

Happy Chinese New Year of 2024 and A Look Back on 2023

Description

We have just said goodbye to 2023 and welcomed the lunar new year of 2024.

It is interesting to see that on the same planet different ethnic people celebrating the new year in different ways, and this diversity of different cultures in the world makes it appealing and attractive for people to explore and experience exotic cultures.



Chinese New Year of Dragon

Looking back at 2023, it has been a fulfilling year for my Cross-border Family Law team at Shanghai Landing Law Offices as we have seen obvious increase of volume of cases in both marriage- and inheritance-related matters, contentious and non-contentious, and accordingly, accordingly, resulting in a new milestone of revenue for our team. Indeed, at the end of 2023, we have felt a greater demand for cross-border divorce and inheritance (including estate planning) legal services, and I will have to take on board a new team member soon to deal with the work load.

Let us single out a few cases that are of particular importance and landmark, something I am very proud of in legal practice career.

1. Foreign Trustee Granted the Power to Manage, Use and Dispose of Real Properties in China Mainland

This case is of particular interest and importance which is a landmark victory in the area of cross-border inheritance legal practice where a foreign testamentary trust over real properties is involved.

As you may know, China family trusts are still not well developed till now, and in practice, seldom will you see testamentary trusts used in estate planning in China. As a result, Chinese courts and judges are not familiar with testamentary trusts, not to mention foreign trusts.

In this case we helped the British trustee to assert and establish her capacity as a testamentary trustee of the trust set up by her late father over two pieces of real estates in Shenzhen, Guangdong province.

The two real properties are an apartment titled in the names of the deceased and his wife and another factory property titled in the name of the local village with the deceased having 40 year-long tenancy interests. Client sued the other family members and successfully overturned the decision of a lower court vesting interests of the two properties according to intestate succession law in China, and had herself affirmed as the testamentary trustee over the two properties in China enjoying the power of managing, using and disposing of the estates.

This case is probably the first one in history in which a foreign trustee is allowed to exercise its powers in managing real properties in China. Indeed, in the past, foreign trustees may be allowed to act over personal assets in China mainland, but not real properties. We have known quite a few cases in which foreign trustees are denied by China courts to exercise trustee powers over China real properties, and on the contrary, those real properties are distributed according to Chinese inheritance laws and vested outright in those beneficiaries designated in related wills.

However, this isolated success doesn't mean it opens the door wide enough to welcome foreign testamentary trustees to act over real properties in China mainland. Foreign estate attorneys shall act with prudence in advising clients on estate planning involving real properties in mainland China.

2. Insurance Benefits Paid by Foreign Insurer Paid into China and Converted into RMB

This matter is much about China laws on foreign exchange control: money flow across borders.

We are actually hired by a UK trust that manages the fund/insurance benefits paid by a UK insurance company under a group life insurance that covers the death of a senior staff of the China representative office of a UK law firm. The deceased Chinese employee covered under that group life insurance designated her minor son, a Chinese citizen. The trustees of the mentioned trust has the obligation to send the fund comprising the insurance benefits into China for the beneficiary.

It may sound absurd for China laws to block the payment of this GBP fund into China for the benefits of a Chinese citizen. However, that is true in this case. This substantial amount of foreign exchange fund cannot be readily converted into RMB that is the only lawful currency circulating within China. Yes, the trust may easily pay the GBP fund into the account of the beneficiary or his guardian's bank account in China, but it cannot be used without converting the same into RMB.

We took up the task with no guarantee of success, but commenced our endeavour to find cooperative bank and communicate with foreign exchange authority (SAFE) in Shanghai. Not every bank is interested in such complex and new business that may well lead to incompliance of China foreign exchange regulations.

Initially we thought this insurance-related fund was capital account foreign exchange, which shall be subject to approval by SAFE department, but SAFE official said they won't approve this kind of incoming fund due to lack of clear rules in this regard.

We also tried to present this whole thing as a matter of inheritance of foreign estates by Chinese citizens which is, according to current law, current account foreign exchanges that can be paid into China and converted to RMB without SAFE approval, but the bank refused to accept this story because we cannot produce documentation to prove this money was the estate of the deceased.

Finally, we worked together with the bank (by the way, smaller banks are more interested to such foreign exchange businesses) to present the fund as a result of consumptive and non-investment insurance policies which was not deemed as capital account fund, which was confirmed inexplicitly by SAFE officials following multiple visits to SAFE office in Shanghai. The bank we chose finally proceeded to accept the wire of the fund from UK trustees and convert the same into RMB accordingly, a happy end to all related parties.

3. Child Abduction Case Collaboration with IAFL Fellow in California

Thanks to IAFL as a collaboration platform for cross-border family lawyers, I have cooperated with other IAFL fellows working on different matters referred to and by me.

At the end of 2023, a client of mine from China mainland contacted me for help to take back his son who was abducted into California by the client's wife during the process of divorce proceedings in China.

This is the very first case of this kind in my practice history, and I was very excited to work on such a case. Fortunately enough, I came to know Steven Yoda a veteran international family lawyer in California who has a great deal of experience in handling similar cases.

The client finally agreed to hire lawyers from both China and California to work together towards his goal of bringing his son back home in China.

This case is still ongoing, and we hope that such collaboration of American and Chinese family lawyers will culminate into success for our mutual client.

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