

# 中国法通讯 China Law Newsletter 跨境争议解决 Cross-border Dispute Resolution

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编者按：本刊旨在报道与中国有关的跨境争议解决的最新动态与我们的实务经验，但本刊不可替代个案的正式法律意见。若您重复收到本刊或者要订阅、退订或进一步了解本刊的内容，请与大成的有关律师联系。

Editor's note: the purpose of this publication is to report the most recent developments in the field of cross-border dispute resolution in connection with China, as well as our practical experience therein. However, this publication should not be treated as a substitute for a formal legal opinion in individual cases. If you have received this publication more than once, or would like to subscribe or unsubscribe to this publication, or follow up on any issues raised in this publication, please be in contact with the lawyer you usually deal with at Dacheng Law Offices.

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## **立法新闻** **LEGISLATIVE NEWS**

- 人社部公布《企业劳动争议协商调解规定》（来源：人力资源和社会保障部网站，2011年12月5日）

**MOHRSS Issues the Provisions on Negotiation and Mediation of Labor Disputes of Enterprises (source: www.mohrss.gov.cn, 5 December 2011)**

近日，人力资源和社会保障部公布了《企业劳动争议协商调解规定》（《规定》），自2012年1月1日起施行。《规定》对劳动关系双方协商的原则、方式、参加人、时限及和解协议效力等作出详细要求。

Recently, the Ministry of Human Resources and Social Security (the "MOHRSS ") has

issued the "Provisions on Negotiation and Mediation of Labor Disputes of Enterprises " (the "Provisions ") that come into force on January 1, 2012. The Provisions stipulate detailed requirements for the principles, methods, participants, duration and effect of the settlement agreement of the negotiation of both parties of labor relations.

《规定》明确，大中型企业应当依法设立劳动争议调解委员会，有分公司、分店、分厂的企业，可以根据需要在分支机构设立调解委员会。解委员具有调解劳动争议，聘任、解聘和管理调解员的基本职责，还具有宣传劳动保障法律、法规和政策；参与协调履行劳动合同、集体合同、劳动规章制度等方面出现的问题；参与研究涉及劳动者切身利益的重大方案；协助企业建立劳动争议预防预警机制等职责。

The Provisions stipulate clearly large and medium-sized enterprises shall set up the labor dispute mediation committee according to laws, the enterprises with branch, branch shop and branch factory may set up the mediation committee in branches according to the need. The mediation committee shall have the basic duty of mediation of labor disputes, employment, unemployment and management of mediators, as well as publicity of labor security laws, regulations and policies; participation in coordination of issues arising from implementation of labor contracts, collective contracts and the labor regulations and systems, etc.; participation in research of major plans involving interests of employees; helping the enterprises to establish early warning mechanisms to prevent labor disputes responsibilities, etc.

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- 最高法发布《关于依法妥善审理民间借贷纠纷案件，促进经济发展维护社会稳定的通知》（来源：最高人民法院，2011年12月07日）

**The Supreme People's Court issues a Circular on due and proper trial of private loan disputes to promote economic development and maintain social stability (source: The Supreme People's Court, 07 December 2011)**

2011年12月6日，最高法发布了《关于依法妥善审理民间借贷纠纷案件，促进经济发展维护社会稳定的通知》，要求各级人民法院积极践行能动司法理念，充分发挥审判职能作用，妥善化解民间借贷纠纷，促进经济发展，维护社会稳定。该通知要求各级法院，认真做好民间借贷纠纷案件的立案受理工作；依法惩治与民间借贷相关的刑事犯罪；依法妥善审理民间借贷纠纷案件；加大对民间借贷纠纷案件的调解力度；依法保护合法的借贷利息。该通知还要求各级法院注意防范、制裁虚假诉讼，妥善适用诉讼保全、重整、和解及破产程序等有关司法措施，积极促进建立健全民间借贷纠纷防范和解决机制。

On December 6, 2011, the Supreme People's Court issued a Circular on due and proper trial of private loan disputes to promote economic development and maintain social stability, in which, the Supreme People's Court requests the people's courts at each level to pursue active jurisprudence, and fully leverage the trial functions, in order to properly resolve private loan disputes, promote economic development and maintain social stability. The Circular requests the people's courts at each level to carefully accept into docket private loan disputes, duly punish criminal offenses related to private loans, duly and properly

adjudicate private loan disputes, and strengthen mediation for private loan disputes, and duly protect legitimate lending rates. The Circular also requests the courts at each level to be wary so as to prevent and punish fraudulent litigations, and properly apply relevant judicial measures, such as preservation, restructuring, mediation and bankruptcy proceedings, and actively promote the establishment and improvement of a mechanism for avoiding and resolving private loan disputes.

