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 hypothetic 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 real estate properties in China.

II. Provisions of Choice of Laws under China Laws

When there is a case that has foreign elements (esp involving a foreign party), it is a foreign-related case under China Civil Procedure Law. As always, the attorneys and judges shall first decide on the applicable laws in this case.

We need to turn to China Law on Choice of Laws in Foreign-Related Civil Cases that provides for what laws shall apply in certain foreign related legal matters.

Unfortunately, there is a lot of confusion at this very beginning because of the following three provisions in China Law of Choice of Laws:

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> Article 24 As for the matrimonial property relation between husband and wife, the parties concerned may choose by agreement the applicable laws at the habitual residence, of the state of nationality of one party or at the place of major property of one party. 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.
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> ?27? ?????????????
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> Article 27 The laws at the locality of the court shall apply to a divorce by litigation.
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> ?36? ?????????????????
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> Article 36 The laws at the locality of immovables shall apply to the right to immovables.

We may have to scold the language used by the Law, too vague and concise to be clear.

In the case of divorcing spouses fighting for China real properties (homes or offices or other immovable properties) in China court, these three provisions are often mentioned and applied by China courts mistakenly, as revealed by our research on precedent cases.

For example, some courts (esp in second- or third-tiered cities in China where courts don’t deal with a lot of cross-border cases) even interpret Article 27 so broadly that all matters including splitting of properties in a divorce case shall be governed by the law at the place of forum courts, namely, Chinese laws. This is egregiously wrong, effectively rendering Article 24 useless.

Some courts skip Article 24 and apply Article 36 in those cases involving real properties on the ground that the divorcing parties' claim or dispute over rights in real properties. This is also often discussed in many cases. Over the years ever since the enactment of Law on Choice of Laws, there has been an increasing consensus built here that property disputes between spouses or associated with marriage shall be governed by Article 24 instead of Article 36. However, still we see courts err on this point.

This particular issue of choice of law can be critical and a game-changer in cross border divorce cases. However only those attorneys who specialize in cross-border legal cases can be well-versed in this area of law. This is exactly why very often we are chosen to represent clients in other cities in China often requiring travel. In a nutshell, not every lawyer is good at this niche legal service market.

III. Interpretation of Article 24

Our discussion has not ended above yet. More confusion comes with Article 24 in practice.

In Section II above, we conclude that disputes over real properties between spouses during or after divorce shall fall within the ambits of Article 24 of China Law on Choice of Laws.

We focus on the second part of Article 24 which addresses the applicable law when the parties don't have any written agreement or cannot agree on the choice of laws. Now it is the duty of the court to decide thereon.

The judge shall first look at whether the parties have habitual residence. This is exactly where problem arises.

(1) What is Habitual Residence

Habitual residence is a particularly important concept in the Law on Choice of Laws. It is not domicile for sure. China Supreme Court in its interpretation of the Law says:

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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, except for places for hospitalization, employment secondment or public services.

Clear? Probably not at all.

The precedent cases we have found indicate that there is a great deal of ambiguity in determining whether the parties have mutual habitual residence. Some courts simply avert detailed discussion on how they come to finding of habitual residence.

Further issues shall be clarified in finding mutual habitual residence in cases.

(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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