

# CHINA LEGAL BRIEFING\* 222

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## **Interpretation Issued by the Supreme People's Court of the People's Republic of China on Several Issues Regarding the Implementation of the Marriage Law of People's Republic of China (III)**

最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(三)

<b>【 Issued by 】</b>	<b>the Supreme People's Court of People's Republic of China</b>
<b>【 Subject 】</b>	<b>Interpretation Regarding the Implementation of the Marriage Law</b>
<b>【 Promulgated on 】</b>	<b>August 09, 2011</b>
<b>【 Effective from 】</b>	<b>August 13, 2011</b>
<b>【 Source 】</b>	<b><a href="http://www.court.gov.cn">http://www.court.gov.cn</a></b>

After the promulgation of the Marriage Law of People's Republic of China (the "PRC") (the "Marriage Law"), the Supreme People's Court of PRC (the "Supreme Court") has issued two interpretations in 2001 (the "Interpretation I") and 2003 (the "Interpretation II") to clarify the procedure for dealing with void marriage and revocable marriage, child alimony, compensation for divorce damage, the return of betrothal gifts, debts between husband and wife, house reservation, and benefits in connection with IP. In recent years, disputes on real estate show an ascending trend, and thus this Interpretation on Several Issues Regarding the Implementation of the Marriage Law of PRC (III) (the "Interpretation III") mainly focuses on solving disputes arising from dividing real estate in divorce. In addition, it also provides interpretations on paternity test and remedy for procedure defects of marriage registration.

The Interpretation III, as promulgated on August 9, 2011 and taking effect on August 13, 2011, is constituted of 19 articles, mainly relating to the following six points:

### Remedy for procedure defects of marriage registration

The Interpretation III, for the first time, provides that claiming for revocation of marriage registration due to procedure defects in registration shall be solved through administrative reconsideration or administrative litigation. In practice, there exists a claim for revocation of marriage registration resulted from procedure defects, for example: the other party did not complete the registration in person; the documents, especially the identity certificates, submitted by parties have defects; or marriage registration agency has no jurisdiction. The Marriage Law only provides four circumstances in Article 101 under which parties could bring a civil litigation claiming for revocation of marriage. Those four circumstances are called substantial requirements for marriage. However, in case that a marriage satisfies all substantial requirements but fails to meet the procedure ones, then previously court would reject such claim of revoking marriage registration. After the promulgation of this Interpretation III, the aforesaid situation could be solved by administrative reconsideration or litigation.

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<sup>1</sup> Article 10 If any of the following circumstances occurs, the marriage shall be invalid:

- a. if either party is a bigamist;
- b. if both parties are in the kinship that is forbidden from getting married by law;
- c. if any party has suffered from any disease that is held by medical science as rendering a person unfit for getting married and the disease has not been cured after marriage;
- d. if any party has not come up to the legitimate age for marriage.

According to the Regulation on Marriage Registration, the procedure requirements mainly include: register in person at a proper marriage registration agency, bring ID documents, and submit single status affidavit.

1. Paternity test

DNA test, as its simplicity and high accuracy, has been widely used to prove blood relationship, especially in denial of legitimate child or adoption of an illegitimate child. As provided in Article 2 of this Interpretation III, if one party is able to supply reasonable evidence proving the existence or non-existence of blood relationship, while the other party has no opposite evidence and refuse to accept DNA test, the other party will be inferred to bear the liability of losing the case.

2. Ownership of the fruits and accretion of individual property accrued after marriage

In general, the benefits of individual property after marriage include fruits, interests from investment, and accretion. Interpretation II has already provided that interests obtained by investment of one party's individual property after marriage shall be regarded as communal estate, but failed to define the possession of fruits and accretion. In the Interpretation III, pursuant to Article 5, fruits and accretion of one party's property accrued after marriage are excluded from the communal estate.

3. Real estate bought by one party's parents and registered under this party's name

In China, due to the high price of real estate, new couples are usually unable to afford an apartment or house. In practice, their parents or one party's parents will normally use almost all their savings to buy an apartment for the children. No matter buying before or after marriage registration, such parents' original intent is to protect their own child's profits. Therefore, in divorce, it will be indeed contrary to parents' original intent to define such real estate as communal assets and also infringes parents' benefits. The Interpretation III defines the real estate bought after marriage, but solely by one party's parents, and registered simply under such party's name, as such parents' bestowal to their own child, and thus the real estate will be regarded as individual property. If the real estate is invested by both parties' parents, then it will be treated as common shared property by the couple.

4. Real estate with its down payment paid by one party before marriage

In divorce, it is a disputable issue of dividing real estate with its down payment paid by one party before marriage but the mortgage loan still being in payment by the couple. According to Article 10 of the Interpretation III, if one party pays up the down payment before marriage, then he/she has paid up the whole house price through bank to the real estate company, which shall be reckoned as the purchase contract between the party and the real estate company has been performed. So this real estate shall be an individual property, even if the property ownership certificate is obtained after marriage registration. However, taking into account of the accretion of the real estate and the payment by the other party of the mortgage loan, the other party is entitled to claim for reasonable and fair compensation.

