

Choice of Law and Recognition of Foreign Orders in the Administration of Estates in Malaysia

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Abstract: Administration of estates is not confined to only administering the deceased's estate in a particular place or country. It covers the administration of the whole of his estates wherever situated. Generally, the *lex situs* or the law of the place in which the property is situated governs the administration of immovable property while the law of the deceased's domicile or *lex domicilii* for the movable property. In practice, an application for grant of representation will be made to the court of the deceased domiciled country for the purpose of administering the deceased's estate. However where the deceased died leaving behind property situated in a foreign country, such grant will not suffice to administer the estate of the deceased person until it has been recognized by the court within the jurisdiction. In Malaysia, the High Court has an exclusive jurisdiction in the administration of the deceased's estate especially in cases of choice of law and recognizing any foreign order in inter-jurisdictional cases of estate administration. Hence, this paper seeks to provide an overview of the administration of estates in Malaysia, its choice of law and further ascertain the extent to which the Malaysian courts will recognise and enforce the orders made by the courts of another. The law and procedure relating to the resealing of the foreign grant of representation or orders and the alternatives thereto are also propounded accordingly.

Key words: Administration of estates, choice of law, foreign orders, resealing of grants.

INTRODUCTION

Death brings sadness to those left by the deceased. In cases where the deceased is the breadwinner of the family, his death would also bring hardship to his family members. This is due to the fact that before a particular estate can actually be distributed, it must firstly be administered for the purpose of paying funeral expenses, debts and liabilities of the deceased. Tan, Y.L., (1993) is of the view that the term "administration of estates" includes the management and distribution by an executor or administrator of the estate of the deceased. It lends extension to judicial management of the executor or administrator in the performance of his duties by way of superintending his management, taking the account and making proper distribution among the persons entitled. Hence, it can be deduced that there are three discernible stages involved in the administration of an estate. They are, firstly, to obtain either the grant of probate or letters of administration (Wee, N., 2007), secondly, to manage the estate according to the will or by selling off the property or other manner of disposing of the estate and finally to distribute the property or the proceeds of sale to the heirs or beneficiaries.

The application for the grants of probate or letters of administration will have to be made by the executor or administrator respectively in order to administer the deceased's estate. However, should the representative obtain a grant of representation in the deceased's domiciled country, the same is not sufficient to administer the deceased's estate in a foreign country unless such grant has been recognized by the courts of other jurisdictions.

Moreover, in some circumstances, administration of estates warrants subsequent orders of the court to enable the representative namely, the administrator to dispose of or distribute the estate of the intestate deceased accordingly. Thus, the following discussion uses the term "foreign orders" in the context of the administration of estates, to refer and include the grant of representation obtained from any foreign country and any subsequent orders thereto.

MATERIALS AND DISCUSSION

Legal Framework for Administration of Estate in Malaysia:

The main statute that governs the law and procedure for the administration of estates in Malaysia is the Rules of Court 2012 (PU(A) 232 /2012) which has come into force on 1 August 2012 where the Subordinate Court Rules and Rules of High Court have been combined into one common set of rules. The purpose of the Rules of Court 2012 ('RC') is to facilitate and standardize civil case procedures in court as well as to improve

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the quality of the justice system in the country. In the context of estate administration, the RC is to be read together with the Probate and Administration Act 1959 (Act 97) which provides for the law relating to the grant of representation (Halim, A.H., 2012). Other relevant statutes would include the Small Estates (Distribution) Act 1955 (Act 98) and Public Trust Corporation Act 1995 (Act 532).

Ascertaining the appropriate body to administer the estate of the deceased is dependent upon the types of estate left by the deceased. The types of property or estate can be classified into two, namely, testate and intestate. The former refers to the estate of a deceased person who dies leaving a valid will, with an executor having been named therein. In the circumstance, the application for a grant of probate should be filed at the High Court and governed by Order 71 and Order 72 of RC that regulate the law for non-contentious and contentious probate proceedings respectively.

