

CANADA / JUDGMENT

Liu v. Xu

2020 BCSC 92

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 92 Liu v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liu v. Xu,

2020 BCSC 92

Date: 20200124

Docket: E191222

Registry: Vancouver

Between:

Li Ping Liu

Claimant

And

Si Jie Xu

Respondent

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Claimant:

R. Chen

Counsel for the Respondent:

S.K. Chen

Place and Date of Hearing:

Vancouver, B.C.

November 8, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2020

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1. INTRODUCTION

- [1] Ms. Liu and Mr. Xu are married with two children. On June 3, 2018, the parties separated after approximately 11 years of marriage.
- [2] Ms. Liu, Mr. Xu, and their two children are Canadian residents. Ms. Liu and Mr. Xu are also citizens of China.
- [3] On January 9, 2019, the parties signed a separation agreement (the "SA") drafted by Mr. Xu. The SA has a forum selection clause assigning a court with jurisdiction in Shanghai, China as the agreed forum for the resolution of disputes between the parties relating to their divorce and separation.
- [4] On April 16, 2019, Mr. Xu commenced divorce proceedings in Shanghai by filing a civil complaint with The People's Courts of the Pudong New Area of Shanghai Municipality ("The People's Courts, Shanghai").
- [5] On May 8, 2019, Ms. Liu commenced family proceedings by filing a notice of family claim in this Court (the "BC Proceeding").
- [6] Each party has brought an application before this Court.
- [7] In her application, Ms. Liu asks the Court to recognize its jurisdiction over the BC Proceeding.
- [8] In his application, Mr. Xu asks for "an order dismissing or staying this proceeding [the BC Proceeding] pending the outcome of the divorce proceeding in Shanghai, China [The People's Courts, Shanghai], on the grounds that this Court has no jurisdiction or ought to decline to exercise jurisdiction over the parties with respect to the resolution or the dispute arising from the Agreements and the enforcement thereof".
- [9] Mr. Xu concedes that this Court has territorial competence, but submits that the Court should decline to exercise jurisdiction over the parties primarily on the basis of the forum selection clause in the SA in favour of The People's Courts, Shanghai.

[10] For the reasons that follow, the Court finds that the SA is void and, therefore, is not enforceable. The Court has the jurisdiction to hear all matters involved in the family proceedings. The Court will not decline jurisdiction.

2. KEY FACTS

[11] Ms. Liu is 37 years old. Mr. Xu is 43 years old.

[12] On January 20, 2007, the parties were married in Shanghai, China.

[13] The parties have two children, a son who is 7 years old and a daughter who is 12 years old.

[14] On February 28, 2011, the parties, with their daughter, immigrated to Canada. Their son was born in Canada.

[15] Ms. Liu is currently a full-time student at the University of British Columbia ("UBC") studying to receive a Diploma in Health Education. She wishes to become a registered clinical counsellor, using her fluency in Mandarin to help others who may otherwise be unable to readily receive counselling.

[16] Mr. Xu works in Canada and in China and divides his time between Vancouver and Shanghai.

[17] In China, Mr. Xu is employed by Shanghai Jiasheng Products Co. Ltd. ("Jiasheng Products") which manufactures and sells cleaning products. He says that the corporation was originally founded in 2003 by him and his uncle. He swears that after he immigrated to Canada, he sold his shares in the capital of the corporation to his parents. He further swears that since the sale of his shares, he has "been involved in the company only as a paid employee between 2013 and 2017" and that he has "no legal or beneficial interest in the company".

[18] Mr. Xu swears that he owns a 1% interest in a corporation, Shanghai Jiasheng Cleaning Products Co. Ltd. ("Jiasheng Cleaning"). He swears that his brother, Qingfeng Xu, owns a 99% interest in that corporation. Mr. Xu further swears that he is "not involved in his [brother's] business, nor do I receive any income or dividends".

[19] In 2017, Mr. Xu incorporated Setbest Enterprises Ltd. ("Setbest") under the laws of the Province of British Columbia. The incorporation agreement for Setbest shows the parties as owning all of the shares in the capital of Setbest. Mr. Xu is shown as holding 1000 Class A common shares and Ms. Liu is shown as holding 1000 Class B common shares. The Class A shares are voting shares. The Class B shares are non-voting. Counsel stated that all of the shares participate fully.

[20] Setbest purchases cleaning products from China and exports them directly from China to the United States. Mr. Xu manages Setbest.

- [21] For its fiscal years ending May 31, 2018 and May 31, 2019, Setbest's taxable income was \$449,488 and \$548,898 respectively. However, Mr. Xu says that Setbest has recently been negatively impacted by a current trade dispute between China and the United States.
- [22] For a period of approximately two years, Mr. Xu lost his Canadian permanent resident status. With Ms. Liu's sponsorship, he reapplied successfully and on July 31, 2018, received permanent resident status again. In his 2016, 2017, and 2018 income tax returns, Mr. Xu certifies that he is a resident of British Columbia as of the end of each of those years.
- [23] In 2011, the year the parties immigrated to Canada, Mr. Xu purchased a house in Surrey for \$800,000 (funding with a \$580,000 mortgage) (the "Surrey Property").
- [24] In 2015, the parties sold the Surrey Property. They purchased a condominium near UBC (the "UBC Condo") and a house on West 50th Avenue ("the West 50th House") in Vancouver using the sale proceeds from the Surrey Property to help fund the purchases.
- [25] The UBC Condo was used as the parties' main residence. The West 50th House was initially an investment property. Since separation, Mr. Xu has used the West 50th House as his Vancouver residence.
- [26] The respective 2019 BC Assessment values are \$1,367,000 for the UBC Condo and \$2,514,700 for the West 50th House.
- [27] Since separation, the children have continued to live with Ms. Liu in the UBC Condo other than for a temporary arrangement under which the children have been living with Mr. Xu at the West 50th House since late September 2019. The temporary living arrangement arose from Ms. Liu experiencing a serious health issue requiring medical attention while trying to raise the children and maintain her studies.
- [28] The UBC Condo is registered in Ms. Liu's name. The West 50th House is registered in Mr. Xu's name.
- [29] Mr. Xu calculates the equity of the two properties as follows:

