1st April 1972.

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1. [1858] 3 Kyshe 16.

Malacca

From the time of its founding in 1402, the law in Malacca was administered by the village elders, who mainly applied Malay customary law. The Undang-undang Malaka, which is a compilation of Malacca laws in 1523, shows that the adat temanggong was in force prior to the Portuguese arrival.

During the Portuguese era, it is doubtful that the Portuguese did really introduce their laws into Malacca. On the whole, the Portuguese left the administration of justice amongst their non-Christian Asian subjects in the hands of their community leaders, while the Portuguese came under the jurisdiction of Portuguese judges.

Malacca was then captured by the Dutch in 1641. By the time of its final cessor to the East India Company by the Dutch in 1824, Malacca had a settled population governed by Dutch Law. Ignoring constitutional principles, the Second Charter of Justice 1826, introduced English law to Malacca, with no provision for any transition from the one legal system to the other. Thereafter, Malacca followed a similar path as that outlined above for Penang.

Federated Malay States (F.M.S.)

By the year 1890, the states of Selangor, Perak, Negri Sembilan and Pahang had accepted British protection. For the purpose of a more efficient administration these four states were united into the Federated Malay States in 1895.

Due to the F.M.S. being only British protectorates, English law was not introduced by legislation. Nevertheless, principles of English law did creep into the legal systems on account of the English and English-educated judges, especially in matters not provided for by the local laws. To mention just two of the many instances, in the 1924 case of Re Yap Kwan Seng's Will[2], it was held

2. (1924) F.M.S.L.R. 313

that the rule against perpetuity applied in Selangor, and Motor Emporium v Arumugam[3] (1933) held that the principles of equity and natural justice were applicable in the F.M.S., by virtue of the inherent jurisdiction of the Court to do justice.

As regards the formal reception of English law in the F.M.S., section 2 of the F.M.S. Civil Law Enactment, 1937 provided for the application of "the common law of England and the rules of equity" as at 12th March 1937. This Enactment of 1937 was then repealed and replaced by the Civil Law Ordinance, 1956 whereby section 3 provides for the reception of the common law and rules of equity "... so far as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

It has to be noted, however, that section 2 of the 1937 Enactment provided for the reception of English law " other than any modification of such law or any such rules enacted by stature", while this phrase was omitted in the later Ordinance of 1956.

It is quite evident that the earlier provision had, in specific terms, limited the reception of the common law of England and the rules of equity to that unmodified by English statutory law. As regards section 3 of the 1956 Ordinance, however, controversy has arisen as to its interpretation; more specifically, whether English statute law passed before 1956 has been imported. To date, there has been no occasion for judicial opinion on this issue, but a reasonable interpretation is that the statutory modifications of the common law and rules of equity, which have shaped the law as at 7th April 1956 are also to be accorded a reception, subject to the usual imitations, that is, local circumstances and local legal provisions.

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3. (1933) MLJ 276.

Another point that has to be borne in mind is that involving section 6[4] of the Civil Law Ordinance 1956 which specifically excludes the application of English Land Law. In the Law of Trusts, this exclusion creates several problems where local enactment of English trust provisions in toto creates anachronisms arising from a different system of land law being applicable locally.

Unfederated Malay States

The formal reception of English law did not take place till 1955 when the F.M.S. Law Enactment, 1937 was extended to Johore, Trenggamu, Kelantan, Kedah and Perlis. Nonetheless, considerable English law and practice had already been established by local enactment of English provisions and the adoption of familiar English principles and procedures by the judiciary and members of the legal profession to fill any lacunae in the law. These states then followed a similar path as that outlined above till they are now governed by the Civil Law Act, 1956 (Revised-1971 [Act 67]).

East Malaysia

In the earlier part of the nineteenth century, the Sultan of Brunei claimed Brunei and most of what is now Sabah and Sarawak. In 1839, however, a revolt broke out in Sarawak, resulting in James Brooke becoming the Rajah of Sarawak. This was the beginning of a three-generation dynasty of the so-called 'White Rajahs'.

In 1847, the Sultan of Brunei ceded the island of Labuan to the British Crown which, in 1946, was incorporated into the Crown Colony of North Borneo (Sabah). Finally, in 1888, Britain established a Protectorate over North Borneo, Sarawak and Brunei. This state of affairs lasted until the Japanese occupation.