5. Divorce agreement

The two parties in divorce will normally enter into divorce agreement conditioned upon either divorce registration at marriage registration agency, or divorce decision from court, to clarify the child care and division of property. In practical, one party may, for the purpose of smoothly solving the divorce issue, compromise in conclusion of such divorce agreement, while in case, later, one party regrets and refuses to perform the divorce agreement before divorce registration, such divorce agreement shall not be the basis in deciding the child care and division of property. Because divorce is a significant issue, both parties are allowed to consider twice before making any decision, and hence any party is allowed to regret before the divorce registration. Therefore, in a divorce hearing, such conditioned divorce agreement shall not be the base of court's decision.

**Circular Issued by State Administration of Foreign Exchange on Relevant Issues Concerning the Approval of Domestic Banks' Overseas Financing Guarantee Balance Index in 2011**  
国家外汇管理局关于核定境内银行2011年度融资性对外担保余额指标有关问题的通知

<b>【 Issues by 】</b>	<b>State Administration of Foreign Exchange</b>
<b>【 Subject 】</b>	<b>Domestic Banks' Overseas Financing Guarantee Balance Index in 2011</b>
<b>【 Promulgated on 】</b>	<b>July 27, 2011</b>
<b>【 Effective from 】</b>	<b>July 27, 2011</b>
<b>【 Source 】</b>	<b><a href="http://www.safe.gov.cn">http://www.safe.gov.cn</a></b>

For the purpose of continuously striking down the inflow of “Hot Money”, the State Administration of Foreign Exchange (the “SAFE”) promulgated the Circular on Relevant Issues Concerning the Approval of Domestic Banks' Overseas Financing Guarantee Balance Index in 2011 (the “Circular”).

SAFE has decreased domestic banks' short-term debts index for two years in a row, while those which have the necessity of financing could still raise money from their offshore enterprises by applying for overseas financing guarantee. Therefore, for further strengthening the control of inflow of “Hot Money”, one significant provision in this Circular is that it declines the domestic banks' overseas financing guarantee balance index in 2011 is decreased to a total number of USD 76.37622 billion (with the figures of 2010 being unable to be traced).

The other prominent requirement is that the Circular clarifies that applications of providing overseas guarantees by domestic real estate development enterprises to their overseas subsidiary corporations, which plan to issue offshore bonds, will temporarily not be accepted. For the sake of lowering the high price of real estate and control the real estate market, as affected by the national policy on real estate, the domestic banks shrink the quota of releasing loan to real estate developers. Therefore, many developers begin seeking channels to finance from overseas market. As reported by news on Xinhuanet's webpage dated February 24, 2011, since the beginning of the year 2011 to the publishing of this news, real estate companies have obtained over USD 3 billion funds from offshore bonds market, while the total figure of last year was USD 8 billion. After the issuance of policy by the State Council this year and last year on control of the real estate market, real estate companies have suffered great pressure to refund loans from domestic banks, which leads them to enlarge the scale of financing from offshore bond markets, because most of them are not inclined to accelerate the collection of money by lowering the real estate price. For example, in January Shui On Land Company issued RMB bonds settled in USD (the “RMB Bonds”) in offshore market equal to RMB 3.5 billion, Kaisa Group issued RMB Bonds in offshore market equal to RMB 2 billion, and Evergrand Real Estate Group announced its financing plan of issuing RMB Bonds in offshore market in value of RMB 9.25 billion. In addition to those real estate companies, at least other seven real estate companies issued bonds or announced their financing plan at the beginning of this year. Moreover, those companies already financed on overseas market last year. Pursuant to the comments of an independent economist, it is not a healthy trend to enlarge development

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<sup>2</sup> According to Article 1 of the Notice of the SAFE on the Administration of External Guarantees Provided by Domestic Institutions, the term “Overseas financing guarantee” refers to overseas guarantees under which the master contract bears a financing nature, including but not limited to guarantees provided for borrowing, bond issuance and financing lease, as well as other forms of external guarantees recognized by the SAFE.

by financing from overseas market instead of declining price to accelerate the refund of money, as the expiry dates of those debts may be quite close as within several months, which will force those real estate companies facing greater risk of re-finance.

Foreign credit rating organizations also show their worries by degrading those real estate companies credit rates. For instance, after the issuance of bonds by Kaisa Group, the Standard and Poor degraded its outlook rate from stable to negative, and Evergrand Real Estate's instrument rate to BB-.