The UBC Condo

Value (per 2019 BC Assessment)

\$1,367,000.00

Mortgage

(\$670,000.00)

Loan from Qingfeng Xu

(\$200,600.00)

Equity

\$496,400.00

The West 50th House

Value (per 2019 BC Assessment)

\$2,514,700.00

Mortgage

(\$1,444,669.72)

Loan from Qingfeng Xu

(\$134,600.58)

Loan from Zuguo Shang

(\$199,990.00)

Equity

\$735,439.70

[30] As noted above, Qingfeng Xu is Mr. Xu's brother. Zuguo Shang is a friend of both Ms. Liu and Mr. Xu.

[31] Ms. Liu challenges that funds were borrowed from Qingfeng Xu or Zuguo Shang in connection with either property.

[32] In her amended notice of family claim filed August 26, 2019, Ms. Liu states that Mr. Xu owns in China, a "Shanghai Condo", a "Shanghai Townhouse", a "Commercial Property", and a "Factory".

[33] Mr. Xu says that the only real property he owns in China is the Shanghai Townhouse. He does not state the value of the Shanghai Townhouse.

[34] In the BC Proceeding, he has filed a jurisdictional response: Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR], R. 18-1. He has also filed a response to the family claim disputing this Court's jurisdiction based on the forum selection clause in the SA and the divorce proceedings he commenced in The People's Courts, Shanghai. He has not filed a Form F8 Financial Statement.

[35] On January 9, 2019, the parties signed the SA. A copy of the SA is attached as Schedule "A" to these reasons.

[36] As noted, on April 16, 2019, Mr. Xu commenced divorce proceedings in China. Ms. Liu says that before becoming aware of the proceedings brought by Mr. Xu in China, she filed her notice of family claim in this Court on May 8, 2019 and had it personally served on Mr. Xu on May 9, 2019.

3. TERRITORIAL COMPETENCE

a) Generally

- [37] The parties do not dispute that the Court has territorial competence to hear all the matters at bar. Mr. Xu says, however, that this Court should decline to exercise its jurisdiction based on the SA's forum selection clause. In the alternative, Mr. Xu says that this Court should not exercise its jurisdiction with respect to the division of the parties' property in China.
- [38] I will review briefly the existence of this Court's jurisdiction. The question as to whether this Court should decline to exercise jurisdiction over all or some of the issues at bar is addressed later in these reasons.
- [39] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, Justice LeBel writing for the Supreme Court of Canada elaborated on the distinction between the existence of jurisdiction and the exercise of jurisdiction. Territorial competence is part of the existence of jurisdiction. Justice LeBel states at paras. 101 to 103:
- [101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of forum non conveniens. Forum non conveniens comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
- [102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes forum non conveniens. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.
- [103] If a defendant raises an issue of forum non conveniens, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of forum non conveniens must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.
- [40] The existence of this Court's jurisdiction with respect to the matters before me is found in the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA], the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Family Law Act, S.B.C. 2011, c. 25 [FLA], in conjunction with this Court's general jurisdiction as a provincial Superior Court.

b) Court Jurisdiction and Proceedings Transfer Act

[41] The starting point for the analysis of the existence and the exercise of jurisdiction is the CJPTA. The CJPTA provides specific rules for the determination of jurisdiction (and forum non conveniens).

[42] The CJPTA recognizes that federal or provincial legislation may create different rules for both territorial competence (existence of jurisdiction) and forum non conveniens (discretion not to exercise jurisdiction). Section 12 provides:

If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

- (a) confers jurisdiction or territorial competence on a court, or
- (b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

[43] Section 3 of the CJPTA sets out when a court has territorial competence in a proceeding. In the case at bar, the relevant part reads:

A court has territorial competence in a proceeding that is brought against a person only if

...

- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding,

[44] A court is defined in s. 2 of the CJPTA as "a court of British Columbia".

[45] The term "ordinarily resident" for individuals is not defined in the CJPTA. In *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at 231, Justice Estey sets forth the meaning of the term, stating that "one is 'ordinarily resident' in the place where in the settled routine of his life he regularly, normally or customarily lives". A person may be ordinarily resident in more than one place.

[46] In *Broad v. Pavlis*, 2015 BCCA 20, our Court of Appeal considered whether the appellant was "ordinarily resident" in British Columbia. In the family law claim it was not disputed that the appellant was ordinarily resident in Alberta; however, he also regularly spent approximately 30% of his time at a home he maintained in British Columbia as a place for vacation and family time. Applying the definition set out in *Thomson*, the Court stated that it was "part of the 'settled routine of his life'" to spend months of the year at his British Columbia property: paras. 22, 36. As a result, the Court upheld the trial judge's finding that the appellant was ordinarily resident in British Columbia for the purposes of the family law claim.

[47] In the present case, the parties immigrated to British Columbia in 2011 with the intention of making British Columbia their home. Although Mr. Xu travels to China frequently for business, he is ordinarily resident in British Columbia. He spends a significant amount of time in British Columbia. He owns property in Vancouver. He certifies to our tax authorities that he is a resident of British Columbia. He recently regained his Canadian permanent resident status. I find that Mr. Xu is "ordinarily resident" in British Columbia.

c) Divorce Act

[48] The provisions of the Divorce Act addressing jurisdiction must be considered.

[49] Jurisdiction under the Divorce Act is governed by ss. 3(1) and 4(1):

3 (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

4 (1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if

(a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or

(b) both former spouses accept the jurisdiction of the court.