Conversely, intestate refers to the estate of a deceased person who dies leaving no valid will or dies leaving a will without having appointed an executor, or none of those appointed is able and willing to act, or no executor survives the testator, or all the executors die before obtaining probate or before having administered all the estate of the deceased, or the executors appointed by any will do not appear and extract probate. It also includes a person who leaves a will, but dies intestate as to some beneficial interest in his movable or immovable property as prescribed under section 2 of the Probate and Administration Act 1959 ('1959Act'). This is known as partial intestate.

A further division is seen in the intestate estate; first, a small estate and second, a non-small estate. A small estate is confined to an estate of a deceased person that consists wholly or partly of immovable property situated in any state and not exceeding two million ringgit in total value. The administration of a small estate is governed by the Small Estates (Distribution) Act 1955 ('1955Act'). The main feature of the small estate is that the intestate estate of the deceased must comprise of immovable property. Thus, if the estate comprises of movable property only, such an estate cannot be construed as a small estate. Notwithstanding the above, there are specific provisions of the Act 1955 that is applicable to specific States. The non-small estate, on the other hand, refers to an estate of a deceased person that exceeds two million ringgit in total value in which letters of administration must be applied to the High Court for administration purposes.

It is worth mentioning that under the Public Trust Corporation Act 1995 ('1995Act') a Corporation called Amanah Raya Berhad is empowered to administer the deceased's estate in its capacity as an administrative body. By virtue of section 17(1) of the 1995 Act, the Corporation is authorised to summarily administer the estate of a deceased who dies leaving only movable property in Malaysia of which the total value of the estate does not exceed six hundred thousand ringgit. In such a case, the Corporation may declare that it undertakes to administer the estate or directly distribute the estate to the entitled claimant without the need to get a court order. Marican, P., (2008) considered the process as one of the significant powers granted to the Corporation by the 1995Act. Whenever a person dies, and where no person who is entitled to apply to the Court for a grant of probate of will or no petition for letters of administration is pending in the Court, any person who assuredly has an interest or claims to such property may make an application to the Corporation for the administration of such property.

The Corporation may also be appointed as a personal representative to the deceased's estate and be granted probate of will or letters of administration by the Court based on sections 12 and section 13(1) of the Act 1995 respectively. The Corporation may also act as a trustee for the undistributed fund upon the conclusion of the estate administration.

Choice of Law:

The vital consideration in choice of law is drawing the demarcation line between movable and immovable property (Tan, Y.L., 1993). Miller, G. (2000) divided the rule of a choice of law into two parts, firstly, the legal category that involve the determination of the question or issues raised by a particular case that are *lex fori* which refers to the law of forum or *lex causae* referring to the law chosen by the forum court from among the relevant systems to arrive at its judgment of an international or inter-jurisdictional case. Secondly, the factors connecting the particular issue with a particular legal system namely, *lex situs* referring to the law of the place in which the property is situated and *lex domicilii* which refers to the law of domicile.

In the context of administration of estates herein, the law has invariably depended on the *lex situs* and *lex domicilii*. The importance of domicile is that it carries with it personal law determined by the legal system to which a person belongs. Hence the question of succession such as validity of wills or intestate succession depends on the system of law of his domicile.

The general principle is that, the *lex situs* governs the succession and administration of immovable property while the *lex domicilii* governed the succession and administration of movable property (Tan, Y.L., 1993). Practically, an application for a grant of representation will be made to the court of the *lex domicilii*. The Court of Appeal held in a Federated Malay States case of *Fatimah Bee alias Batcha Ammal v Mohideen Batcha* [1946] MLJ 112 at 116, that the jurisdiction of the court only arise under the Probate and Administration Enactment (now 1959Act) when there is some estates in the Federated Malay States to be administered.

In the case of *Shaik Abdul Latif v Shaik Elias Bux* (1915) 1 FMSLR 204 at 217, the Court of Appeal propounded, *inter alia*, “Domicile is only a determining factor as regards the distribution of movables, and it does not seem to me that it can be extended for the purposes of adoption by Mohammedan Law in a Mohammedan State to include a principle to decide the distribution of immovables. In Selangor there is a law, the Mohammedan Law, capable of deciding the succession to property of Moslems. Though a domicile in England or Hong Kong would take away from this Selangor Law the determination of the distribution of movables, I do not see on what principle the regulation of the succession to immovable should be decided by any other than local law. Though from want of local law, dealing with the non-Mohammedans, Selangor Law may in the case of other owners of local immovable property adopt the law of the domicile to determine the distribution, yet as there is local law appropriate to Mohammedan owners of such property I hardly think a different law is applicable.”