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- **中国对故意侵权将引入惩罚性赔偿制度（来源：新华网，2011年12月20日）**  
**China will introduce punitive damages for intentional infringements (source: Xinhua Net, 20 December 2011)**

2011年全国外商机构保护知识产权座谈会近日在深圳召开。国家知识产权局副局长贺化在会上表示，我国将研究降低侵权和假冒伪劣行为的刑事责任门槛，加大刑事处罚力度。并提高知识产权侵权罚款数额，研究引入对营利性故意侵权和假冒伪劣行为的惩罚性赔偿制度，同时加大侵权人举证责任。

The IPR Protection Symposium for Foreign Institutions 2011 was held in Shenzhen City today. At the forum, HE Hua, Vice Director of the State Intellectual Property Office, indicated that China will carry out researches and studies in connection with lowering of the threshold for pursuit of criminal liability for acts of infringements and counterfeits, in order to beef up criminal penalties. The studies will also research into areas, including raising the amounts of damages payable for IPR infringements, the introduction of punitive damages for intentional infringements and counterfeits which are committed for profit, and imposition of more burdens of proof on the infringing party.

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- **最高法明确网络著作权侵权判定规则（来源：最高人民法院网站，2011年12月21日）**  
**The Supreme People's Court Defines the Rules for Adjudication of Infringement of Online Copyright (source: www.court.gov.cn, 21 December 2011)**

近日，最高人民法院发布了《关于充分发挥知识产权审判职能作用推动社会主义文化大发展大繁荣和促进经济自主协调发展若干问题的意见》（《意见》）。

Recently, the Supreme People's Court has released the Opinions on Several Issues Concerning Full Exertion of the IPR Adjudication Functions to Promote the Boom of Socialistic Culture and Promote the Autonomous and Harmonious Development of Economy (the "Opinions").

《意见》提出，既要加强网络环境下著作权保护，又要注意促进信息网络技术创新和商业模式发展，确保社会公众利益。

The Opinions provides that the purpose of the Opinions is to strengthen the protection of copyrights under online environment while promote the innovation of information network techniques and development of business modes so as to ensure the public interests of the society.

准确把握网络服务提供行为的侵权过错认定，既要根据侵权事实明显的过错标准认定过错，不使网络服务提供者承担一般性的事先审查义务和较高的注意义务，又要适当地调动网络服务提供者主动防止侵权和与权利人合作防止侵权的积极性。

The accurate recognition of infringement by provision of online service shall not only be based on the recognition of fault according to the fault standard of obvious infringement facts to prevent the online service provider from bearing the obligations of normal precensorship and the higher duty of care, but shall also stimulate properly the online service provider to prevent infringement by itself or cooperating with other stakeholders actively.

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## **司法动态**

### **JUDICIAL DEVELOPMENTS**

- 最高人民法院发布第一批指导性案例（来源：最高人民法院网站，2011 年 12 月 21 日）  
**The Supreme People's Court Releases the First Guiding Cases (source: www.court.gov.cn, 21 December 2011)**

12 月 21 日，根据《最高人民法院关于案例指导工作的规定》，最高人民法院发布了第一批指导性案例，共 4 个，包括民事和刑事案例各 2 个。指导性案例所确定的裁判要点，对人民法院审理类似案件、做出裁判具有指导效力，法官在审判类似案件时应当参照，并可以作为裁判文书的说理依据加以引用。

On December 21, the Supreme People's Court released the first 4 guiding cases including 2 civil cases and 2 criminal cases in accordance with the Provisions of the Supreme People's Court on Guiding Cases. The key principles for adjudication established in these cases will be of function of guidance for the people's courts in hearing similar cases and making decisions and shall be referred by judges when hearing similar cases and may be incorporated as reasoning basis for the preparation of ruling instruments.

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- 陕西高院与省政府建立涉外民商事案件沟通协调机制（来源：中国法院网，2011 年 12 月 31 日）  
**Shaanxi High Court establishes foreign-related civil and commercial case communication and coordination mechanism with the provincial government (source: Chinacourt.org, 31 December 2011)**

为了充分发挥法院和政府部门的职能作用，妥善处理涉外民商事案件，预防和化解纠纷，促进经济发展，维护社会稳定。日前，陕西省高院与陕西省政府外事办公室经协商，形成了《陕西省高级人民法院关于与陕西省人民政府外事办公室建立涉外民商事案件沟通协调机制的会议纪要》。根据该纪要，陕西省法院在处理涉外民商事案

件时，若发现外资企业在用工制度、企业管理中存在漏洞的，应以司法建议的形式建议外资企业完善用工制度、保障职工合法权益以及规范企业管理等。对于某些重大疑难复杂涉外民商事案件，省外事办也可要求省法院进行沟通协调，省外事办还可以对法院的工作提出意见和建议。

