

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**

- 证券纠纷调解方案及规则初步拟定（来源：上海证券报，2012 年 3 月 13 日）

Securities dispute resolution program and rules take shape (Source: Shanghai Securities News, March 13, 2012)

中国证券投资者保护基金公司（以下简称保护基金公司）有关负责人日前透露，现阶段我国建立证券纠纷诉讼外调机制的时机已经成熟，保护基金公司已拟定出证券纠纷调解工作方案和调解规则，正在征求有关方面的意见，该方案拟借鉴我国台湾地区的证券纠纷调解机制。

The person in charge of China Securities Investor Protection Fund Corporation Limited (SIPF) recently revealed that the time for China to establish the securities litigation and dispute resolution mechanism has arrived. SIPF has worked out the securities dispute resolution program and rules, and are now soliciting the opinions from the parties concerned. The program intends to draw lessons from Taiwan region's securities dispute resolution mechanism.

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- 广东省高级人民法院发布《关于审理建设工程施工合同纠纷案件若干问题的指导意见》（来源：广东法院网，2012 年 3 月 14 日）

High People's Court of Guangdong Province publishes the Guiding Opinions on Certain Issues Relating to Hearing of Construction Contract Dispute Cases (Source: GDCourts.gov.cn, March 14, 2012)

据广东法院网 2012 年 3 月 8 日消息，日前，广东省高级人民法院发布《关于审理建设工程施工合同纠纷案件若干问题的指导意见》（粤高法发[2011]37 号）。该意见指出，工程欠款纠纷案件中，发包人以建设工程质量不符合合同约定为由主张付款条件未成就的，可以作为抗辩处理；发包人以建设工程质量不符合合同约定为由，请求承包人承担违约责任的，应当提起反诉；承包人将建设工程施工合同约定的工程款债权依法转让，债权受让方主张其对建设工程享有优先受偿权的，可予支持；承包人在转让工程款债权前与发包人约定排除优先受偿权的，该约定对承包人以外的实际施工人不具有约束力。

According to news sourced from GDCourts.gov.cn on March 8, 2012, the High People's Court of Guangdong Province recently published the Guiding Opinions on Certain Issues Relating to Hearing of Construction Contract Dispute Cases (Yue Gao Fa Fa [2011] No. 37). The Opinions point out that in a case involving disputes over construction payment in arrears, if the party issuing contract alleges that the payment conditions are not satisfied on the ground that the construction project quality does not meet the contract standard, it may be handled as a defence; if the party issuing contract requests the contractor to bear the liability for breach of contract on the grounds that the construction project quality does not meet the contract standard, it should file a counterclaim; if the transferee of creditor's right claims the priority to the construction project after the party issuing contract legally transfers the creditor's right of project payment stipulated in the construction contract, it may be supported; if the party issuing contract and the contractor agree on exclusion of the priority of claim before the transfer of the creditor's right of project payment, such agreement is not binding on the actual construction parties other than contractor.

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- 《最高人民法院关于审理海上货运代理纠纷案件若干问题的规定》将于 5 月 1 日开始实施（来源：人民法院报，2012 年 3 月 19 日）

Provisions of the Supreme People's Court on Certain Issues Involved in Hearing of Ocean Freight Forwarding Dispute Cases become effective on May 1, 2012 Circumstances (Source: RMFYB.chinacourt.org, March 19, 2012)

2012 年 2 月 27 日，最高院公布《最高人民法院关于审理海上货运代理纠纷案件若干问题的规定》（法释[2012]3 号）（2012 年 1 月 9 日最高人民法院审判委员会第 1538 次会议通过），该司法解释共 19 条，明确了审理海上货运代理合同纠纷案件应采取过错推定原则，由货运代理企业对其不具有过错承担举证责任。该司法解释将于今年 5 月 1 日起实施。针对实践中少数货运代理企业为追求自身利益，将委托人的货物交给不具有资质的无船承运人运送的情况，该司法解释明确货运代理企业对其不当选任承运人应当承担相应的赔偿责任。

On February 27, 2012, the Supreme People's Court published the Provisions of the Supreme People's Court on Certain Issues Involved in Hearing of Ocean Freight Forwarding Dispute Cases (Fa Shi [2012] No. 3) (adopted at the 1538th meeting of the Trial Committee of the Supreme People's Court on January 9, 2012). The said 19-article judicial interpretation clarifies that the principle of presumptive fault should be adopted when hearing the cases involving disputes over ocean freight forwarding contracts and the freight forwarders should bear the burden of proof regarding their allegation that they do not have fault. The judicial interpretation will become effective on May 1, 2012. As for the practice that a few freight forwarders deliver the principals' goods to unqualified NVOCCs for transport in pursuit of their own interests, the judicial interpretation clarifies that the freight forwarders should bear the corresponding compensation liabilities for their improper election of carriers.