In the instant case, the testator was a Mohammedan Indian and a British subject having his domicile of origin in Hong Kong. In 1895 he came to Selangor and had acquired by choice a domicile in the State. The issue revolved around the testator’s power of testamentary disposition and the governing law for the administration of his estate as he died leaving immovable property which was situated in Selangor. The Court of Appeal held that the devolution of immovable property of the deceased was governed by the *lex situs* and the distribution of the movable property was subject to his *lex domicilii*. Hence, the validity of the will and distribution of property of the deceased was determined based on Mohammedan Law as administered in the state of Selangor.

The adoption of a similar line was seen in the case of *Soundara Achi v Kalyani Achi & Ors* (1953) MLJ 147 at 148 when Thomson J stated that, “The law on the subject is contained in the Distribution Enactment (Cap. 71) which follows the well known principle of private international law that in the case of intestacy immovable property should be distributed in accordance with the *lex rei situ* and movable property should be distributed in accordance with the law of the country in which the deceased has his domicile at the time of his death.”

It stands to reason that a similar approach was taken by the Singaporean court in dealing with intestate inheritance in the case of *MTT ARSAR Meyammai Achi v V Valliammai & Anor* (1996) reported in (Mallal’s Digest, 2011). In that case, the deceased, a Hindu domiciled in India, died intestate and was survived by his mother (as plaintiff in the suit), his wife (first defendant) and a minor daughter. The deceased died leaving an estate comprising of both immovable and movable property. The plaintiff sought among others, a declaration that she was entitled to one-third in the whole of the deceased estate. The court held that under section 4(2), 5 and 7 of the Intestate Succession Act, the plaintiff had no share in the immovable property as only the first defendant and the daughter would each be entitled to half of the share under the Act. Whereas, with regard to movable property, the plaintiff, the first defendant and the daughter each were entitled to one-third of the share according to the Indian law governing the distribution of the estate of an intestate male Hindu.

It is evident and also enshrined in section 4 of the Malaysian Distribution Act 1958 (‘Act 1958’) that the *lex situs* exclusively decides the succession or distribution of the immovable property of the deceased intestate which is located in Malaysia wherever he may have been domiciled at the time of his death. Meanwhile, the succession and distribution of the movable of the deceased is governed by *lex domicilii*, the law of the country in which he is domiciled at the time of his death (Halim, AH, 2010).

Recognition of Foreign Orders:

In cases where the deceased domiciled outside Malaysia and left a will disposing of his estate within Malaysia or died intestate and having property in Malaysia, the foreign orders obtained therein may be clearly delineated in two ways. The representative may apply to have the same resealed by the Malaysian courts or alternatively, the representative may apply for a fresh grant of representation from the Malaysian courts in order to administer the estate.

It is undeniable that the issue of jurisdiction proves to be pertinent in law, rendering a particular court eligible with the power to hear and decide on a distinctive case. In the context of Malaysia, it is worth noting that the Malaysian legal system is generally based on the dual system of courts. A parallel system of *Shari’ah* Court is structured along the same lines as the civil courts in matters relating to the Muslim personal law. By virtue of Article 121(A) of the Federal Constitution of Malaysia, the High Courts and inferior courts established by federal law shall have no jurisdiction in respect of any matter within the jurisdiction of the *Shari’ah* courts as specified in the State List as set out in paragraph 1 of List II of the Ninth Schedule of the Federal Constitution. The specified matters include Islamic law relating to succession, testate and intestate. Nevertheless, matters relating to the grant of probate and letters of administration are matters enumerated in the Federal List. This has also been highlighted in the case of *Jumaaton & Anor v Raja Hizaruddin* (1998) 6 MLJ 556 where the *Shari’ah* Court of Appeal decided that the *Shari’ah* court has no jurisdiction over probate and administration matters. Hence, the jurisdiction over matters of probate and administration in respect of re-sealing of grants from abroad is to be exercised by the High Court with no exception made in respect of Muslims (Sundrum K, 2010).

