

# Spouse Infidelity Clause under Chinese Laws

## Description

A [pre-nuptial agreement or contract](#) is no longer an alien concept to people in many jurisdictions including China, a relatively conservative society. Chinese young people entering into marriages are increasingly considering signing such a contract.



Prenuptial Agreement under Chinese Laws

## I. What is a Nuptial Agreement Like under Chinese Laws

What is a nuptial agreement supposed to look like? What can be written into a nuptial agreement? When should a nuptial agreement be signed?

Different jurisdictions will very likely give different answers.

In the year 2001, China Marriage Law introduced the nuptial agreement regime, and till 2021 when China Civil Code was enacted, the provisions about nuptial agreement have remained largely the same.

Article 1065 of China Civil Code reads:

A man and a woman may agree that their premarital property and the property to be acquired by them during their marriage may be owned by them separately or jointly, or partially owned separately and partially owned jointly. The agreement shall be in writing. Where there is no agreement or the agreement is unclear, Articles 1062 and 1063 of this Code shall apply.

The agreement on their premarital property and the property acquired during the marriage is legally binding on both parties to the marriage.

Where the spouses agree that the property acquired during the marriage is to be owned

separately, a debt incurred by one of the spouses shall be paid off with his separate property to the extent that the third person concerned is aware of such an agreement.

### *Nuptial Agreement Provisions in China Civil Code*

These provisions have laid out the basic legal framework for nuptial agreements in China.

Examining this article carefully, you will find that in China, a nuptial agreement, either pre-nuptial or post-nuptial, is supposed to deal with marital or matrimonial property ownership, and related debt obligations to third party creditors between spouses, **not other marital issues**.

## **II. Expansion of Nuptial Agreement to Non-property Marital Issues**

In practice, we have seen many couples take advantage of this legal regime to address other non-property marital issues, in particular, infidelity or adultery, something that could happen to every couple and in every marriage.

Adultery can be painful and devastating, a nightmare that all new couples want to fend off and keep at bay. So many of them resort to prenuptial contracts in which they ask their better halves to undertake that they will and shall remain faithful and must not commit adultery. In case of breach of such undertakings, there will always be some sort of serious pecuniary consequence such as:

(1) the breaching party shall forfeit everything acquired and accumulated during their marriage upon divorce; or

(2) the breaching party shall pay a big amount of damages to the non-fault party, often big enough to deprive the other party entirety or most of his or her marital properties;

So, when adultery does happen, as is often the case, and the parties go to court for divorce, will China courts uphold those terms described above?

Unfortunately, China courts are divided on this issue. We have researched on this topic and found that courts in the past have delivered opposite decisions with some upholding the terms and some denying the same.

## **III. China Judicial Practice**

Courts in China have diverged greatly on this issue. We saw a report finding out that among 71 relevant judgments on the validity of loyalty or infidelity agreements, 16 judgments upheld the validity of such agreements and 17 judgments held the opposite, and 38 judgments simply avoided ruling on the validity of such agreements. So you can see how divided Chinese judges are about infidelity clause or agreement or loyalty contract.

It is hard to foresee a clear direction of judicial development in this area of legal practice without concrete guidelines from China Supreme Court.

There is a disturbing interpretation of some changes brought about by China Civil Code in regard of general contract law and marriage law, which could lead to the judicial leaning towards upholding of such infidelity clause in nuptial agreements in China.

(1) first of all, in the section of contract law in China Civil Code, Article 464 of the Code says that contracts for marriage, adoption, custody and other personal relationships shall be regulated by such special laws governing these personal relationship, and ***in case of absence of such special laws, the provisions of the general contract law may be applied by reference thereto in light of the nature of such personal relationships***. The latter part of reference application of general contract law to those personal relationships is new, not provided in old Contract Law.

This may open the door to China courts to apply general contract rules to marriage contracts including infidelity clause.

(2) also China Civil Code has also showed its willingness to expand the fault-based damages claims by the non-fault spouse upon divorce. In Article 1091, in addition to the four fault grounds (bigamy, cohabitation with others, domestic violence and torturing and abandoning family members) for claiming damages, ***a new blanket wording is added: any other grave faults***. This has prima facie expanded China courts' power to find other faults as a basis for ordering damages in divorce cases.

So it is a bit worrisome that China courts may find it easier to back up infidelity clauses penalizing the faulty party in breach of infidelity clauses.

#### IV. Should You Include Infidelity Clauses in Your Nuptial Agreements

Internationally, [infidelity clauses have met some setbacks in jurisdictions](#) that have braced for no-fault divorce laws.

However, from a pragmatic perspective, it doesn't hurt to add such an infidelity clause in your pre-nuptial or post-nuptial agreements. Very likely, this clause may give one party an upper hand in the case of divorce negotiation, given the ambiguous and widely divided judicial attitudes towards such agreements.

On the other hand, in drafting such nuptial agreements, it is important to gauge the red lines over which courts may strike out such clause altogether. If sheer imbalance or inequality or injustice is found as a result of such infidelity clauses, for instance, depriving the faulty spouse of all his or her rights in matrimonial properties, courts are more willing to step in and redress the balance.

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