When a foreign testamentary trust involves a property in China

Description

As I deal with quite a number of matters of inheritance by foreigners of estates in China, a few cases in which clients from Anglo-Saxon jurisdictions such as Canada and USA inherited estates left by their family members have involved trusts that are set up by the decedents, which are very interesting to me, a lawyer in China where civil trusts are rarely used in society.

I. How Inheritance of China Estates is Conducted in light of a Trust on the Estate Property
A typical trust created by will or a living trust subsisting after the death of the settlor may cover the major estate assets such as houses or apartments in China, so as a basic rule of trust laws, the legal title of the trust property in China shall be transferred in the name of the trustee of the trust, often one of the legal heirs or a non-heir professional or even a trust company.

The problem arises here.

As said, people in China don't have a culture of using trusts in their life, and indeed only a small fraction of the population will make a will when they are alive, not to mention trust, despite the fact that China has enacted its trust law back in 2001. As a result, when someone dies in China, his or her estates will generally be dealt with pursuant to laws about intestate succession or testate succession with no application of trusts at all. To be best of my knowledge for the last decade of my legal services in Shanghai (the most westernized city in China), I have never handled a domestic inheritance matter involving trust arrangements. As a result, China notary offices and China real estate authorities are not familiar with the concept of trusts that are often associated with inheritance matters in many foreign countries. To Chinese officials (mainly the real estate registry authority), inheritance means the transfer of the absolute ownership of the estate properties to all heirs (in the case of intestate succession, unless one or part of the heirs expressly waive their inheritance rights) or to the heirs appointed in the will.

Shanghai Landing Law Offices

In a typical testamentary trust, there will always be one or more trustees who are supposed to hold the title of the estate properties and manage and administer the same for the interests of the beneficiaries of the trust. In a family setting, the trustee and the beneficiaries of the trust may all be legal heirs of the deceased, but only the trustee heir will hold the title of the estates.

Now assuming a China estate, say, a piece of real property such as a house or apartment is settled on the trust whereby one of the children heirs is now the trustee and with all children heirs being the beneficiaries. So accordingly the trustee heir is supposed to hold the title of the real properties alone, and in other words, only the trustee heir's name will appear on the title deed of the estate property. If the trustee heir presents the trust documents to China real estate authority for purpose of transferring the estate title to his or her name only, the presentation will most likely get rejected. Instead, to transfer the title of the estate property into the trustee heir's name only, the China authority will request the trustee heir to present documents to prove that other heirs have waived their respective inheritance rights in regard of the estate property. This may run squarely against the intention of the trust which is created for benefits of all heirs. The point is that under Chinese laws, once you waive the inheritance

right, you cannot claim any interests in the estate property. This waiver can leave the waiving heirs very uneasy. To address the issue, all the heirs, the trustees and beneficiaries should enter into an agreement to expressly set down their real intention of such waivers.

However, when the trustee is a non-heir professionals (attorneys) or even trust companies, things can be more complicated, because in the eyes of the China authorities, this is not inheritance but a sale or gift instead.

Things may be done without any heir to waive their inheritance right by resorting to China courts which are supposed to know and deal with legal issues including cross-border legal issues but I reckon the road will be smooth and rosy.

II. What Should You Do When Setting up a Trust Involving China Properties

The problem described above may arise very often in the future when more and more wealthy Chinese people migrating to Anglo-Saxon countries who may be advised by their legal counsels to set up trusts for purpose of estate planning.

The main idea is how you should advise the settlor clients in choosing the trustee (or co-trustees) in respect of the assets located within China (for purpose of this article, excluding Hong Kong, Macau and Taiwan) to make sure the planning will be carried out as planned.

Extra caution shall be wielded when you have to deal with China assets in the estate planning not only for the reasons described above but also for reason of foreign exchange restrictions that may hinder the money remittance out of China.

Again, the best policy is to consult and work with a local attorney in China who will help to make your estate planning perfect.

Date Created
May 2017
Author
admin

Shanghai Landing Law Offices