Make a Will for Your China Assets: why and how?

Description

With so many Chinese emigrating to foreign countries while having substantial assets within China or so many foreigners holding China assets, it is no wonder that we have seen the increase of inquiries regarding estate plan for their China assets, mainly real properties, corporate shares or bank deposits.

I. Why Do You Need a Separate Will for Your China Assets

Due to the widely different inheritance laws and rules in different jurisdictions, very often wills made under foreign laws may not be enforced or executed in China esp when there are provisions regarding roles of executors or trustees. Also the way how estate is administered is widely different as well, so if the China assets as a part of the whole estate are covered only by the wills made under the foreign laws, it won't be administered in the same way as foreign estates.

Put it simply, you need a separate will to deal with your China assets upon your death so that your heirs can be better off when it comes to the inheritance of the estate.

we will write an article about how foreign wills are received and treated in China by Chinese notary offices and courts in more details later on.

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II. How to Make a Will for your China Assets

Now you know you need to prepare a separate will for your China assets, but how exactly do you go about it?

(1) Where should the will be made?

Assuming (actually most likely it is a fact) that you have the China asset or property, but you don't live in China or you don't have any habitual residence in China, where should you make the will in your home country or come to China to do it?

Before the enactment of *China Law on Choice of Law on Foreign Related Civil Relationships* in 2011, China notary offices have been helping foreigners with making wills in China. However after the enactment of the Law, unless the foreigners live in China for more than one year in a certain residence (that can be recognized as their habitual residence), China notary offices no longer entertain such clients. The reason lies with Article 33 of the Law which says:

> with regard to validity of a will/testament, the applicable law shall be the law of the habitual residence or of the state of the nationality of the testator at the time of making the will or at the time of death.

So except that the foreign clients live in China and establish the habitual residence in the place where the notary office is located, the applicable law regarding the validity of the will will be the foreign laws

which Chinese notary offices are not familiar or know nothing about. For that reason, Chinese notary offices worrying about professional risks have stopped providing will notarization services to foreign clients.

Now it is clear that foreigners without a habitual residence in China can only make a will under and governed by the foreign laws of the place of their habitual residences or their national laws.

(2) Is It Possible to Choose Chinese Laws as Applicable Law for Will?

Since the will is specifically made for China assets or properties, clients may wish to make it clear and firm that the will and the inheritance thereunder will be governed by Chinese law, which will save a lot of trouble for Chinese courts and judges to apply foreign laws, something Chinese judges are pretty much averse to.

So is it ok for the testator to choose in his or her will Chinese inheritance laws as the applicable laws for the succession of their China estates?

A good question, but the answer is probably bad. While some of the countries in the world have started to allow testators to designate applicable laws in their wills or testaments, so far it has not been the mainstream in today's global society. China has apparently not gone that far, I mean, under current Chinese laws, the laws designated by a testator in his or her will is not likely to be upheld by Chinese courts.

On the other hand, if you have chosen the applicable law in your will or testament, then you don't have to worry much as the likely outcome is that only your choice of law is void. In other words, despite the voidness of the clause of choice of law, the courts may still respect the rest of the terms of that will or testament.

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Indeed, our research on precedent cases involving wills made outside of China shows that there is a strong sign of Chinese courts attempting to avoid the application of foreign laws. The choice of Chinese laws as applicable law in wills, while invalid, may lend convenience or offer easy excuse to judges to apply Chinese laws.

In the end, a client that wishes to prepare a will for his or her China assets, may need to involve both Chinese lawyers and local lawyers as well to make sure the will or testament will hold up in Chinese courts.

[*if you wish to know more about Chinese divorce laws and inheritance laws, you can follow Jason Tian on Facebook to ensure prompt attention of any update or new posts about China Laws.*]

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