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- 最高法院公布审理道路交通事故赔偿案解释意见稿（来源：人民日报，2012 年 3 月 21 日）

Supreme People's Court Announces the Draft for Comments of Interpretation on the Trial of Cases on Road Traffic Accident Compensation (Source: www.people.com.cn, March 21, 2012)

3 月 21 日，最高人民法院公布了《关于审理道路交通事故损害赔偿案件适用法律若干问题的解释（征求意见稿）》。《意见》明确，出租车发生交通事故造成损害，赔偿权利人请求经营出租车的单位或个人对超出机动车第三者责任强制保险责任限额之外的损害承担赔偿责任的，法院应予支持。免费搭乘机动车发生交通事故造成搭乘人损害，被搭乘方有过错的，应当承担赔偿责任，但可以适当减轻其责任。搭乘人有过错的，应当减轻被搭乘方的责任。《意见》称，驾驶人未取得驾驶资格、醉酒、吸毒、滥用麻醉药品或精神药品后驾驶机动车发生交通事故的或被保险人故意制造交通事故的，最后导致人身损害的，由保险公司在机动车第三者责任强制保险责任限额范围内予以赔偿。在交通事故责任认定上，《意见》称，法院有充分证据足以推翻公安

机关交通管理部门制作的交通事故认定书的，人民法院应确认其证明力。

On March 21, the Supreme People's Court announced the "Interpretation on Several Issues Concerning the Application of Law in the Trial of Cases on Road Traffic Accident Compensation (Draft for Comments)" (the "Draft"). It is due by April 21, 2012. The Draft stipulates clearly that where a traffic accident of taxi causes damages, if the claimant for compensation request compensation from the unit or the individual operating the taxi for the damages outside the insurance coverage of compulsory third party insurance, the Court should support it. Where any traffic accident of motor vehicle causes damages to a passenger taking free ride, the party giving the ride having defaults should undertake the responsibility of compensation; however the responsibility may be reduced properly. Where the passenger has defaults, the responsibility of the party giving the ride should be reduced. The Draft states that where the driver who fails to get the driving qualification or is drunk, takes drugs, abuses narcotic drugs or psychotropic drugs drives a motor vehicle and causes a traffic accident, or a insured person creates a traffic accident deliberately and causes personal injury, the insurance company should compensate for the loss within the insured coverage of compulsory third party insurance of motor vehicle. On the identification of traffic accidents, the Draft stipulates where the People's Court has sufficient evidence to overthrow the Report Concerning Traffic Accidents made by the Traffic Administration Department of the Public Security Authority, the People's Court should confirm the probative force.

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司法动态 **JUDICIAL DEVELOPMENTS**

- 最高人民法院发布《印发〈关于在审判执行工作中切实规范自由裁量权行使保障法律统一适用的指导意见〉的通知》（来源：最高人民法院网站，2012年3月15日）

SPC releases the Notice on Printing and Distributing the "Guiding Opinions on Effectively Regulating the Exercise of Judicial Discretion and Ensuring Unified Application of Laws in the Trial and Execution Work" (Source: Supreme People's Court, March 15, 2012)

2012年3月14日，最高人民法院发布了《印发〈关于在审判执行工作中切实规范自由裁量权行使保障法律统一适用的指导意见〉的通知》（法发[2012]7号）。该通知对自由裁量权的行使条件、行使原则、正确运用证据规则、正确运用法律适用方法、正确运用法律解释方法、正确运用利益衡量方法、强化诉讼程序规范、强化裁判文书规范、强化审判管理、合理规范审级监督、加强司法解释、加强案例指导、不断统一裁判标准、加强法官职业保障、防止权力滥用等方面的内容进行了规定。

On March 14, 2012, the Supreme People's Court (SPC) released the Notice on Printing

and Distributing the "Guiding Opinions on Effectively Regulating the Exercise of Judicial Discretion and Ensuring Unified Application of Laws in the Trial and Execution Work" (Fa Fa [2012] No. 7). The Notice specifies the conditions and principles for exercising judicial discretion, correct application of evidence rules, law application methods, legal interpretation methods and interest balancing methods, strengthen the specifications of proceedings, strengthen the specifications of adjudicative documents, strengthen the trial management, reasonably regulate the trial-level supervision, strengthen the judicial interpretation, strengthen the case guidance, constantly unify the judicial standards, strengthen the vocational safeguard for judges, prevent the abuse of power and so forth.

