

Estate Planning for Your China Assets: Not Necessarily by Chinese Lawyers

Description

Estate planning professionals dealing with [cross-border estate planning](#) often say that clients should prepare separate wills for their overseas assets to avoid problems in local jurisdictions. Yes, this is true in most cases, but not in all cases.

Do I create more than one Will if I have

The best way to ensure your wishes are met and your estate is properly situated. It is best to consult a legal professional to advise you on the rights of executors and beneficiaries facing complicated

A excerpt from a website advising on estate planning for overseas properties

Let us look at the following scenario: a foreign citizen, say an American, who doesn't habitually reside in China wants to write a will for their assets in China, be it a piece of real property or bank deposits or corporate equity interests.

I. the Problem for Chinese Lawyers: the Applicable Laws

When foreign lawyers may refer the matter of estate planning for China assets to Chinese lawyers, they are assuming that the matter shall be governed by Chinese laws, thus naturally the job for China lawyers.

BUT HOLD ON!!!!!!!

When it comes to such a foreign-related matter, we Chinese lawyers need to turn to China private international laws, which are written in the [Law of Choice of Applicable Laws in Foreign-related Civil Relationships](#) (effective as of April 1, 2011), a law that has tied up the hands of Chinese lawyers on the matter. Chapter 5 of the Law of Choice of Applicable Laws deals with private international laws in relation to inheritance. Article 32 provides:

A testament shall be confirmed as valid 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 32 of China Law on Choice of Applicable Laws

At the same time, Article 33 provides:

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

Article 33 of China Law on Choice of Applicable Laws

In particular, Article 33 is more often triggered, as in our case. In accordance with this Article 33, even though the properties in question are in China, the applicable law governing the validity of the will is any of the four possible foreign laws (of the habitual residence or of state of nationality at the time of making the will or death of the testator) but Chinese law. In other words, Chinese law is not the applicable law that will be applied in deciding on the validity of the will.

So why bother a Chinese lawyer for drafting the will?

Indeed, this dilemma has bit me bitterly as I have to turn down many foreign clients who ask for help from us to set up their estate plan for their China assets.

Please note that Article 33 doesn't distinguish personal properties and real properties, meaning that in such factual pattern as we have described, there is not much we can do to help clients with regard to their estate planning for China assets.

In an extreme case where a real property in China is involved, the foreign owner may find himself in a situation where neither China lawyers or foreign lawyers can help him with drafting the will, because in some foreign jurisdictions, local private international laws say that [estate planning for real properties](#) shall be governed by the laws in the place where the real properties are located. You see here, the conflict in the rules of applicable laws can cause so much confusion instead of clarity in cross-border estate planning practice.

II. Solution to the Problem

So what can a foreigner do to set up an estate plan for their China assets?

(1) Include China Assets in Your Foreign Will

This is actually desirable if the client has a simple family structure and there is not a good chance of dispute over the inheritance of his or her estates wherever situated. In this case, this foreign will can be

quickly probated in the foreign court whereby the validity of the will is confirmed by the foreign courts. Once the foreign will is probated and confirmed as valid by the foreign courts, it is easier for China notary offices to accept such foreign wills as valid, based on which China notary offices will be willing to [issue the notarization document to affirm the inheritance rights of the designated beneficiary to inherit the China estates](#).

Indeed, if a stand-alone will is made for the China assets which is not probated in foreign courts, then with the applicable laws being foreign laws, China notary offices will have a hard time to decide on the validity of the foreign wills, thus hesitant or unwilling to deal with such notarization request for inheriting estates in China.

So from the perspective of China lawyers, it may not be a good idea to prepare a separate will for your China properties.

(2) Get Your China Lawyer to Work with Foreign Lawyer

If there is a good reason not to include your China assets in your foreign will, then you will need to hire both a China estate attorney and a foreign one to work together to get the will drafted so as to make sure that the will is valid in China and the foreign jurisdiction.

Despite the [change of laws regarding legal weight of various forms of testament](#) brought about under China Civil Code, in practice, we still advise clients to have their wills notarized by China notary offices. After all, the validity of notarized wills is easier to prove and to be accepted by courts in China. However, because the applicable laws to such wills as discussed in our case are foreign laws, China notary offices generally refuse to notarize such wills. Instead, clients can choose to formalize their will by [having it witnessed by two persons who are not interested to beneficiaries](#), which is a common practice in many other jurisdictions.

Cross-border estate planning can be very challenging due to the often-conflicting rules between home and foreign jurisdictions. To better serve international clients, estate practitioners shall strive to better equip themselves with wider knowledge about family and inheritance laws in foreign jurisdictions.

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