[50] For the province of British Columbia, "court" is defined as "the Supreme Court of the Province": Divorce Act, s. 2(1), definition of "court".

[51] Corollary relief may include child support, spousal support, and custody. Corollary relief does not include the division of property.

[52] The parties are ordinarily resident in British Columbia, as stated above, and they had been so for at least one year prior to the commencement of the BC Proceeding.

[53] In sum, the Divorce Act confers jurisdiction on this Court to make an order of divorce and the corollary relief of custody, spousal support, and child support.

d) Family Law Act

[54] Ms. Liu claims relief under both the Divorce Act and the FLA. The FLA also confers jurisdiction on the Court with respect to certain matters. Accordingly, the provisions of the FLA addressing jurisdiction must be considered.

[55] Under the FLA, s. 74 governs jurisdiction with respect to guardianship, parenting arrangements, or contact with a child where orders respecting these matters may be made in more than one jurisdiction. Section 74 provides in part:

74 (1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

(2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:

(a) the child is habitually resident in British Columbia when the application is filed;

[56] Section 72(2) provides:

(2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided

(a) with his or her parents,

(b) if the parents are living separate and apart, with one parent

(i) under an agreement,

(ii) with the implied consent of the other parent, or

(iii) under an order of a court or tribunal

[57] As set out above, the children resided with the parties in Vancouver and, since the separation, have continued to reside with Ms. Liu in Vancouver with the agreement of the parties (except for the current agreed temporary arrangement where the children are living with Mr. Xu in Vancouver). Each child is therefore habitually resident in British Columbia (as defined in s. 72(2) of the FLA). In sum, jurisdiction exists for this Court to make the appropriate order under the FLA regarding guardianship, parenting arrangements, and contact with each child.

[58] The FLA does not set out the Court's jurisdiction over spousal or child support obligations. As a result, to the extent spousal or child support may arise under the FLA, the provisions of the CJPTA apply: *Fastlicht v. Carmichael*, 2018 BCSC 37 at para. 76. As a result, this Court has territorial competence over spousal and child support orders under the FLA.

[59] Section 106 of the FLA governs jurisdiction over property division. The relevant portion of this section with respect to territorial competence provides:

(1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

(2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

(c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started

[60] The term "habitually resident" is not defined with respect to property division.

- [61] In *Mark v. Mark*, [2005] UKHL 42 at para. 33, Baroness Hale of Richmond noted "habitual residence and ordinary residence are interchangeable concepts". In *S.R.L. v. K.J.T.*, 2014 BCSC 597, Justice Fenlon, then sitting in this Court, referred to Lady Hale's statement and stated (at para. 25) that the two expressions are "interchangeable".
- [62] I have previously found that Mr. Xu and Ms. Liu were each ordinarily resident in British Columbia at the time Ms. Liu filed her notice of family claim. With habitual residence and ordinary residence as interchangeable terms, I find that under s. 106(2)(c) of the FLA, this Court has territorial competence that it may exercise over the parties' property claims.
- [63] In sum, the Court has territorial competence over all of the matters engaged by the BC Proceeding.
- [64] The question becomes whether this Court should decline to exercise its jurisdiction over the matters (all or some) engaged in the BC Proceeding.
4. setting aside the separation agreement
- a) Generally
- [65] A key consideration is whether the parties have an agreement that The People's Courts, Shanghai is the proper forum to hear the matters engaged in the BC Proceeding.
- [66] As noted, Mr. Xu relies on the SA's forum selection clause to say that this Court should decline jurisdiction in favour of The People's Courts, Shanghai.
- [67] Ms. Liu says the SA should be set aside. Accordingly, she says the SA's forum selection clause should not be considered by this Court in determining whether it should decline to exercise its jurisdiction in favour of The People's Courts, Shanghai.
- b) Forum Selection Clauses
- [68] As the Supreme Court of Canada stated in *Douez v. Facebook*, 2017 SCC 33 at para. 27, forum selection clauses encroach on the public sphere of adjudication and therefore courts "do not simply enforce them like any other clause". Instead, courts determine whether to enforce the clause and stay an action brought contrary to it by applying a two-step test: *Douez* at para. 28; *Z.I. Pompey Industries v. ECU-Line*, 2003 SCC 27 at para. 39.
- [69] Under the first part of the test, the party seeking the stay must establish that the forum selection clause is valid, clear and enforceable, and that it applies to the cause of action: *Pompey* at para. 39. The party opposing the stay may resist the enforceability of a forum selection clause by raising a defence such as unconscionability, undue influence, or fraud: *Douez* at para. 28. If the party seeking the stay establishes the validity of the clause, then the party opposing the stay must show "strong cause" as to why the court should not enforce the forum selection clause and stay the action: *Pompey* at para. 39. The Court must consider all the circumstances, "including the 'convenience of the parties, fairness between the parties and the interests of justice': *Douez* at para. 29, citing *Pompey* at paras. 19 and 30-31.

c) Sham

[70] I find that the SA embraces a sham. Accordingly, I find that the SA is void and must be set aside. It will not be enforced, including its forum selection clause.

[71] D. Waters, M. Gillen and L. Smith's *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 154, describes a sham as follows:

The term "sham" in English and offshore parlance, adopted in Canada, is not a precise term. It is more a turn of speech: its meaning has been given as "something that is not what it seems: a counterfeit." [1] It originated in England with regard to transactions, to which of course there are always at least two parties, and it means the parties' true intent is that others shall be misled by the terms appearing in the transactional instrument. The real terms are something other, and the instrument is therefore declared void. [2]

[72] The sham is found in Articles II(4) and III(3) of the SA. For ease of reference, Article II(4) and III(3) read:

Party A [Mr. Xu] may, at its discretion, make payment to Party B's [Ms. Liu] personal account by salaries, dividends or other means through his company in Canada, provided, however, that Party B shall cooperate with Party A to complete the normal signing procedures required for the company's payroll, dividends, and tax returns, and the taxes thereon shall be borne by Party A. If Party B fails to follow the requirements of this Article, resulting in inability to pay the relevant expenses in full and on time, Party B shall be liable therefor.

