

CHINA LEGAL BRIEFING* 220

AUGUST 22-28



* CHINA LEGAL BRIEFING is a weekly collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL BRIEFING subscribers. WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL BRIEFING is not intended to provide advice.

- 1 Circular of the National Development and Reform Commission on Delegating Authority for the Approval of Overseas Investment Projects**
国家发改委关于做好境外投资项目下放核准权限工作的通知
- 2 Notice of the State Administration of Foreign Exchange on Relevant Issues Concerning Further Strengthening the Administration of Foreign Exchange Business**
外汇管理局关于进一步加强外汇业务管理有关问题的通知
- 3 Notice of the Supreme People's Court on Issuing the Decision on Amending the Provisions on the Cause of Action of Civil Cases**
最高人民法院印发《关于修改〈民事案件案由规定〉的决定》的通知

Circular of the National Development and Reform Commission on Delegating Authority for the Approval of Overseas Investment Projects

国家发改委关于做好境外投资项目下放核准权限工作的通知

【 Issued by 】	National Development and Reform Commission
【 Subject 】	Approval of Overseas and Investment Projects
【 Promulgated on 】	February 14, 2011
【 Effective from 】	February 14, 2011
【 Source 】	http://www.gov.cn

For the purpose of the development of offshore investment, as approved by the National State Council, National Development and Reform Commission (the “NDRC”) promulgated the “Circular on Delegating Authority for the Approval of Overseas Investment Projects” (the “Circular”) on February 14, 2011. The key contents are as follows:

(1) Lowering the requirement for the approval by provincial authority

The projects of resource development executed by local enterprises with the Chinese party’s investment amount of USD 300 million or less and other projects (except for special items) with the Chinese party’s investment amount of USD 100 million or less shall be subject to the examination and approval of the provincial development and reform departments of all provinces, autonomous regions, municipalities directly under the Central Government, the cities directly under state planning and Xinjiang Production and Construction Corp. (collectively the “Provincial NDRC”); the authority for examining overseas investment projects as aforesaid executed by enterprises managed by Central Government may be chosen on the sole discretion of the enterprise but shall be recorded at the NDRC. Moreover, the projects with Chinese party’s investment above those thresholds shall be examined and approved by the NDRC. The thresholds used to be USD 30 million and USD 10 million respectively as previously provided in the existing “Interim Measures for the Administration of Examination and Approval of the Overseas Investment Projects” (the “Interim Measures”) dated October 09, 2004.

(2) Examination and approval on special items

Irrespective of the investment amount by the Chinese party, the overseas investment projects below shall either (i) be pre-examined by the Provincial NDRC or enterprises managed by the Central Government, and then examined and approved by the NDRC, or (ii) after the examination by the NDRC, reported to the State Council by the NDRC for examination and approval:

- a. Investment in countries having no diplomatic relationship with China, or against which sanctions are applied;
- b. Investment in countries or areas which are at war, have rebellions, etc.; and
- c. Investment in the fields of basic telecom operation, cross-boarder water resources development and exploitation, large scale land development, primary route network, news and media, and other sensitive trade.

(3) Separation of government and enterprise

In examining the overseas investment projects, the Provincial NDRC shall comply with the requirements provided in Article 181 of the Interim Measures. The enterprise shall by itself

¹ The relevant requirements are: The project (1) shall comply with the laws and regulations of the State and the industrial policies, not do harm to the sovereignty, safety and public interests of the State, and not violate the norms of international laws; (2) shall comply with the demands of sustainable development of the economy and society, be beneficial to the development of

decide on the market prospect, economic benefit, source of the funds and products and techniques as well as be responsible for the risk and liability incurred by its choice. The Provincial NDRC shall point out the possible political, economic, and legal risks.

(4) Establishment of item registration system

For the sake of distinguishing the overseas investment projects mentioned in Article 2 of this Circular, with regard to resource development projects with the Chinese party's investment amount between USD 30 million and USD 300 million and non-resource development projects with the Chinese party's investment amount between USD 10 million and USD 100 million, before issuing the approval documents, the Provincial NDRC shall report to the NDRC for registration, and the NDRC shall, within 5 work days upon the receipt of such report, issue "Examination and Approval Registration Sheet for Local Important Overseas Investment Projects". Registered examination and approval documents are the basis for the completion of relevant process and enjoyment of relevant preferential policy.

(5) Improving the measures for management of recording

With regard to resource development projects executed by enterprises managed by Central Government with the Chinese party's investment amount between USD 30 million and USD 300 million and non-resource development projects with the Chinese party's investment amount between USD 10 million and USD 100 million, such enterprise shall submit the projects to the NDRC for recording. The detailed measures shall be referred to "Circular by NDRC on Certificate of Record for Overseas Investment Projects" (2007).