The power of the High Court to reseal the probate and letters of administration granted out of Malaysia is provided Section 52 of the 1959 Act. In general, any grant of probate or letters of administration granted by the court of probate in any part of the Commonwealth countries, may be recognized by the Malaysian courts by way of application for resealing of such grant of representation in the High Court in pursuant to section 52 of the 1959 Act. Upon resealing of the grant, it will have the like force and effect and have the same operation in this country as if it were a grant made by the Malaysian High Court.

By virtue of section 53 of the 1959 Act, any probate and letters of administration granted by a British Court in a foreign country may be resealed in Malaysia. Under section 51 of the 1959 Act, British Court in a foreign country means a British Court having jurisdiction out of the Commonwealth in pursuance of an Order of Her Britannic Majesty in Council, whether made under any Act of the Parliament of the United Kingdom or otherwise.

In cases where the grant of representation was obtained from a non-Commonwealth country, the personal representative would have no other choice except to apply for a fresh grant of representation (either grant of probate or letters of administration) from the High Court. It is of great importance that the applicable law and procedure relating to thereto are strictly complied with.

Procedure for Resealing of Grants:

Upon obtaining a grant of representation from the domiciled country of the deceased, the representative namely, the executor or the administrator of the estate of the deceased or the appointed attorney (as the case may be) may file an application for resealing of the grant by way of originating summons in form 5 of the RC at the High Court. The originating summons should be supported by an affidavit sworn by administrators or executors or attorney (as the case may be) in form 159 (f) who shall depose therein, amongst others, particulars and relationship of administrators (executors and attorney, if applicable), particulars of deceased including his ordinary or principal domicile at the time of his death, list of the deceased's assets and liabilities in Malaysia and any other relevant information or documents as the Registrar may require. A copy of the power of attorney (if applicable), must also be exhibited together with the list of assets and liabilities and a true copy of the foreign grant.

In addition, an affidavit to state the foreign law of the deceased's domiciled country is also required. Such affidavit may be sworn by any person who practices, or has practiced, as a barrister or advocate in that country and who is well-versed with its law. It is however worth noting that in some special circumstances, allowance may be given for the affidavit to be sworn by any other person who does not possess the above qualification if it is satisfied that by reason of such person's official position or otherwise, he has knowledge of the law of the country in question (Raman G, 2005; Halsbury's Law, 2011; Azhari, E.Z., *et al* 2011; Order 71 rule 5(3), (4), Order 16 RC; section 52, 1959 Act).

It was ruled in the case of *Re Azhar Azizan Harun (As the Absolute Representative of Eleanor Dulcie Robinson)* (1998) 7 MLJ 89 that the petition for resealing a grant of probate pursuant to section 52 of the 1959 Act ought to be filed in the executrix's name notwithstanding the existence of the power of attorney. However, the attorney appointed by the executrix may affirm the affidavit verifying the petition on behalf of the executrix.

After all the required documents have been filed, the matter will be fixed for hearing before a Judge or a Deputy Registrar of the High Court (wherever applicable) within one month from the date of filing thereof. On the hearing date, the executor or administrator is required to be present in person. Nevertheless, the executor or administrator may appoint an attorney to apply and appear in court on his behalf at the hearing of the application for the resealing of the grant. The Court has discretion to refuse or defer the application in some special circumstances (*Re Syed Hassan bin Abdullah AlJofri Deceased; the Estate & Trust Agencies (1927) Ltd v Syed Hamid bin Hassan AlJofri & 2 Ors* (1949) 1 MLJ 198).

In cases where a grant of letters of administration is concerned, the administrator or his attorney must place security by bond for the administration of the estates before resealing the grant. Such bond is subject to section 35 of the 1959 Act. Where the deceased has carried on a business or resided in Malaysia within twelve months of his death, the court may on the application of a creditor of the deceased require adequate security to be given for the payment of debts due to creditors residing in Malaysia (Halsbury' Law, 2011).

