

China Prenuptial Agreement: No Longer That Effectual?

Description

In many occasions, esp IAFL associated conference and seminars, I have spoken several times about China prenuptial agreement, and in particular, about the validity of such an agreement under Chinese laws.

But there have been some changes in that regard introduced into play by China Supreme Court when handing down [judicial interpretations](#) on marriage and family chapter of China Civil Code.

Before we proceed further, it shall be made clear that when we talk about prenuptial agreements in China, strictly speaking, [prenuptial agreements in China generally only deal with matrimonial property regime](#) between them, and cannot deal with as many marital issues as prenuptial agreements in other jurisdictions. In particular, provisions related to division of community properties and child custody and maintenance are not supposed to be covered in those prenuptial agreements.

I. The Impression on [China Laws on Prenuptial Agreements](#)

I have personally spoken a few times in IAFL conferences and other occasions that for the reason that China law has made it clear that a prenuptial agreement is binding on the parties. Because of this clear rule, it has been understood that validity of prenuptial agreements under Chinese laws is certain and these agreements are enforceable without problem. Such certainty and enforceability are in sharp contrast to prenuptial agreements written under most common law jurisdictions like Hong Kong, Singapore and United Kingdom.

Again, I cannot emphasize enough that the scope of contents in Chinese law based prenuptial agreements varies widely from those in other jurisdictions. Indeed, this difference in contents itself can much explain the difference in terms of legal certainty and enforceability of nuptial agreements.

Any agreement on division of marital properties and on [child custody and maintenance](#) reached at the time of marriage that may only happen after years later is surely susceptible to legal challenges as circumstances of the parties at the time of divorce may have changed so much that original agreements could look absurd, unfair or unjust, compelling conscientious courts to reconsider their original agreements. On the contrary, Chinese prenuptial agreements often don't deal with such issues at all, thus they can be conferred by law with more certainty and enforceability.

II. New Changes

It is not that there has been any fundamental change of law in this regard.

The changes are reflected in recent judicial interpretations handed down by China Supreme Court, in particular the second judicial interpretation (effective as from February 1, 2025) on family and marriage chapter in China Civil Code when it comes to such agreements between couples on real properties ownership.

Article 5 of this second judicial interpretation deals with agreement on real property title transfer in two scenarios:

(1) prior to or during marriage, the parties agree to transfer (without consideration) the title of the property owned by one party to the other party or to the names of both parties but the title transfer has not been registered at the time of divorce, in case of dispute over the ownership or division of title of this property, the Chinese courts won't necessarily follow their initial agreement on the property title, but will take into account various factors such as purpose of contemplated transfer, length of marriage, conditions of living together and child, faults for the divorce, contribution to the family, and the market price of the property at the time of divorce, and make a decision on who shall hold the title, and whether the title-holding party shall pay compensation to the other party.

(2) prior to or during marriage, the parties agree to transfer (without consideration) the title of the property owned by one party to the other party or to the names of both parties but the title transfer has been registered already at the time of divorce, in case of dispute over the ownership or division of title of this property, and the marriage has lasted for only a relatively short period of time and the transferor has no [material fault](#), the Chinese courts may take into account various factors such as purpose of contemplated transfer, length of marriage, conditions of living together and child, faults for the divorce, [contribution to the family](#), and the market price of the property at the time of divorce, and make a decision to grant the title back to the transferor, and whether the title-holding party shall pay compensation to the other party.

As reflected in this Article 5, agreements reached before or after marriage in relation to property ownership are of the same nature of prenuptial or postnuptial agreements, but apparently Chinese courts can now disregard such agreements on property title transfers, thus a divergence from the common understanding that Chinese prenuptial agreements are binding on the parties.

III. Notes

While the new changes described above does indicate a change in law regarding validity of prenuptial agreements in China, it shall be noted that that Article 5 addresses the property ownership only, the type of assets that are most significant in most societies.

So the pertinent law has remained largely the same but this particular issue shall be borne in mind when drafting prenuptial agreements covering real properties in China.

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