In order to fully leverage the functions of courts and government agencies, properly settle foreign-related civil and commercial cases, prevent and resolve disputes, promote economic development, and maintain social stability, Shaanxi High Court and the Foreign Affairs Office of Shaanxi Provincial Government have, through negotiation, formed the Meeting Minutes on Establishing Foreign-Related Civil and Commercial Case Communication and Coordination Mechanism. According to the Minutes, where Shaanxi High Court discovers loopholes in the labor use system or enterprise management of a foreign-invested enterprise when handling foreign-related civil or commercial cases, they should, by way of judicial suggestions, advise the foreign-enterprise to improve the labor use system, guarantee the legitimate rights and interests of staff, and standardize enterprise management. With regard to major complicated foreign-related civil and commercial cases, the provincial Foreign Affairs Office may also require the Court to conduct communication and coordination, and it may also make proposals and give opinions regarding the work of the Court.

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## 仲裁动态

### ARBITRATION DEVELOPMENTS

- 中国海事仲裁委员会西南分会举行揭牌仪式（来源：中国国际经济贸易仲裁委员会，2011年12月01日）

**An Opening Ceremony was held by the Southwest Chapter of China Maritime Arbitration Commission (source: China International Economic and Trade Arbitration Commission, 1 December 2011)**

2011年11月18日，中国海事仲裁委员会西南分会在重庆正式揭牌成立。中国海事仲裁委员会西南分会的设立将为海商海事纠纷当事人提供法律诉讼之外的另一个选择，为中外航运、物流及进出口企业等市场主体提供便捷的纠纷解决机制，为企业和地方经济发展服务，使重庆作为长江上游航运中心的涉外法律服务功能更加完善。

On November 18, 2011, the Southwest Chapter of China Maritime Arbitration Commission was officially unveiled and set up in Chongqing, and its establishment will offer parties to maritime and admiralty disputes an alternative to litigation, and provide Chinese and foreign shipping companies, logistics companies, export and import companies and other market players an expeditious mechanism for resolution of disputes, and the Chapter will facilitate the growth of enterprises and the development of local economy, and



improve the foreign related legal service function of Chongqing City as a shipping center for the upper reaches of Yangtze River.

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## **典型案例**

### **CLASSICAL CASE**

- **最高人民法院指导案例一：上海中原物业顾问有限公司诉陶德华居间合同纠纷案（来源：人民法院报，2011年12月21日）**

本案原告上海中原物业顾问有限公司认为被告陶德华利用中原公司提供的房屋销售信息，故意跳过中介，私自与卖方直接签订购房合同，违反了《房地产求购确认书》的约定，属于恶意“跳单”行为，请求法院判令陶德华按约支付中原公司违约金。

法院经审理查明：房屋买卖居间合同中关于禁止买方利用中介公司提供的房源信息却绕开该中介公司与卖方签订房屋买卖合同的约定合法有效。但是，如果卖方将同一房屋通过多个中介公司挂牌出售时，买方通过其他公众可以获知的正当途径获得相同房源信息的，买方有权选择报价低、服务好的中介公司促成房屋买卖合同成立，其行为并没有利用先前与之签约中介公司的房源信息，不构成违约。本案中房屋卖方即是到多家中介挂牌销售，被告并未利用原告中原地产的售房信息“跳单”，而是通过其他正当途径获知房源并最终选择了满意的中介公司促成房屋买卖合同成立。这样的规定既可以保护中介公司合法权益，促进中介服务市场健康发展，维护市场交易诚信，又能促进房屋买卖中介公司之间公平竞争，提高服务质量，保护消费者的合法权益。

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- **最高人民法院指导案例二：吴梅诉四川省眉山西城纸业有限公司买卖合同纠纷案（来源：人民法院报，2011年12月21日）**

原告吴梅两次出售废书给被告四川省眉山西城纸业有限公司，被告均写有欠条拖欠货款。原告一审起诉后被告对判决的还款额没有异议，但提出上诉。二审审理期间，西城纸业公司与吴梅签订了一份还款协议，使吴梅放弃了支付利息的请求，西城纸业公司遂撤回上诉。但西城纸业公司并未完全履行和解协议，吴梅向一审法院申请执行一审判决得到支持，但西城纸业公司向中院申请执行监督主张不予执行原一审判决。

中院认为：民事案件二审期间，双方当事人达成和解协议，人民法院准许撤回上诉的，该和解协议未经人民法院依法制作调解书，属于诉讼外达成的协议，不具有强制执行力。一方当事人不履行和解协议，另一方当事人申请执行一审判决的，人民法院应予支持。这样既尊重当事人对争议标的的自由处分权，强调了协议必须信守履行的规则，又维护了人民法院生效裁判的权威。

