Cross-border Divorce I: Jurisdiction Matters a Lot

Description

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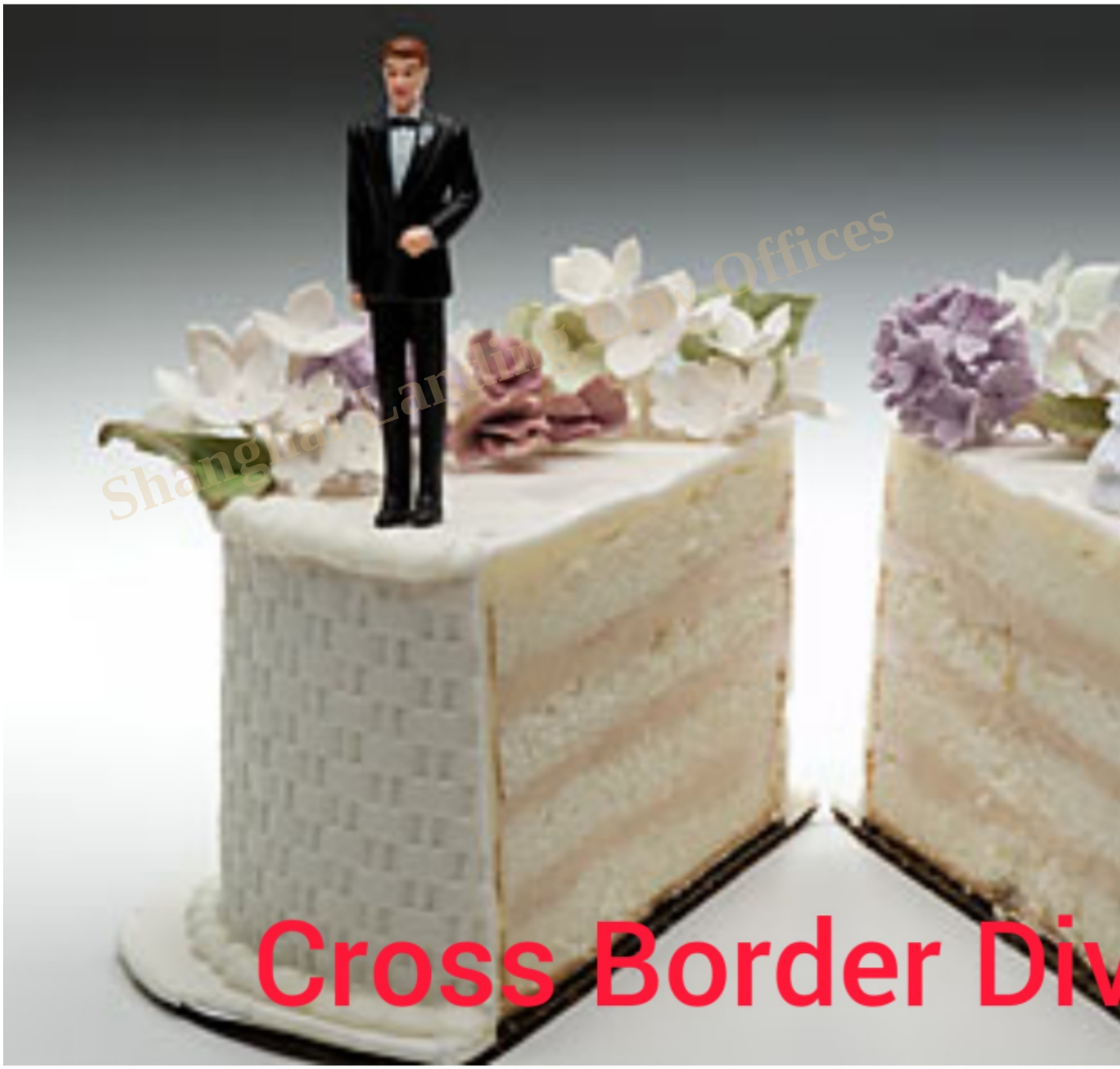
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Cross Border Div

Every marriage has an end.

