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

Description

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.

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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

As the couple were fighting in a China family court (if you have question about China court jurisdiction over the divorce between two foreigners, click here.), the first issue for dividing the corporate shares before the judge is to decide on what laws will be applied in

(1) determining the ownership of the corporate shares registered in the name of the husband; and

(2) how the corporate shares be divided between the divorcing spouses.

Yes, these are two separate issues that are often overlooked by lawyers and judges.

1. ***Are These Shares Personal Property of the Husband or Community Property of the Couple***

As a matter of legislation and practice in China, when it comes to division of assets in a divorce case, judges are educated and trained to think and reason as follows: whether the asset in question is a separate and property of one spouse or the community property acquired by the couple after marriage;

if the former, it won't be split, and if the latter, split roughly half and half between the couple or a slightly skewed ratio factoring into other elements.

So who owns the monetary value of these corporate shares? A must-answer question.

To answer this question, the judge needs to determine the applicable law. Since it is a matter of marital property relationship, it seems pretty clear in Article 24 of China Law on Choice of Laws for Foreign-related Civil Relationships which reads:

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> Article 24 As for the property relation between husband and wife, the parties concerned may choose the applicable laws at the habitual residence, of the state of nationality or at the locality of the main properties of one party by agreement. If the parties do not choose, the laws at the mutual habitual residence shall apply; if there is no mutual habitual residence, the laws of the mutual state of nationality shall apply.

According to Article 24, marital or matrimonial property relationship, in the absence of agreement between the couple, shall be governed by the law of their common habitual residence.

So where is the couple's common habitual residence?

Go back to the facts, and we find that there are two different habitual residences of the couple: one is the place they lived before moving to China and the second is the place in Shanghai, China. Which one is relevant or both?

Unfortunately, the silence on timing of habitual residence in this Article 24 has been criticized 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:

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> the place a natual 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,

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> 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 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 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

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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.

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Author
admin

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