Both Parties confirm in Canada that SETBEST ENTERPRISES INC. is owned by XU Sijie, who is actually responsible for the operation and management of the company. Although LIU Liping receives salaries in the name of an employee and dividends in the name of a shareholder, she is not actually involved in the operation of the company. All the rights of LIU Liping as a shareholder of the company specified in the original articles of association of the company, including but not limited to voting rights, the right to receive dividends and the right to make decisions, are automatically waived. She receives salaries in the name of an employee and dividends in the name of a shareholder only for child support cost and apartment loan purposes, has no ownership and control of the company, and does not assume all the creditor's rights and debts of the company. If Party A needs to modify the equity ratio and rights of Party B in the company's articles of association in the future, Party B is willing to cooperate to go through the relevant signing procedures unconditionally.

[Emphasis added.]

[73] Although Ms. Liu may be held out to the world as a shareholder in the capital of Setbest, under the SA she is not. Similarly, although Ms. Liu may receive "salaries in the name of an employee she is not actually involved in the operation of [Setbest]". I find that Mr. Xu wishes to use Setbest to deduct in computing Setbest's taxable income the child support he agreed to pay.

- [74] In blunt terms, if Ms. Liu is not employed by Setbest but Mr. Xu wishes to pay child support under the guise of a salary to Ms. Liu and if Ms. Liu is unwilling to go along with the sham, Ms. Liu, under the SA (if it were to be enforced), is liable. The SA's imposition of liability on Ms. Liu for failing to be part of a sham also makes the SA unconscionable.
- [75] On the sole ground that the SA embraces a sham, I find the SA is void and must be set aside. It will not be enforced, including its forum selection clause.
- d) Further Grounds
- [76] In addition to the SA being void as embracing a sham, several further grounds exist to set aside the SA in its entirety.
- [77] The Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24 considered the circumstances in which a family law agreement should be set aside. The majority held that judicial intervention would be justified where an agreement was found to be either procedurally or substantively flawed: para 4.
- [78] With respect to procedural flaws, the court must be "alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerability", and consider the relevant legislation and the circumstances of the negotiations, including whether the parties obtained professional help: *Miglin* at para. 81.
- [79] In *Miglin*, the majority further stated:
- [82] First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution
- [Emphasis added.]
- [80] If the procedures used to negotiate the agreement and surrounding conditions were satisfactory, the court must then consider the substance of the agreement: *Miglin* at para. 84. The court must "determine the extent to which the agreement takes into account the factors and objectives listed in the [Divorce Act], thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown": para 84. A significant departure from the objectives of the relevant legislation will warrant judicial intervention on this basis: *Rick v. Brandsema*, 2009 SCC 10 at para. 49.
- [81] With respect to property division and spousal support, the FLA also provides particular stipulations.

[82] Section 93 of the FLA provides when the Court may set aside agreements respecting property division. Section 93 reads in part:

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[83] Section 164 of the FLA provides when the Court may set aside an agreement respecting spousal support:

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.

(6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[84] Section 44(4) of the FLA provides that the Court must set aside an agreement respecting parenting arrangements if it is satisfied that the agreement is not in the best interests of the child. Section 148 addresses child support and similarly provides that the Court may set aside an agreement if the Court would make a different order upon consideration of the factors set out in s. 150.

e) Procedural Grounds

[85] I have considered the procedure used by the parties in drafting and signing the SA in relation to the factors set out in Miglin and the applicable legislation.

i) Financial Disclosure

[86] First, I find that there was inadequate financial disclosure prior to the signing of the separation agreement. In Brandsema, the Supreme Court of Canada held that a deliberate failure to make financial disclosure may render a separation agreement "vulnerable to judicial intervention". The Court stated at para. 47:

In my view, it flows from the observations and principles set out in Miglin that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.

[87] The SA does not have recitals or a schedule showing the parties' assets and liabilities and there is significant disagreement about the parties' assets. Ms. Liu says that she has not been privy to all of Mr. Xu's financial affairs. Ms. Liu currently understands that Mr. Xu owns three further properties than he says he does.

[88] Visibility of Mr. Xu's financial affairs is wanting. For example, his taxable income for 2015 and 2016 is shown to be \$34,500 and \$61,120 respectively. Relative to the parties' lifestyle during those years, the income was not sufficient to support it.

[89] As a result, it is unclear whether the SA's provisions for the division of property, child support, and the \$60,000 lump sum "living allowance" for Ms. Liu are adequate.

ii) Financial Vulnerability

[90] Second, at the time of the signing of the SA, Ms. Liu was in a vulnerable financial position.

- [91] During their marriage, Ms. Liu worked as a school teacher in China. Once the parties moved to Canada, Ms. Liu did not work outside the home; she raised their children on a day-to-day basis and is now a full-time student at UBC. Mr. Xu worked outside the home and has been involved in at least two business ventures.
- [92] Ms. Liu says that Mr. Xu is in control of the parties' finances. It is not disputed that funds for the parties' marriage and children have originated primarily from Mr. Xu.
- [93] As evidence of her financial vulnerability, Ms. Liu says that since August 2017, her income tax returns show that she received income as an "employee" of Setbest, but she did not actually receive any money from Setbest until July 2018, after the parties separated. She also says she received significantly less than what Setbest appeared to "pay" her.
- [94] I find that Ms. Liu was and continues to be vulnerable to Mr. Xu's financial wishes.

iii) Legal Advice

- [95] Third, the parties did not receive legal advice regarding the SA. Mr. Xu drafted the agreement and neither party obtained professional advice.
- [96] While failure to obtain legal advice does not necessarily result in a separation agreement being set aside, this factor is particularly relevant given the relative financial positions of the parties and the lack of financial disclosure. It is also relevant given the liability that the SA imposes on Ms. Liu, as noted above.

iv) The Separation Agreement is Set Aside on Procedural Grounds

- [97] I am satisfied that Ms. Liu's lack of financial disclosure, Ms. Liu's financial vulnerability, and the parties' lack of legal advice warrant setting aside the SA in its entirety.

f) Substantive Grounds

- [98] In addition to the procedural flaws, further substantive grounds justify setting aside the SA. As noted above, a significant departure from the objectives of the applicable legislation may result in a separation agreement being set aside.

i) Child Support and Property Division

- [99] There is evidence that child support and the division of property in accordance with the relevant legislation would differ significantly from that provided for in the SA.