4. Section 6 of the Civil Law Ordinance, 1956: Nothing in this Part shall be taken to introduce into the Federation or any of the States and Settlements comprised therein any part of the Law of England relating to the tenure or conveyance or assurance of or succession to any immovable property, or any estate, right or interest therein.

a) Sarawak

The position in Sarawak was that of an autocratic British Rajah enacting laws but still paying due regard to local circumstances.

When James Brooke became the Rajah of Sarawak, one of his first acts was to prepare a set of eight laws, and these were printed in Malay and published in 1843. They provided, inter alia, for the punishment of murder, robbery and "other heinous crimes", permitted all men "to trade or labour according to their pleasure and to enjoy their gains" and protected the Dayaks from exploitation.

The formal reception of English law in Sarawak only began from 16th February 1928 by virtue of Order No. L-4. Order No. L-4, 1928 provided for the application of the "Law of England in so far as it is not modified by Orders and other Enactments issued by His Highness, the Rajah of Sarawak or with his authority, and in so far as it is applicable to Sarawak having regard to native customs and local conditions, shall the Law of Sarawak."

The words used are quite general and are comparable to those used in the Second Charter of Justice, 1826. In the way of interpreting the 'local circumstances' provision, however, there is the "Notes for the Guidance of Officers in Interpreting Order No. L-4 (Law of Sarawak)", which cast an interesting light on the policy giving effect to 'local circumstances.'

On 31st March, 1941 a Constitution was proclaimed and enacted on 24th September, 1941. This was immediately followed by Japan's occupation of Sarawak which lasted until September 1945. Martial law was then proclaimed by the British Military Administration, cancelling all legislative enactments issued by the Japanese.

Despite an earlier proclamation to the contrary, it became apparent that the Rajah, Sir Charles Vyner Brooke, wished to cede Sarawak to the British. A Parliamentary Commission was set up and on 17th May 1946, the Council Negeri passed the Cession Bill. Subsequent

orders made Sarawak into the Colony of Sarawak under a Governor, although the Constitution of 1941 was preserved.

The effect of the cession on the question of English law was that the law prior to the cession continued to apply. There was then enacted the Application of Laws Ordinance, 1949, section 2 of which reads:

"Subject to the provisions of this Ordinance and save in so far as any"other provisions has been or may hereafter be made by any written law in Sarawak, the common law of England and the doctrines of equity together with statutes of general application as administered or in force in England at the commencement of this Ordinance / 12th December 1949 / shall be in force in Sarawak:

Provided that the said common law, doctrines of equity and statues of general application shall be in force in Sarawak so far only as the circumstances of Sarawak and its inhabitants permit and subject to such qualification as local circumstances and native customs render necessary."

It is to be noted that the above proviso is somewhat similar in effect to the words of the Privy Council in the case of Yeap Cheah Neo v Ong Cheng Neo[5] "the law of England must be taken to be the governing law so far as it is applicable to the circumstances of the place and modified in its application by these circumstances."

To complement and clarify the law further, section3 of the same Ordinance provided for the specific adoption of certain Acts such as the Defamation Act 1952, Law Reform (Miscellaneous Provisions) Act 1934, Law Reform (Married Women and Tortfeasors) Act 1935, Law Reform (Contributory Negligence) Act 1943 and the Law Reform (Personal Injuries) Act 1948.

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5. (1872) 1 Kyshe 326.

As already mentioned, the Civil Law Ordinance 1956, of West Malaysia was extended to the states of Sabah and Sarawak by the Civil Law Ordinance (Extension) Order 1971, which came into force on the 1st April 1972. The Application of Laws Ordinance in Sarawak (and Sabah) were repealed to the extent that it related to any matter in the Federal List of Subjects.

b) Sabah

A Royal Charter was granted to the British North Borneo Company on 1st November 1881 to regulate the cession of territory to early merchant-adventurers.

Proclamations by the Governor formed the law until the settling-up of the Legislative Council in 1912, when Ordinance's were enacted. The British North Borneo, which also reserved to itself the right to legislate for the territory, enacted laws by the Honourable Court of the Directors in London. These were then incorporated into the law and published in the Official Gazette as Ordinances until 1942. The Japanese Occupation lasted from 19th January, 1942 to June, 1945.

On 15th July, 1946 the State of North Borneo, together with Labuan, became the new Colony of North Borneo. The Governor, in conjunction with the Advisory Council, enacted Ordinance till the formation of Malaysia on 16th September, 1963.

The formal reception of English law in Sabah did not begin until 1st December, 1951 when the Application of Laws Ordinance 1951 was enacted, with an identical provision to section 2 of the Sarawak Ordinance. There was however no provision equivalent to the Sarawak section 3.