Years ago, when I talked with a foreign lawyer friend who used to work in China law firm about cross-border divorces, he mentioned about his parents divorcing across USA-Israel borders, emphasizing the importance of choosing the favorable jurisdiction to litigate. When I started to focus more on cross-border family laws, I have realized over years that in many cases, jurisdiction matters a lot.

In practice, every year, we deal with a few cases of cross-border divorces involving a Chinese spouse with substantial assets in China (for purpose of this article, China excluding Hong Kong, Macau and Taiwan). A typical case encompasses the following facts: the couple have two different nationalities (Chinese and American/Canadian/Australian, either an inter-racial marriage, or originally two Chinese persons with one of them later becoming a foreign citizen), and they have substantial assets in both China and the foreign country.

I. Why You Should Carefully Choose Jurisdiction

You hear of the term forum shopping in legal world where the party to a lawsuit may meticulously frame its litigation strategy by choosing the proper court that is potentially more friendly and favorable to him or her. In other words, you want to litigate in a court that may maximize your expectation out of the case.

Assuming (often it is true) that the courts in both USA/Canada/Australia/Singapore and China have jurisdiction to hear the case, then what are the factors to consider in make the choice of forum before pulling the trigger in the legal fight?

(1) how easy is it for the court to grant divorce?

I don't have much say on this question in respect of foreign judicial practice, after all, I am a China licensed attorney. But from our past practice of advising foreign clients or foreign lawyers on China marriage law, it seems to me that most developed countries have a pretty easy threshold for the courts to grant divorce.

However in China, as you may have read it already on my blog, the divorce procedures can be prolonged in China simply because one party doesn't agree on the divorce. Here is what generally happens in a divorce case in China: unless there is clear ground (as provided by in China Marriage Law) for divorce, courts generally won't grant divorce if one spouse doesn't agree on the divorce claiming that she or he still loves the other, and wants to work out their problems. Sometimes, such claims are just tactic to delay the divorce sought by the other party, a leverage used for bargaining for more assets. I used to hear a judge saying in court that in last 10 years of his work, only in two cases did he grant divorce directly.

The law in China is that if the divorce is denied in the first attempt by the initiating party/spouse, then the initiating spouse (plaintiff) shall have to wait six months, a period hoped for reconciliation between the unhappy couple, before he or she can go to court again.

Sometimes, I cannot understand the practice though it is based on social merits of keeping families united instead of breaking it apart.

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Oh, by the way, it is not about easiness but appears related. In China, despite the fact China Civil Procedure Law imposes no time limit for a foreign-related court proceeding, in practice, very often China courts will close the trial proceeding around 6 months (can be longer for sure). So far as I know about foreign jurisdiction over divorce proceedings, it could easily run for years.

(2) *how favorable to the female spouse is the court in dividing community properties?*

No shame in talking about dividing money and assets in divorce, and sometimes that is all about divorcing in reality.

Well, it is hard to draw any general conclusion on this, as different parts of the world have different rules on marital properties ownership, community properties or separate properties. Oh, pre-nuptial agreement or post-nuptial agreement shall be factored in as well.

China Marriage Law provides that upon divorcing, the court should give more regards to the interests of the children and the wives without specifying how much more the wives should get, leaving it largely to the discretion of the judges.

(3) *any alimony available for one spouse from the other?*

This is a big issue and could be the decisive factor in choosing the proper forum for divorce litigation. Unfortunately, China law doesn't provide for alimony in divorce proceedings. The lack of this alimony provision is probably grounded on the fact that wives are entitled to at least half of the community properties, and there is no need to go further to protect the often weak party, the wives.

On the other hand, alimony (or spousal support/maintenance) is available in major other jurisdictions like USA, Canada and Australia.

