Inheritance of Personal Properties/Chattels in China: a Real Headache (I)

Description

In most cases in the past years, we help foreign clients in dealing with inheritance or succession of real properties, mainly residential properties like apartments or houses in cities like Shenzhen, Shanghai, Guangzhou, Beijing and even Suzhou.

Occasionally, we received clients' inquiries about inheriting chattels or personal properties (properties other than real properties or real estate) in China, such as corporate shares, antiques, arts, bank deposits, and other chose in actions. The rules under Chinese laws relating to succession of such chattels can be very different from inheritance of real properties and may well lead to dilemma for the heirs or testament beneficiaries.

I. Hypothetical Facts

A high-ranking foreign corporate officer from Europe who had been working in China for years and had accumulated a substantial amount of money in his bank account with Bank of China (most popular China domestic bank for foreigners) in Shanghai died suddenly, leaving the estate fund to his heirs.

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II. The Deceased Died without Will/Testament

Just assuming that the deceased died without a will or testament, how do the heirs go about the inheritance process in China to claim the estate fund in the bank account?

First of all, as a matter involving a foreigner, it is a foreign-related civil matter, and we need to firstly decide on the applicable law that shall govern inheritance of estate. Naturally, we turn to China Law on Choice of Law to Foreign-related Civil Relations. Article 31 reads:

> The laws of the place of the habitual residence at the time of death of the deceased shall apply in intestate inheritances, but the laws of the locality of the real estate shall apply in the intestate inheritance of a real estate.
> *Applicable Laws in Intestate Inheritances of both Personal and Real Properties.*

So the law directs that the applicable law for inheritance of chattels or personal properties shall be the law at the habitual residence of the deceased at the time of his death. Here there could be two scenarios:

(1) with habitual residence in China

In this case, the inheritance of the bank deposits shall be governed and carried out in accordance with China succession law and related rules. Then please refer to other posts on the blog about inheritance of China estates by foreigners, Inheritance of estates in China: you may have to resort to courts.

(2) without habitual residence in China

In this case, the foreign laws will apply, and problem arises here. It is a requirement of China banking regulator that the bank shall only release the estate fund upon presentment of the so called "inheritance right notarisation document" issued by a China notary office in that municipal jurisdiction. Before China's enactment of the Law on Choice of Law, notary offices in China will be ready to issue the inheritance right notarisation document to foreign heirs believing the applicable law is Chinese law. But now, when it is clear that the foreign laws shall apply, many Chinese notary offices are now refusing to issue such notarisation documents since they simply don't know about any foreign laws. To fend off risks, they simply don't do it any more, basically depriving the foreign heirs of an easy option for going about inheritance in China.

When China notary offices refuse to issue the notarisation document, then the only way is to go to China courts for final solution.

III. the Deceased Died with a Will/Testament

Will a well-drafted testament (assuming that the testament is made outside of China) solve the problem of the intestate succession of the bank deposit in China? Well, the answer may be disappointing. Again, let us first find out the applicable laws from China Law on Choice of Laws:

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> Article 32 A testament shall be confirmed as duly formed if its form conforms to the laws at the habitual residence, of the state of nationality or at the locality of the testamentary acts when the testament is made or at the time of death of the testator.

> Article 33 The laws at the habitual residence or of the state of nationality when the testament is made or at the time of death of the testator shall apply to the validity of a testament.

In practice, testamentary form is not often a point of problem. It is the judicial consensus in China that the courts should try to adopt the law that gives effect to the form of the testament in question. But when it comes to the validity of the testament, there is plenty of confusion.

(1) with habitual residence within China

Again, in order to determine the applicable law (Chinese law or foreign laws), we need to know whether the deceased has habitual residence in China either at the time of making the will or at the time of death. If yes, then Chinese law will apply to the inheritance or succession of the estate fund. ***BUT*** this does not necessarily mean the process of inheritance will be easy and straightforward.

As we assume that the will or testament is made outside of China duly notarized, there could still be problem for Chinese notary offices to use the testament for purpose of issuing the inheritance right notarisation document because the notary officer will have trouble to equal the foreign "duly notarized" testament as the "notarized testament" under Chinese inheritance law which they deal most with.

Also it shall be noted that as a notarial practice in China, even the testament or will is duly notarized, notary officer will still summon all heirs to appear (or be represented by attorneys) in order to further make sure that the will or testament is all acceptable and not challenged by any heirs. This is often an impossible mission for the heirs to ran, since those heirs may scatter in different countries or some of them are physically unable to travel.

(2) Without habitual residence in China

Well, as provided in the quoted Article 33 of China Law on Choice of Laws, the foreign inheritance laws will apply. The same problem with China notary offices as described above arises again.

As in the case of intestate inheritance, if notary offices don't work with foreign laws, the foreign heirs can only resort to Chinese courts for a way out.

Moreover, it could be more complicated if the deceased has his or her habitual residence outside of his or her home country, resulting in two applicable foreign laws that can be chosen by Chinese courts. It is not hard to imagine that the different foreign laws may be contradictory in whole or in part with regard to the contents of the testament or will. So far, it is not clear how Chinese courts will choose the applicable law.

In practice, to save trouble for clients, in the case of testate inheritance, if the applicable law can be Chinese laws (when the deceased has habitual residence in China) and there is no dispute among heirs, then we always advise clients to put aside the will but to conduct the inheritance based on Chinese intestate rules to achieve the same outcome as set out in the will or testament.

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IV. How to Deal with the Problems: Estate Planning

As you may see from the above, there could be difficult situations for foreign heirs to carry out inheritance of personal properties or chattels, which difficulties are brought about by China Law on the Choice of Law in Foreign-related Civil Relations.

So how to deal with the difficulties? Honestly speaking, there is probably no easy way to get over them if the deceased dies suddenly without any estate plan before his death.

On one hand, foreign residents with assets in China shall well mind the possible difficulties for their loved ones and shall prepare a good estate plan to avoid those problems and difficulties in relation to inheritance of estates in China.

On the other hand, the final solution shall be offered by legislation in China to clarify the confusion, in particular, about the choice of foreign applicable law among multiple options, or to grant to testators the freedom of designating the applicable law in his or her testament, for example, allowing them to choose Chinese inheritance law in their wills or testaments made for their China assets.

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