Temporarily denying accepting applications for providing overseas guarantees by domestic real estate development enterprises to their overseas subsidiary corporations, which plan to issue offshore bonds, first, displays SAFE's obvious intent to shrink the inflow of foreign currency, and second, cooperates with nationally policy on control of the domestic real estate market.

## **Provisions Issues by Ministry of Human Resources and Social Security on the Implementation of “Social Insurance Law of People's Republic of China”**

实施《中华人民共和国社会保险法》若干问题

<b>【 Issued by 】</b>	<b>Ministry of Human Resources and Social Security</b>
<b>【 Subject 】</b>	<b>Implementation of “Social Insurance Law of PRC”</b>
<b>【 Promulgated on 】</b>	<b>June 29, 2011</b>
<b>【 Effective from 】</b>	<b>July 01, 2011</b>
<b>【 Source 】</b>	<b><a href="http://www.mohrss.gov.cn">http://www.mohrss.gov.cn</a></b>

The Social Insurance Law of PRC was approved on October 28, 2010, and entered into force on July 1, 2011. However, the Social Insurance Law is more like a framework of the social security system in China, which needs to be specified by more detailed rules. Therefore, on May 12, 2011, the Ministry of Human Resources and Social Security of the PRC published the draft of Provisions on the Implementation of Social Security Law (the “Provisions”) for public feedbacks and formally issued it on June 29, 2011. The Provisions took effect on July 01, 2011.

The Provisions are comprised by seven chapters and 30 Articles. The main content is as below:

1. Providing the treatment for individual participating in the basic endowment less than 15 years

According to paragraph 2 of Article 16 of the Social Insurance Law, where an individual participating in the basic endowment insurance has contributed premiums for a cumulative period under 15 years when he/she reaches the statutory retirement age, he/she shall receive a monthly basic pension after having contributed premiums for 15 years; or his/her insurance relationship may be transferred into the new-type social endowment insurance for rural areas or social endowment insurance for urban residents, and he/she shall enjoy the corresponding endowment insurance benefits in accordance with the relevant provisions of the State Council.

Two questions arise: 1) What if a person only paid one year's premium when he reaches the retirement at the age of 55. He then has to pay 14 years' premium, at which time he is nearly 70 years' old; and 2) What if an individual fails to meet the 15 years' requirement, but refuse to continue paying, and be transferred into other types of social insurance. Article 3 of the Provisions gives an answer to these two questions: If the individual participating in the basic endowment insurance before the promulgation of the Social Insurance Law without satisfying the 15 years' requirement when reaching the retirement

age, and after having contributed premiums for 5 years more since retirement, he/she still fails to satisfy the 15 years' requirement, then such person could contribute all the remained premium in one sum. In the second scenario, in case the aforesaid individual neither satisfies the 15 years' requirement, nor intends to continue contributing or to be transferred to the other types of social insurance, the funds deposited in this person's individual account will be refunded to him/her in one sum.

2. Clarifying that the minimum paying period for basic medical insurance shall be based on local regulations

Article 27 of the Social Insurance Law provides that where an individual participating in the basic medical insurance for employees has paid premiums for a cumulative period reaching the number of years prescribed by the state when he/she reaches the statutory retirement age, he/she does not have to pay the basic medical insurance premiums any more after retirement, and shall enjoy the basic medical insurance benefits according to the relevant provisions of the state; or if the number of years prescribed by the state is not reached, he/she may pay premiums until the number of years prescribed by the state is reached. In the Social Insurance Law the minimum years for paying medical premiums are not clear. Moreover, the specific number of the years prescribed by the state is not disclosed. Based on the Provisions, such figures shall be in accordance with local rules, as many places have had requirements on the figures. For example, the minimum years in Shanghai is 15 years as provided in the Measures on Basic Medical Insurance of Urban Area in Shanghai.

3. Clarifying the definition of discontinuing working by reason against the employee's will

Based on Article 45, discontinuing working for the reason against the employee's will is one of the requirements to receive unemployed funds, while under which circumstances could be referred to "discontinuing working for the reason against the employee" are not disclosed. The Provisions provide six circumstances to further define that term: i) terminating labor contract according to item 1, 4, and 5 of Article 44 of the Labor Contract Law, ii) employer dismissing the labor contract according to Article 39, 40, and 41 of the Labor Contract Law, iii) employer dismissing the labor contract according to Article 36 of the Labor Contract Law, and reaches settlement agreement with the employee, iv) employee being fired by the employer, v) employee dismissing labor contract according to Article 38 of the Labor Contract Law, and vi) other circumstances as provided by laws and regulations.

4. Clarifying method for delivering individual benefit record

In accordance with Article 74 of the Social Insurance Law, social insurance agencies shall periodically send personal benefit records to the individuals for free. The Provisions specify that the social insurance agencies shall send insured person the records at least once a year by mail. Furthermore, those agencies could also send the records by short text message or by email.

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