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## **公报案例**

### **CASE FROM SPC**

- **知情权纠纷：夏浩鹏等人诉上海市闸北区精文城市家园小区业主委员会业主知情权纠纷案（来源：最高人民法院公报，2011年第10期）**

本案原告夏浩鹏、杨建平、杨荣华、罗光亚、周修安系上海市闸北区精文城市家园小区业主。五原告起诉精文城市家园小区业主委员会及其负责人姜宏章，认为被告未按规定公布小区维修基金和公共收益有关账目，侵犯其业主知情权。

法院认定，业主知情权是指业主了解建筑区划内涉及业主共有权以及共同管理权相关事项的权利。根据最高人民法院《关于审理建筑物区分所有权纠纷案件具体应用法律若干问题的解释》第十三条的规定，业主请求公布、查阅建筑物及其附属设施的维修基金使用、业委会的决定及会议记录、共有部分的收益、物业服务合同等情况和资料的，人民法院应予支持。司法解释对于业主知情权的范围作出了明确的规定，业主以合理的方式行使知情权，应当受到法律保护。

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大成律师事务所成立于1992年，是亚洲最大的综合性律师事务所之一。大成总部设在北京，拥有中国最大的全球化法律服务网络，在上海、武汉、成都、济南、重庆、天津、哈尔滨、郑州、银川、西宁、厦门、杭州、海口、深圳、南通、广州、长春、西安、沈阳、呼和浩特、南京、常州、无锡、青岛、兰州、福州、南宁、太原、大连、长沙、吉林、舟山、合肥、南昌、苏州、香港、台北、莫斯科、新加坡、巴黎、首尔、华盛顿、东京、纽约、芝加哥、旧金山、多伦多、墨西哥、圣保罗、利马、伦敦、布鲁塞尔、柏林、阿姆斯特丹、马德里、斯德哥尔摩、迪拜、开罗、开普敦、阿布贾、特拉维夫、悉尼等城市设有分支机构或联盟机构。

Founded in 1992, Dacheng Law Offices is one of the largest law firms of full services in Asia. Headquartered in Beijing, Dacheng has the largest global legal services network of any law firm in China, with branch offices or alliance partners in Shanghai Wuhan Chengdu Jinan Chongqing Tianjin Ha'erbin Zhengzhou Yinchuan Xining Xiamen Hangzhou Haikou Shenzhen Nantong Guangzhou Changchun Xi'an Shenyang Hohhot Nanjing Changzhou Wuxi Qingdao Lanzhou Fuzhou Nanning Taiyuan Dalian Changsha Jilin Zhoushan Hefei Suzhou Hong Kong Taipei Moscow Singapore Paris Seoul London Washington Tokyo New York San Francisco Toronto Mexico St. Paul Lima London Brussels Berlin Amsterdam Madrid Stockholm Dubai Cairo Cape Town Abuja Tel Aviv Sydney.

争议解决与强制执行是大成的传统优势业务，大成曾获得《亚洲法律事务》(ALB) 2009 年度“纠纷解决律师事务所大奖”。大成可以通过其全球化法律服务网络，帮助客户高效、经济地处理发生在中国各地及其法律服务网络内其他国家和地区的争议。大成在争议解决领域与强制执行可以提供如下法律服务：

Dacheng traditional strength is in the field of dispute resolution and enforcement, and was awarded the Dispute Resolution Law Firm of Year 2009 by Asian Legal Business (ALB). Drawing upon its global legal services network, Dacheng is able to assist clients in resolving, in a highly efficient and economical manner, disputes arising in any location throughout China, as well as all other countries and regions forming part of its global legal services network. Dacheng offers the following legal services in the field of dispute resolution and enforcement:

- (1) 争议解决谈判与争议和解；  
Negotiations in the course of dispute resolution and settlement of disputes;
- (2) 诉前法律咨询；  
Pre-action legal consultancy;
- (3) 诉前调查取证；  
Pre-action investigation and evidence-gathering;
- (4) 证据保全；  
Preservation of evidence;
- (5) 财产保全；  
Preservation of assets;
- (6) 诉讼仲裁代理；  
Representation in litigation and arbitration proceedings;

- (7) 中国法院生效法律文书的强制执行；  
Enforcement of effective legal instruments of the PRC courts;
- (8) 中国仲裁机构（如中国国际经济贸易仲裁委员会）生效裁决的强制执行；  
Enforcement of the effective awards of Chinese arbitration institutions (such as the China International Economic and Trade Arbitration Commission);
- (9) 香港、澳门及台湾法院生效法律文书在中国的承认与执行；  
Recognition and enforcement of the effective legal instruments of the courts of Hong Kong, Macau and Taiwan in mainland China;
- (10) 外国仲裁裁决在中国的承认和执行；及  
Recognition and enforcement of foreign arbitral awards in China; and
- (11) 基于争议解决实务经验的法律风险管理。  
Legal risks management based on our practical experience in dispute resolution.