So when one spouse is very concerned about post-divorce life, he or she is more likely to resort to the foreign jurisdiction for divorce.

As we don't have post-divorce spousal alimony or support in China, I don't know much about how it works in foreign jurisdictions and this is exactly why cross-border divorce clients need to consult family lawyers in both countries.

(4) Child Custody

To many, children are their lives. But in fighting for child custody, there are many factors to take into consideration with the general principle in mind which party can offer the best benefits to the child.

In this regard, it is advisable to know that China is not a party to the international convention on children abduction, and in some circumstance, this will complicate the tug war for child custody, for example, your spouse takes your child into China, you won't be able to rely on international convention to demand the return of the child.

(5) Courts' willingness to deal with foreign assets

Well, it has been a tradition in China family judiciary practice that Chinese courts are reluctant or

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unwilling to deal with foreign assets in divorce cases despite those properties are well established community properties. The reason is simple: Chinese court judgments won't be enforced in most foreign countries and it will be rediculous to render a court judgment that cannot be enforced, a marring on court judiciary credibility.

However, we have seen quite a few family court judgments rendered by American courts that orders the splitting of the assets located in China. While that is a tradition of long-arm jurisdiction by American courts, Chinese courts on the other hand is very conservative in dealing with foreign assets in divorce cases. Unless the parties agree on the splitting of foreign assets, China courts would generally refuse to decide on those foreign assets despite such assets are community properties of the couple.

II. What Should You Do

Well, if you are caught in such a difficult situtation, what shall you do?

Sorry, there is no one-size-for-all solution, as each case has its own unique conditions. But you at least need to know the following before making your final decision:

(1) American Court Judgments Won't be Enforced in China at Large

As you may have known before, foreign divorce judgments can be recognized and enforced through China courts **to the extent that** only divorce or dissolution of marriage itself in such foreign judgments are recognizied. Assets splitting and children custody in such foreign court judgments won't get recognized and enforced by China courts. No way!

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I am not sure about whether Chinese family court judgments can be enforced in foreign countries, and I doubt it.

(2) You May Sue in both Countries at the Same Time

At least, I know that if your divorce proceeding is ongoing in the foreign country, subject to the reqirements of China court jurisdiction, you may be able to take legal action to divorce in China court at the same time. In other words, the ongoing foreign divorce proceeding doesn't bar or prevent China courts from exercising jurisdiction over the divorce the same couple provided that the case is eligible for China court jurisdictions.

Let me reiterate it that you may take parallel legal action to divorce your spouse in both China and another foreign country.

But why bother to double your legal cost to take two parallel legal action for the same divorce?

Well, share a story, a real case indeed. A client of mine in the past approached me for advice on her cross-border divorce against her husband in China and they had substantial assets in China. She initially hired a China lawyer inquiring about where to litigate to maximize her benefits, and her lawyer even went to court to ask about whether she could sue in China while she litigated in USA. Her lawyer got a negative answer (most likely because the court clerk didn't know about foreign-related divorce laws or court didn't want to deal with complicated foreign-related cases). So the client went on to litigate in USA, which as you may well know, could drag for years. Three years later, when she got to the end in the USA court which did deliver a favorable judgment to her, but she found that some of the

important assets in Shanghai China had been disposed of by her husband already, leaving her favorable American court judgment meaningless. For disposal of marital properties, read a prior post here.

See the point in getting two legal actions run at the same time? Yes, it is about protecting the assets that may be split in the future, making sure the China spouse won't be able to hide and dispose of those assets by him or her alone. Once those physical assets like real estates are transformed into cash, you will have tons of trouble to recover your money after your divorce in the foreign jurisdiction.

III. Conclusion

Simple as always. Cross-border divorce or estate disputes are not easy to manage, involving complicated forum shopping and choice of applicable laws, which are far beyond a laymen's mind.

Consult your lawyer in China and in the foreign jurisdiction, and set up your legal team before you take any serious legal action.

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