- [100] In his September 9, 2019 affidavit filed in the BC Proceeding, Mr. Xu summarizes his understanding of the key terms of the SA as follows:

- a. We would register our divorce in Shanghai by April 1, 2019.
- b. I would have custody of [daughter] the Claimant would have custody of [son]. We also acknowledged that custody could be changed in the future pursuant to the children's growing needs and wishes.

- c. I would pay the Claimant \$20,000 per year for the support of [son] in Canada. If [son] resided in China in the future, child support would be recalculated to take into account the standard of living in China.
- d. We confirmed again that the real property in China were purchased with my pre-marital assets, and would remain my separate property.
- e. The Claimant would retain the [UBC Condo] and I would be responsible for the monthly mortgage payments. If the Claimant decided to sell the [UBC Condo], I would pay her a sum equivalent to the remaining balance of the mortgage in Chinese currency based on the bank exchange rate at the time.
- f. I would retain the Rental Property and be responsible for the mortgage payments.
- g. The Claimant would retain her Audi Q5 and I would retain the leased Volvo XC90.
- h. With respect to [Setbest], I would retain sole control and management and be solely responsible for any debts. The Claimant would retain her non-voting shares so that I could pay the [UBC Condo] mortgage and child support by issuing salary and dividends to the Claimant.
- i. I would pay the annual premium of \$12,000 for the Claimant's life insurance policy until the end of the policy term.
- j. After the divorce registration, I would pay the Claimant a lump sum amount of \$60,000 for her living expenses.
- k. These terms would continue to be effective even if a party did not cooperate with the divorce application.
- l. Any disputes over the agreement would be resolved by negotiation first, or otherwise submitted to the judicial court of the marriage registration authority.

[101] While Mr. Xu's summary also goes to the inadequacy of his financial disclosure, without reliable figures to determine Mr. Xu's income, this Court cannot find that \$20,000 per year in child support for the parties' son would be sufficient.

[102] With respect to the UBC Condo with a current net equity of approximately \$496,000 (as calculated by Mr. Xu), he states that if the UBC Condo were to be sold, he would pay Ms. Liu an amount equal to the balance of any outstanding mortgage (loan) in Chinese currency. Article III(2) of the SA further provides that such amount would be paid in China. There was no evidence presented as to whether such an amount would be subject to currency control laws, if any, in China.

[103] More importantly, if one accepts that Ms. Liu would be able to realize the full value of the UBC Condo (\$1,367,000 based on the 2019 BC Assessment), without the value of the Shanghai Townhouse and the value of Setbest disclosed, it is not possible to ascertain that such a result would be a fair division of assets. A fortiori, if Mr. Xu owns any of the three properties which Ms. Liu understands Mr. Xu owns in China, the possibility of unfairness is greater.

[104] Prior to separation, the parties enjoyed a comfortable lifestyle. Mr. Xu also intends to have Setbest fund many of the requisite payments to Ms. Liu. The combination of these two facts is evidence that Setbest may have significant value. If the shares in the capital of Setbest are found to be family property, the value of these shares would have particular relevance with respect to property division (and spousal support).

ii) Parenting Arrangements

[105] The provisions of the SA regarding parenting arrangements do not appear to be in the best interests of either child. The SA states:

- a) [Daughter] shall be raised by XU Sijie, and [son] shall be raised by LIU Liping. In the future, both Parties may exchange the child's custody due to the child's personal growth needs and according to the child's personal wishes;
- b) Where the child is raised by one Party, the other Party shall have the right to visit him or her 1-2 times per week and to live with him or her 1-2 days per week.

[106] In *Mitchell v. Mitchell*, [1998] B.C.J. No. 1684 (S.C.) at para. 50, cited with approval in *Poole v. Poole*, 1999 BCCA 203 at para. 31, Justice Stromberg-Stein, then sitting in this Court, stated:

While there is no presumption of law to this effect, the best interests of children are, in many cases, served by a custody situation that avoids splitting siblings between the parents. See for example, *Lynch v. Lynch* (1995), 2 R.F.L. (4th) 367 (Ont. Gen. Div.). However, splitting siblings may be appropriate in cases where there is a successful de facto situation and the children are settled and happy in the homes in which they live: *Vandher [v. Vandher]* (23 March 1995), Vancouver D087757 (B.C.S.C.).

[Emphasis added by Proudfoot J.A.]

[107] Other than a short period of time when the parties' son lived in Shanghai with Mr. Xu, the children have not been separated. Since the parties' separation, they have resided together with Ms. Liu (other than the current temporary arrangement). The children are relatively close in age. As a result, I am not satisfied that the proposed parenting arrangements should be approved by this Court without further evidence to ensure that the best interests of each child are served.

iii) The Separation Agreement is Set Aside on Substantive Grounds

[108] In summary, in addition to setting aside as void the SA as it embraces a sham, the SA should be set aside on substantive grounds.

5. should this court decline to exercise its jurisdiction?

a) Generally

[109] Mr. Xu has failed to establish that the forum selection clause is valid, clear, and enforceable. I have found that the SA should be set aside in its entirety. The circumstances in which the SA was created and the substance of the SA are flawed such that the Court should give no effect to it, including its forum selection clause. As a result, there is no need to discuss the strong cause test set out in Pompey.