Thereafter, the court shall reseal the foreign grant with the seal of the High Court namely the memorandum of resealing as per Form 168 and issue form of notice of resealing in form 169 (Order 71 rule 49, RC). The latter will be sent by the Registrar to the court from which the foreign grant is issued (section 57, 1959 Act). Once resealed, the grant will have the like force and effect and have the same operation in Malaysia, as if it was a grant made by the High Court (section 52, 1959 Act). Should there be any revocation or alteration of the grant by the issuance court, a notice of the effect will be sent to the court so resealing the grant (section 58, 1959 Act).

In *Chung Kok Yeang v Public Prosecutor* (1941) MLJ 163, it was held by the High Court of the Federated Malay States that where a foreign probate has been resealed in this country, the executor had all the rights and obligations of an executor to whom the grant had been made by a Court of the Federated Malay States. However, it is to be noted that the representative only acquires the rights and obligations of an executor or

administrator on the date when the foreign grant of representation is resealed by the Court and not from the date of the original grant. The rights and obligations include a right to institute a suit on behalf of the estate of the deceased (*Issar Singh Son of Bhola Singh & Anor v Samund Singh Son of Mayiah* (1941) 1 MLJ 28) and the obligation to exhibit a true and perfect inventory and account of the deceased's estate when lawfully required to do so (*Chung Kok Yeang v Public Prosecutor* (1941) 1 MLJ 163).

Conclusion:

The above discussion proves that the law and procedure for the administration of estates in Malaysia do provide a forum for the recognition of the foreign orders. Therefore, in cases where a grant of representation has been obtained in the deceased's domiciled country, the representative may apply to have the same resealed by the Malaysian courts or alternatively apply for a fresh grant of representation. Interestingly, the rule of private international law is inevitably delved into in determining the issue of choice of law for administration of estates in Malaysia. The rule which provides that the place where immovable property is situated exclusively governs the rights, interests and titles in and to immovable property while the movable is governed by the law of the deceased domiciled at the time of his death, has been legally accepted to represent the current position of the governing law. However, issues, laws and procedures of the same remain tractable for further extrapolation.

REFERENCES

- Azhari, E.Z. *et al.*, 2011. Malaysian Court Practice, High Court. Petaling Jaya, Lexis Nexis Malaysia Sdn Bhd., 2: 1200-1247.
- Halim, A.H., 2010. Rights and Entitlements of a Foreign Spouse to the Deceased's Estate under the Malaysian Law of Succession. *Law Review*, 437-451.
- Halim, A.H., 2012. Administration of Estates in Malaysia: Law and Procedure. Petaling Jaya, Sweet & Maxwell Asia.
- Halsbury's Laws of Malaysia, 2011. Wills, Probate, Administration and Succession, 11(2): 305-657.
- Mallal's Digest of Malaysian & Singapore Case Law, 2011 (Reissue), 4th Edition, Kuala Lumpur, Lexis Nexis Malaysia Sdn Bhd., 11: 765-974.
- Marican, P., 2008. Islamic Inheritance Laws in Malaysia. 2nd edition, Petaling Jaya, Lexis Nexis, MLJ Sdn Bhd.,
- Miller, G., 2000. International Aspects of Succession. Hants, Ashgate Publishing Ltd.
- Raman, G., 2005. Probate and Administration in Singapore and Malaysia. 2nd edition, Singapore, Lexis Nexis, MLJ Sdn Bhd.,
- Sundrum, K., *et al.*, 2010. The Annotated Statutes of Malaysia on the Probate and Administration Act. 8A, Kuala Lumpur, Malayan Law Journal Sdn Bhd.,
- Tan, Y.L., 1993. Conflicts Issues in Family and Succession Law. Kuala Lumpur, Malayan Law Journal Sdn Bhd.,
- Wee, N., 2007. MLJ Handbook Series: Probate Handbook. Petaling Jaya, Malayan Law Journal Sdn. Bhd.,