

Cross-border Divorce in China III: a Closer Look at What Law Governing Division of Marital Properties

We are talking about China courts dividing marital properties involved in cross-border divorce cases where choice of law applicable to the division of marital properties plays a deciding and vital role that could lead to wildly different result.



Cross-border Divorce and Property Division

By the way, this is not the first post discussing property division in cross-border divorces in China, please see the other post: [Choice of Law on Division of Matrimonial Properties](#). We take a closer look at the issue in this article.

I. Fact Pattern

As always, let us create a hypo case to illustrate the legal issues we are going to delve into: A couple initially get married in a common law country or region like Singapore, UK, Australia, Canada or most USA states or Hong Kong SAR, and they lived there for more than 10 years. During that 10-year period, the husband made a successful investment in a company in China. The corporate shares are registered in the name of the husband only. A couple of years ago, the couple and their kids moved to Shanghai, China where they lived a good life before their marriage started falling apart. They ended up in China family court fighting for both assets and child custody.

We only look at the issue of division of assets.

II. Which Law Shall Govern the Ownership of Shares

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as a defect in legal practice, as manifested in the case we are discussing. Apparently, if the China family court applies the law of their first habitual residence (a common law country or region), then as standard in most common law jurisdictions, the shares are registered in the sole name of the husband, thus the asset shall be the husband's personal and separate asset. On the other hand, if the recent common habitual residence, i.e. Shanghai, China, is chosen as connecting factor, then Chinese marital property laws shall be the applicable law, accordingly, the asset was acquired during marriage and thus a piece of community property jointly owned by the couple despite that the wife is not registered as shareholder.

At the end of 2012, China Supreme Court has issued an interpretation on how to find "habitual residence", here is the quote of the rule:

自然人在中国境内连续居住一年以上且以该地作为其生活中心的地方，可以认定为经常居住地。因该地为其经常居住地，故应适用该地法律。但住院就医、劳务派遣或公务人员除外。

the place a natural person has been consecutively residing for up to one year and takes it as the center of his or her life at the time of the creation, alteration or termination of the foreign-related civil relationship can be recognized by courts as his or her habitual residence, except for places for hospitalization, employment secondment or public services.

China Supreme Court Interpretation on Habitual Residence

Based on this rule, it seems more reasonable to conclude that the applicable law shall be the law at their first common habitual residence because that is the time when the marital property relationship in respect of the shares is created. On the other hand, one may argue that upon decision of China court on dissolving their marriage, namely, termination of their marital property relationship, the second habitual residence in Shanghai China should also be chosen and apply China marital property laws.

As we can see, the choice of law really plays a critical and paramount role in such cases. Lawyers or judges that don't deal with cross-border family laws may readily overlook the issue here.

2. How to Divide the Asset

Once the China court determines the ownership of the marital property shares, then they will proceed to decide on the splitting of the shares, if applicable.

So is there any different set of rules applicable to division of marital property other than the law determined pursuant to Article 24 above under Chinese laws?

The answer should be clear: No. But in judicial practice in China, courts may have different answer.

The laws chosen according to Article 24 quoted above are supposed to deal with all elements

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of marital property relationship between couples in terms of ownership form, title and division upon divorce. It is a matter of interpretation of the term “marital property relationship”.

However surprisingly, we have noticed that the High People’s Court in Beijing has issued a notice guiding its lower courts in applying Article 24, confining its ambits only to marital ownership form and marital debt liability, excluding division of marital properties from its scope of application. Indeed, in that notice, Beijing High Court explicitly stated that division of marital property falls within the ambits of Article 27 in China Law on Choice of Laws for Foreign-related Civil Relationships, which provides:

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Article 27 Article 27 The laws at the locality of the court shall apply to a divorce by litigation.

Applicable Law to Divorce by Litigation

Namely, Beijing court opinion is that division of marital properties shall be governed by China laws, not by the law applicable in determining the ownership nature of the shares registered in the name of the husband.

Then it is clear that with the logic of Beijing High People’s Court, the wife will be left in destitution, as the shares will be deemed as husband’s separate assets and won’t be split by the wife. How sad an outcome!

III. Conclusion

The issue of choice of law is vital and probably most crucial point in forming the best strategy for a party to cross-border divorce in China courts. However, lawyers that don’t deal with foreign-related divorces may often ignore the prerequisite issue.

Clients caught in cross-border divorces should consider hiring lawyers from both jurisdictions in order to best protect his or her own interests.