[110] As set out above, the Court has territorial competence over the BC Proceeding. However, the Court may decline to exercise its jurisdiction when there is another forum that is "clearly more appropriate": Club Resorts Ltd. at para. 103. This step is referred to as a forum non conveniens analysis.

[111] Section 11 of the CJPTA sets out the factors the Court must consider in determining whether to exercise its jurisdiction under the statute. It reads:

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[112] As noted above, under s. 12 of the CJPTA, other statutes may govern this analysis.

b) Division of Property

[113] With respect to the division of property, the FLA provides a list of factors to be considered when determining whether the Court should exercise its jurisdiction. These factors mirror, with refinement, the factors set out in the CJPTA.

[114] Sections 106(4) to (6) of the FLA read:

- (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
- (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed 2014-9-15.]
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
- (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.

[115] The parties own property in both Canada and China. As noted, Mr. Xu says he owns in China the Shanghai Townhouse and a 1% interest in Jiasheng Cleaning. Ms. Liu says that Mr. Xu also owns in China the Shanghai Condo, the Commercial Property, and the Factory.

[116] With respect to s. 106(5)(b) of the FLA, the relative convenience favours British Columbia. Both parties ordinarily reside in British Columbia. Mr. Xu has business activities in both British Columbia and Shanghai. If matters related to the division of property were heard by The People's Courts, Shanghai, Ms. Liu's studies and her career path would be interrupted by trips to China. Ms. Liu also has few financial resources and is financially vulnerable.

[117] The parties' children reside in British Columbia, typically with Ms. Liu. If the proceedings were to take place in China, the children may have to spend periods of time separated from both parents or possibly miss school, unless the trial was held only in the summer (or other holiday time). This factor, in addition to the added expense of child care during such periods, again favours holding the proceedings in British Columbia.

- [118] Ms. Liu says that Mr. Xu's potential witnesses, his parents, and his brother (Qingfeng Xu) are wealthy and could afford to travel to British Columbia. Zuguo Shang lives in Vancouver. Moreover, if necessary, any of these witnesses could testify by video conference.
- [119] All considered, the factor of relative convenience and expense weighs in favour of this Court not declining to exercise its jurisdiction.
- [120] With respect to s. 106(5)(c), s. 108 (choice of law rules) is not applicable for several reasons.
- [121] Our Court of Appeal in *Jiang v. Shi*, 2017 BCCA 276 described how ss. 107 and 108 of the FLA factor into the analysis under s. 106(5)(c). The Court stated:
- [31] Section 108 contains three choice of law rules that are to be applied in a hierarchical manner.
- [32] First, if the parties have made an agreement respecting the division of property, the substantive rights of the parties are governed by that agreement.
- [33] Second, if the parties have not made such an agreement, the judge must consider whether the spouses' "first common habitual residence" was in a jurisdiction where a regime of community of property applies. If so, property division must be made in accordance with that regime of community of property.
- [34] If neither of these considerations applies, the substantive rights of the parties must be determined according to the proper law of the relationship, which is defined in s. 107.
- [35] Section 107 then sets out its own set of rules for determining the proper law of the relationship. Once that has been determined, that law becomes one of the factors for consideration as to whether to decline jurisdiction, pursuant to s. 106(5)(c).
- [122] The SA has been set aside and therefore the first choice of law rule does not apply.
- [123] With respect to the second choice of law rule, there is no evidence before me that the parties' first common habitual residence was in a jurisdiction where a regime of community property applies.
- [124] As stated in *Jiang* at para. 86, the absence of evidence as to whether the jurisdiction has a community of property regime removes the requirement that the property division must be divided according to the laws of the first common habitual residence and defaults the determination to s. 108(6), which provides that, "in the absence of satisfying one of the first two rules, the substantive rights of the parties must be determined according to the proper law of the relationship".
- [125] The proper law of the relationship is determined in accordance with s. 107 of the FLA which provides:

The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,

[126] The parties' most recent common habitual residence was in British Columbia. As a result, the proper law of the relationship is the law of British Columbia (Canada) and this factor weighs in favour of this Court exercising its jurisdiction over the proceedings.

[127] With respect to s. 106(5)(d), multiple proceedings or conflicting decisions in British Columbia and China may also be readily avoided by this Court exercising its jurisdiction. The respective proceedings in British Columbia and China are in their early stages. The People's Courts, Shanghai has issued a summons to Mr. Xu to appear before it on June 18, 2020. Mr. Xu says that this is the trial date but is willing to consent to an adjournment of a few weeks so that the parties' children could spend some of their summer holidays in Shanghai with the parties' extended family. Without more, I am not satisfied that the children would not be separated from their parents or miss school.

[128] In the civil complaint filed by him in the proceedings in China, Mr. Xu states:

Both parties have already reached an agreement on the division of marital properties. If the defendant [Ms. Liu] has any objection, the two parties can separately solve the problem in another case.

[129] There is no evidence that The People's Courts, Shanghai has seen the SA. Accordingly, The People's Courts, Shanghai would be unaware that the SA embraces a sham. Of note, in Mr. Xu's materials there is a reference by his counsel in China to Article 52 of the Contract Law of the People's Republic of China which purportedly states:

A contract shall be null and void under the following circumstances:

- (3) An illegitimate purpose is concealed under the guise of legitimate acts;

[130] In his civil complaint, Mr. Xu also represents to The People's Courts, Shanghai that his habitual residence is in Shanghai. He does not state that for 2016, 2017, and 2018 he declared to the Canadian tax authorities that at the end of each of those years, his province of residence was British Columbia. He also does not state that, after reapplying, he received Canadian permanent resident status on July 31, 2018.