(6) Adjusting the scope of information reporting

In accordance with the new authority of overseas investment approving, the threshold of information report requirement (as required by the "Notice of the NDRC on Issues Concerning the Improvement of the Administration of Overseas Investment Projects" (2009)) has been changed to: "Overseas acquisition project" or "Overseas competitive bid project" with Chinese party's investment amount of USD 100 million or more.

(7) Investment in Hong Kong, Macau, and Taiwan

This Circular shall also be applied to investment in Hong Kong or Macau shall also apply this Circular. However, for investment in Taiwan shall apply the "Notice of the NDRC, the Ministry of Commerce and the Taiwan Affairs Office of the State Council on Issuing the Measures for the Administration of the Mainland Enterprises' Investment in Taiwan Region" (2010) shall be applied.

strategic resources required for developing the national economy; and comply with the requirements of the State for adjusting the industrial structure, promote the export of technology, products, equipment and labor services with the comparative predominance, and absorb the foreign advanced technology; (3) shall comply with the administrative prescriptions of national capital projects and the foreign loans; and (4) the investors shall possess the corresponding investment strength.

Notice of the State Administration of Foreign Exchange on Relevant Issues Concerning Further Strengthening the Administration of Foreign Exchange Business

外汇管理局关于进一步加强外汇业务管理有关问题的通知

【 Issues by 】	State Administration of Foreign Exchange
【 Subject 】	State Administration of Foreign Exchange Business
【 Promulgated on 】	March 18, 2010
【 Effective from 】	April 01, 2011
【 Source 】	http://www.safe.gov.cn

Under the pressure of the continuous inflow of “Hot Money”, for the purpose of constraining the inflow of illegal funds and settlement, compressing the space for the cross-border flow of foreign funds, declining the short-term external debt balance, controlling the financial risks resulted from cross-border capital flows, the State Administration of Foreign Exchange (the “SAFE”) promulgated the Notice of the SAFE on Relevant Issues Concerning Further Strengthening the Administration of Foreign Exchange Business (the “Notice”) on March 18, 2011, which took effect on April 01, 2011.

This Notice incorporates issues of further strengthening the management of the banks’ synthetic positions in foreign exchange settlement and sale², strengthening the foreign exchange management on entrepot trade, reducing the base proportions of advances on sales and deferred payment above ninety days as well as strengthening the management on short-term foreign debt of financial institutions.

1. Further strengthening the management of the banks’ synthetic positions in foreign exchange settlement and sale

This point applies to banks, which are doing futures trading with foreign exchange. On the basis of the lower limit management on the balance of positions under the administration on cash based on accounting³ of such banks, the lower limits shall be adjusted if they were negative on November 8, 2010.

This first provision aims at declining the amount of the futures foreign exchange settlement for banks’ clients and that of the futures foreign exchange purchase from inter-bank foreign exchange market transactions.

² “Banks’ synthetic positions in foreign exchange settlement and sale” here shall refer to the foreign exchange positions held by designated foreign exchange banks resulting from the transactions between RMB and foreign currencies, which are from the banks’ settlement and sale of foreign exchange for their clients, the settlement and sale of foreign exchange of their own, and from the participation in the inter-bank foreign exchange market transactions. (Article I of the Notice of the State Administration of Foreign Exchange on Relevant Issues concerning the Administration of the Banks’ Synthetic Positions in Foreign Exchange Settlement and Sale (October 2010)).

³ “Position administration on cash based on accounting” shall mean that a bank has the business of settlement and sale of foreign exchange to its clients, business of settlement and sale of foreign exchange of its own, and the inter-bank foreign exchange market transaction recorded into the synthetic positions in settlement and sale at the day when the capital is actually received and paid. In comparison to the aforesaid principle, another principle is to record those businesses and transaction into the synthetic positions in settlement and sale at the day when the transaction is concluded. And such banks need to submit Daily Table of Banks’ Synthetic Positions in Foreign Exchange Settlement and Sale to SAFE to report positions in foreign exchange settlement and sales.

2. Strengthening the foreign exchange management on entrepot trade⁴

The foreign exchange incomes under entrepot trade may be settled or transferred only after the enterprises pay the outward payment for the corresponding entrepot trade. The foreign exchange incomes under entrepot trade received by banks shall be transferred to the verification accounts of enterprises; an enterprise shall, when settling the incomes under entrepot trade or transferring them to current accounts, submit the corresponding export contract, import contract, vouchers of exchange receipts and exchange payments for entrepot trade to the bank; the bank may handle the settlement or transfer for the enterprise only after examining relevant documents. If the settled or transferred amount of the incomes under entrepot trade exceeds 20% of the corresponding amount of payment for the goods from the supplier by the entrepot enterprise, the enterprise shall apply to the local foreign exchange authority by submitting the above documents; and the bank may handle the corresponding formalities for settlement or transfer for the enterprise upon the approval of the local foreign exchange authority.

3. Reducing the base proportions of advances on sales and deferred payment above ninety days

The base proportion of advances or of deferred payment on sales above ninety days shall be 20% of the total foreign exchange receipts from its exports or the total foreign exchange payments from its imports of the previous twelve months respectively.

