

Cross-border Divorce in China II: Choice of Law on Division of Matrimonial Properties

Description

Recently we are dealing with two interesting cross-border divorce cases. The parties to the divorce don't have habitual residence in China but they have real properties situated in China that need to be divided and partitioned. An interesting legal issue regarding the choice of applicable law appears here that doesn't seem to be clear in judicial practice.



I. Hypothetical Case Facts

Let us create a hypothetical case mimicking the facts in our real cases: a Chinese wife marries a foreign man in or outside of China, and later, they buy a home in Shanghai China. They live in their Shanghai home for a few years before their relationship breaks down and separates from each other with one living in China and the other outside of China. They end up in court room for divorce.

In practice, the nationalities of the parties matter in term of [case jurisdiction](#) and choice of law (as explained below) as well, esp when they are both citizens of one country.

The fight for divorce and assets can happen in China esp when there is a party that is Chinese. Sometimes, the spouses have divorced outside China but must come to China court for dividing the

(2) which is the starting point for calculating the one-year period?

In cases we have found, some courts calculated the one period prior to the filing of the case without explaining why. Some courts took to say the period shall be the period prior to the purchase of the property in question.

If you look at the interpretation by China Supreme Court, the period shall be the time prior to creation, alteration or termination of the civil relationship, which, in our discussion here, is matrimonial property relationship in regard of the home property. Naturally, one should think of the time of purchase of the home property as the starting point and trace one year back from there.

On the other hand, it can also be argued that the filing of the lawsuit to claim and split the property shall be considered as the fact leading to termination of their relationship over the property. So, it may not be wrong to look at the one-year period prior to the case filing. Ah? Not a convincing argument?

What surprised me is that in a case we located the judges from Shanghai intermediary court referred to the time of marriage as the starting point in computing the one year period on the ground that such property relationship is incident to the personal relationship (marriage), and thus the time of creation of the latter personal relationship shall control. To me this looks absurd, how come you disregard the very nature of a property relationship at the core no matter however incidental or closely associated with marriage?

It is a total mess, isn't it?

Apparently, different starting point in computing the one-year period of time can lead to completely opposite results.

(3) Habitual Residence in Same Home or Same Country/Region?

When you talk about residence, habitual or not, I guess most people will agree such residence shall refer to a specific dwelling address. Then a mutual habitual residence shall mean a specific residence shared by both parties.

However, we did notice that there is a view that the mutual habitual residence can be found and established so long as the couple live in the same country or region. You call this mutual habitual residence?

You have your own understanding of the issue, and I cannot tell what is right at the moment, pending on further interpretation by China courts. Over time, we may be able to come to a consensus on this as well.

See, there are quite a number of problems surrounding the choice of law issue in cross-border divorces in regard of property ownership affirmation and division.

IV. Lessons and Tips

What can we do or learn from this muddy area of law?

(1) Sign Pre-nuptial or Nuptial Agreement

People who are involved in cross-border marriage and who have concern over matrimonial properties shall consider adopting a pre-nuptial or nuptial agreement in which applicable law is clearly stipulated to avoid future shock. Generally it is advisable to review such contract or agreement periodically, esp when the couple relocate to a new country or region.

(2) Taking Advantage of the Ambiguity

For people who are already in the course of preparing for a divorce, if possible, you should make moves to ensure that the ambiguity is dispelled and will play out in your favor in the end. This will require relocation to a different place to ensure that desired applicable law will be applied in your case. This will require expert advice on what you need to do to take an upper hand in your divorce battle.

If you have other questions, please feel free to contact the author at his emails above.

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Author

admin

Shanghai Landing Law Offices