[131] Mr. Xu also represents to The People's Courts, Shanghai that the parties "have actually lived apart since February 5, 2016". In his September 9, 2019 affidavit, he swears that "we officially separated on or about June 3, 2018 when I moved out of the [UBC Condo] upon the claimant's request".

[132] In sum, with a more complete picture (including the provisions of the SA embracing a sham), The People's Courts, Shanghai may consider declining jurisdiction.

- [133] Having regard to the fact that both parties and their children are each ordinarily resident in British Columbia and the various further financial issues engaged in the BC Proceeding (spousal support, child support, the division of property not located in China) are issues which should be considered in the context of all of the parties' properties including property located in China.
- [134] I find that the avoidance of multiple proceedings or conflicting decisions weighs in favour of this Court not declining to exercise its jurisdiction.
- [135] With respect to s. 106(5)(e), the enforceability of court orders involving property in China made by The People's Courts, Shanghai, an order made by The People's Courts, Shanghai would not be recognized in Canada to the extent The People's Courts, Shanghai relied on the SA in making its order.
- [136] With respect to an order made by this Court, there is no evidence that an order of this Court would not be enforceable in China. The onus rests with Mr. Xu to show that this Court should decline jurisdiction: Club Resorts Ltd., para. 103; Jiang, para. 60.
- [137] If an order of this Court is not enforceable in China, appropriate adjustments may be made by this Court: FLA, s. 109.
- [138] I find that the application of s. 106(5)(e) weighs in favour of this Court not declining to exercise its jurisdiction.
- [139] With respect to s. 106(5)(f), the fair and efficient working of the Canadian legal system as a whole favours the Court not declining jurisdiction.
- [140] In the alternative, Mr. Xu seeks a stay of the proceedings just in relation to the property in China. This means that the division of the rest of the parties' property, including the UBC Condo and the West 50th House would be dealt with by this Court. Support obligations and parentings arrangements would also be dealt with by this Court.
- [141] It is inefficient, and may result in an unfair outcome, if the properties in China are not dealt with by this Court together with the other matters. This is particularly so in the context of Mr. Xu's wanting financial disclosure.
- [142] Finally, under s. 106(5)(g), I have considered the parties' connections to China and Canada. I am satisfied with the clear desire of the parties to immigrate to Canada (including Mr. Xu's reapplication) and the various connections to Canada outweigh those with China. The UBC Condo and the West 50th House are in Vancouver. Setbest is a company incorporated under the laws of British Columbia. Ms. Liu ordinarily resides in Vancouver. Mr. Xu ordinarily resides in Vancouver. The parties' two children are Canadian residents (one is a Canadian citizen) with most of their childhoods spent in Canada.
- [143] A further relevant circumstance is the best interests of each child. To the extent Ms. Liu was required to appear in the proceedings before The People's Courts, Shanghai, the children's lives will be disrupted either by travel or without their mother nearby. Disruption

of a child's life is the inevitable consequence where a child's parents are involved in divorce proceedings. It serves the best interests of each child for this family matter to be heard in British Columbia in order to minimize the disruption. I am not satisfied that the parties' children staying with extended family members in Shanghai during the hearing of matters in China would serve to minimize the inevitable disruption.

[144] I find that these other relevant circumstances also weigh in favour of this Court not declining to exercise its jurisdiction.

[145] In sum, this Court will not decline to exercise its jurisdiction with respect to the division of property, including property in China.

c) Guardianship, Parenting Arrangements, and Contact with a Child

[146] With respect to guardianship, parenting arrangements, and contact with a child, the FLA, s. 74(3) provides that a court may decline to make an order "if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia". This provision engages a forum non conveniens analysis, and therefore the inclusive factors set out in s. 11 of the CJPTA apply: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 60.

[147] I also note the Divorce Act is silent on the exercise of jurisdiction with respect to custody. Accordingly, the same analysis under s. 11 of CJPTA is engaged.

[148] I have considered all of the factors set out at s. 11 of the CJPTA and find that British Columbia is the more appropriate forum in which to hear these matters. Again, the comparative convenience and the expense for the parties and their witnesses favour British Columbia. With each of the children ordinarily resident in British Columbia and having spent most of their lives in British Columbia, and each of the parents ordinarily resident in British Columbia, the applicable law would be the laws of British Columbia or Canada, namely the FLA or the Divorce Act. Again, this factor favours British Columbia as the appropriate forum.

[149] I have decided that this Court has and will exercise jurisdiction over the parties with respect to all property. As a result, exercising jurisdiction with respect to guardianship, parenting arrangements, and contact with a child (and custody) would avoid a multiplicity of legal proceedings. With the parties living in British Columbia, an order of this Court would be more easily enforced than an order of the People's Courts, Shanghai. Again, the fair and efficient working of the Canadian legal system as a whole favours this Court dealing with all matters in this case.

[150] In sum, this Court will not decline to exercise its jurisdiction in connection with any matters arising under s. 74 of the FLA (or custody under Divorce Act).

d) Spousal Support and Child Support

[151] The Divorce Act and the FLA are each silent on the exercise of jurisdiction with respect to spousal support and child support. As a result, s. 11 of the CJPTA applies with respect to the forum non conveniens analysis.

[152] Again, I have considered the factors in s. 11 and find that British Columbia is the more appropriate jurisdiction in which to hear matters relating to spousal support and child support obligations. My analysis follows that of my analysis regarding property division and guardianship, parenting arrangements, and contact with a child (and custody) which engage many of the same facts.

[153] In sum, the Court will not decline to exercise its jurisdiction over all matters raised in the BC Proceeding.

6. conclusion

[154] The Court has jurisdiction over this BC Proceeding and does not decline to exercise its jurisdiction.

[155] The Court declares that the SA is void. The SA is set aside. It will not enforced, including the forum selection clause.