4. Strengthening the management on short-term foreign debt of financial institutions

Based on the short-term foreign debt balance indicators of domestic institutions decided in 2010, the SAFE has decided to further compress the scale of those indicators in the year of 2011. Furthermore, the SAFE also has decided to reduce the short-term foreign debt balance indicators of banks that have relatively large scale of inter-bank deposits and inter-bank offers. However, after checking the 2011 Decision on the Indicators of Short-term Foreign Debt of Domestic Financial Institutions (on April 15, 2011), the total scale of indicators are the same as last year, with the amount of USD 32.4 billion.

Notice of the Supreme People's Court on Issuing the Decision on Amending the Provisions on the Cause of Action of Civil Cases

最高人民法院印发《关于修改〈民事案件案由规定〉的决定》的通知

【 Issued by 】	Supreme People's Court
【 Subject 】	Cause of Action of Civil Cases
【 Promulgated on 】	February 18, 2011
【 Effective from 】	April 01, 2011
【 Source 】	http://www.court.gov.cn

Based on the General Principles of the Civil Law of the People's Republic of China (the "PRC"), the Property Law of the PRC (the "Property Law"), the Contract Law of the PRC, the Tort Law of the PRC (the "Tort Law"), the Civil Procedure Law of the PRC and other laws and in light of civil trial practices of people's courts, the Provisions on the Cause of Action of Civil Cases issued on February 4, 2008 have been amended on February 18, 2011, and the new version entered into force on April 01, 2011 (the "Provisions").

⁴ Entrepot trade means here both bonded warehousing trade and export processing trade.

The purpose of the Provisions is to unify the usage of causes of action by the courts and to avoid different courts using different terms on describing the same legal relations. The Provisions determine how the People's Courts must determine the cause of action. For example, the cause of actions of common civil cases should be determined by the nature of the civil relations between parties. However, in civil cases involving special procedures, the causes of action should be determined by the claims of the plaintiff. Furthermore, the Provisions set the rules for the management and statistics of cases.:

The amendments were made to 5 level-1 causes of action, 20 level-2 causes of action, 113 level-3 causes of action, and 154 level-4 causes of action. The new version is now composed of 10 level-1 causes of action, 42 level-2 causes of action, 424 level-3 causes of action, and 367 level-4 causes of action. Level-1 incorporates the most general causes of action, like Dispute over Tort Liability, or Dispute over Intellectual Property Right or Competition. Level-4 includes the most detailed causes of action, like Dispute over a Network Shopping Contract, or Dispute over a Small-sum Loan Contract.

1. Tort Law

The most prominent amendment was to add "Dispute over the Liability for Tort" as one of the level-1 causes of action as Part IX, as the result of the promulgation of the Tort Law, and consequently, in accordance with relevant provisions included in the Tort Law, the new Provisions list detailed causes for tort disputes stipulated by the Tort Law. Although civil rights and interests⁵ are the subject matter protected by the Tort Law, for the sake of keeping stabilization of the Provisions, merely those new causes of action as provided in the Tort Law and those which are inappropriate to be categorized into other parts are incorporated into Part IX "Dispute over Tort Liability".

2. Property Law

The Property Law does not affect the amendments to the Provisions as much as the Tort Law does. The new Provisions maintain the previous categorization to property law disputes and contract disputes, for example, disputes over security interest shall belong to the property law disputes, since such disputes may relate to the establishment of the property right; however, disputes over security agreement shall belong to the disputes over contract, as those disputes relate to contractual relations.

3. Application of the new Provisions

- 1) In applying the new Provisions, the court of first instance shall first try to use the level-4 causes of action, and then level-3, and then level-2. Level-1 causes of action shall be the last choice. With regard to the new causes that may be regarded as level-3 or level-4 causes of action, occurring in judicial practice, local people's courts shall report to the Supreme People's Court in time, so that the Supreme People's Court may collect and study, and may choose to include them into the next provisions of causes of action;
- 2) Each court shall correctly understand the feature and function of this Provisions which is merely to unify the usage of the terms to describe the same legal relations, and shall not regard them the same as Article 108 (conditions for filing a lawsuit) of the Civil Procedure Law of the PRC; Furthermore, each court shall not deny acceptance or reject lawsuit for the reason that certain causes are not listed in the Provisions;
- 3) Each court shall decide the cause of action based on feature of the legal relations, if more than one legal relations involved in the same lawsuit; While in case such legal relations are all involved, then more than one cause of action is also allowed;

⁵ Civil rights and interests used in the Tort Law include: the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.

- 4) In the event of concurrence of claims, the court shall allow the parties involved to choose claims freely; and
- 5) If the legal relation raised by the party involved is different from the actual one, the court shall change the cause of action pursuant to the actual legal relation.

© Wenfei, Beijing, August 2011

Check the China Legal Briefing archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: china@wenfei.com