[156] The Court dismisses Mr. Xu's application seeking to stay or dismiss all or part of the BC Proceeding.

[157] Mr. Xu will have 45 days from the date of these reasons to file and serve a counterclaim, if any, and the requisite Form F8 Financial Statement.

7. COSTS

[158] In any event of the cause, Ms. Liu will have her reasonable costs and disbursements for a matter of ordinary difficulty, payable forthwith.

"Funt J."

Schedule "A"

Agreement

Party A: XU Sijie Male ID Card No.: [redacted]

Party B: LIU Liping Female ID Card No.: [redacted]

Due to marital breakdown, both Parties agree as follows through friendly negotiation with respect to matters concerning divorce by agreement, child support and property division:

I. Both Parties unanimously agree to divorce by agreement and to go through the divorce procedure with the original marriage registration authority in Shanghai no later than April 1, 2019.

II. Provisions on Child Support:

1. [Daughter] shall be raised by XU Sijie and [son] shall be raised by LIU Liping. In the future, both Parties may exchange the child's custody due to the child's personal growth needs and according to the child's personal wishes;
2. Where the child is raised by one Party, the other Party shall have the right to visit him or her 1-2 times per week and to live with him or her 1-2 days per week;
3. The child support cost for [son's] life in Canada is 20,000 Canadian dollars per year, which shall be paid by XU Sijie until he reaches adulthood. If he lives in China in the future, the child support cost shall be paid by reference to the relevant Chinese standards after renegotiation between both Parties;
4. Party A may, at its discretion, make payment to Party B's personal account by salaries, dividends or other means through his company in Canada, provided, however, that Party B shall cooperate with Party A to complete the normal signing procedures required for the company's payroll, dividends, and tax returns, and the taxes thereon shall be borne by Party A. If Party B fails to follow the requirements of this Article, resulting in inability to pay the relevant expense in full and on time, Party B shall be liable therefor.

III. Both Parties agree on the relevant real estate and property as follows:

1. All the properties of both Parties in China were purchased by XU Sijie with pre-marriage funds. Therefore, Party B agrees that all existing properties are owned by XU Sijie, and that the bank loans and borrowings related to such properties are borne by XU Sijie. All properties purchased and sold by Party A in China in the future are owned by Party A, and have nothing to do with Party B. With the exception of such properties in China, both Parties confirm that other property in their respective names (including but not limited to equity, creditor's rights, stocks, insurance, cash, vehicles, and other property) is owned by them respectively.
2. The apartment located at Unit [redacted] Birney Ave, Vancouver, BC Canada is owned by LIU Liping. The loan on the apartment shall be repaid by XU Sijie on a monthly basis (If Party B sells the apartment in advance, the remaining loan shall be converted into RMB at the bank exchange rate and paid by XU Sijie to LIU Liping in China). XU Sijie may make payment to LIU Liping's personal account by salaries, dividends or other means through his company in Canada. The detached house located at [redacted], W 50th ave, Vancouver, BC Canada is owned by XU Sijie. The loan on the detached house shall be repaid by XU Sijie. The Audi Q5 car is owned by LIU Liping, and the right to use and dispose of the Volvo XC90 car under a long-term lease is owned by XU Sijie.
3. Both Parties confirm in Canada that SETBEST ENTERPRISES INC. is owned by XU Sijie, who is actually responsible for the operation and management of the company. Although LIU Liping receives salaries in the name of an employee and dividends in the name of a shareholder, she is not actually involved in the operation of the company. All the rights of LIU Liping as a shareholder of the company specified in the original articles of association

of the company, including but not limited to voting rights, the right to receive dividends and the right to make decisions, are automatically waived. She receives salaries in the name of an employee and dividends in the name of a shareholder only for child support cost and apartment loan purposes, has no ownership and control of the company, and does not assume all the creditor's rights and debts of the company. If Party A needs to modify the equity ratio and rights of Party B in the company's articles of association in the future, Party B is willing to cooperate to go through the relevant signing procedures unconditionally.

4. Property in the respective names of both Parties (including but not limited to personal bank deposits, insurance, cash, vehicles, and other property) other than the real estate and company equity in Canada is owned by them respectively.
5. Party B's CANADA LIFE insurance premium is approximately 12,000 Canadian dollars per year, which shall be paid by XU Sijie according to the amount specified in the insurance policy until the time limit agreed in the insurance policy.
6. Party A shall, after completing the divorce procedure, pay Party B 60,000 Canadian dollars in a lump sum as a living allowance.

IV. If either Party does not cooperate to go through the divorce procedure, resulting in failure to divorce by agreement, the provisions of this Agreement regarding child support and property division are still legally binding on both Parties.

V. This Agreement shall become effective immediately upon signing by both Parties, and is executed in triplicate, one for each Party and one for the original marriage registration authority. Any dispute arising from this Agreement shall be resolved by both Parties through negotiation. If the negotiation fails, it shall be submitted to the court with jurisdiction at the place where the original marriage registration authority is located.

Party A's Signature: XU Sijie [Signature] January 9, 2019

Party B's Signature: LIU Liping [Signature] January 9, 2019

- [1] Black's Law Dictionary, 9th ed. (St. Paul, Minn.: West, 2009)
- [2] In *Snook v. London & West Riding Investments Ltd.*, [1967] 2 Q.B. 786 (Eng. C.A.), Diplock L.J. said of a "sham" that "if it has any meaning in law, means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create" and further that, "for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating". In *Antle v. R.*, 2010 CarswellNat 4878, 61 E.T.R. (3d) 1 (F.C.A.), the Federal Court of Appeal, in assessing whether a trust was a "sham" in the context of a tax assessment, held that the required state of mind with respect to an intent to mislead is "not

equivalent to mens rea [a criminal intent to deceive] and need not go so far as to give rise to what is known at common law as the tort of deceit It suffices that parties to a transaction present it as being different from what they know it to be."

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