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- 上海海事法院发布《2010—2011 海事审判“白皮书”》以及 10 件具有规则示范意义的典型案例（来源：中国法院网，2012 年 3 月 23 日）

SMC release the White Paper on Maritime Trial 2010-2011 and ten typical cases (Source: Chinacourt.org, March 23, 2012)

2012 年 3 月 22 日，上海海事法院召开海事审判情况通报会，向相关航运建设主管部门、航运行业组织、航运企业代表通报过去一年该院海事审判工作情况，发布《2010—2011 海事审判“白皮书”》以及 10 件具有规则示范意义的典型案例。此次发布的白皮书细数了在海上运输、货运代理、航运保险、船舶交易、水上安全 5 大类纠纷中反映出的 28 个突出问题以及在上海国际航运中心建设过程中有待完善的 5 个方面的服务功能，并分别提出了相应的对策和建议。

On March 22, 2012, the Shanghai Maritime Court (SMC) held a meeting to brief the maritime trial situation, report its maritime trial work of past year to the competent departments of navigation construction, shipping service associations, representatives of shipping companies, and release the White Paper on Maritime Trial 2010-2011 and ten typical cases with the significance of rule demonstration. The White Paper details 28 striking problems reflected in five major categories of disputes, i.e., marine transport, freight forwarding, marine insurance, shipping exchange, and water traffic safety, as well as service functions awaiting improvement in five aspects in the process of constructing the Shanghai international shipping center, and puts forward corresponding countermeasures and suggestions.

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- 北京市一中院公布报告显示七成劳动争议案涉及社保法（来源：中国法院网，2012 年 3 月 26 日）

Beijing First Intermediate People's Court releases a report showing that 70% of the labor disputes concerns social security laws (Source: Chinacourt.org, March 26, 2012)

据中国法院网 2012 年 3 月 26 日消息，日前，北京市一中院日前公布的一份调研显示：今年市一中院受理的案件中，70%左右的案件都涉及社会保险方面的诉求，主要涉及四种争议类型：迟延转移社保手续要求赔偿损失、未缴纳社保费用要求赔偿损失、工伤保险待遇争议以及有关生育保险类的争议。其中，以单位未缴社保，劳动者要求赔偿损失的诉求最为普遍，占全部社会保险争议的 60%以上。而且，群体性案件

持续增多。2010 年，法院受理的 4527 件劳动争议案件当中，当事人在 5 人以上的有 1477 件，占 32.6%，今年前三个月受理的 949 件劳动争议案件中，当事人在 5 人以上的为 355 件，占 37%。就行业来看，群体性案件多集中在餐饮、建筑、中介机构等劳动密集型行业和服务性行业，发生群体以农民工为主，案件类型以劳动报酬和加班工资为主，约占 60%。

According to a piece of news on the China Court Net on March 26, 2012, Beijing First Intermediate People's Court recently released a survey report, indicating that of the cases accepted by the Beijing First Intermediate People's Court this year, about 70% involves social security claims, relating to four main types of disputes: claims for damages due to delay in transfer of social security formalities; claims for damages due to non-payment of social security contributions; disputes related to work-related injury insurance entitlements, and disputes related to maternity insurance. Of the social security related disputes, the most common form of claims, more than 60%, are those initiated by employees for damages due to non-payment of social security contributions by employers. Furthermore, the number of group cases continues to rise. In 2010, of the 4527 labor dispute cases accepted by the court, 1477 cases, or 32.6% of the total, have more than 5 disputing parties. Of the 949 cases accepted in the first three months this year, 355 cases, or 37% of the total, have more than 5 disputing parties. The group disputes are mostly concentrated in the labor intensive industries and the service industry, such as catering services, the construction sector and intermediary agencies, and they concern mostly migratory workers, with about 60% of those disputes related to labor compensation and overtime pay.

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- 最高法加强和规范司法建议 不得以个人名义发送司法建议（来源：最高人民法院，2012 年 3 月 29 日）

SPC strengthens and standardizes Judicial Suggestions, no Judicial Suggestions delivered in individual's name allowed (Source: Supreme People's Court, March 29, 2012)

3 月 28 日，最高人民法院公布了《最高人民法院关于加强司法建议工作的意见》（《意见》），对加强和规范司法建议工作提出了明确要求。《意见》对司法建议的对象、发送主体作了要求。明确规定人民法院可以向相关党政机关、企事业单位、社会团体及其他社会组织提出司法建议。司法建议书应当以人民法院的名义发送，不得以法院内设机构或者个人名义发送。拟向上级党委、人大、政府及其他部门提出的司法建议书，必要时可以提请上级人民法院发送。《意见》还对司法建议类型等做出了统一规定。司法建议包括个案司法建议、类案司法建议和综合司法建议三个类型。

On March 28, the Supreme People's Court (SPC) issued the Opinions of Supreme People's Court on Strengthening Judicial Suggestions (the "Opinions"), putting forward clarified requirements on strengthening and standardizing judicial suggestions. The Opinions set out requirements on targets and senders of judicial suggestions, clarifying that people's courts may give judicial suggestions to the relevant CPC and government organs, enterprises and public institutions, social groups and other social organizations. Judicial suggestions shall be given in name of people's court, and shall not in name of any

department or individual of any people's court. Judicial suggestions to be delivered to CPC committee, NPC, government or other authorities at upper levels may be submitted to the people's court at upper levels for delivery, if necessary. The Opinions also have uniform provisions on the categories of judicial suggestions. Judicial suggestions can be divided into three categories: individual case suggestions, class case suggestions and comprehensive suggestions.

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仲裁动态

ARBITRATION DEVELOPMENTS

- 安徽成立海事调解中心（来源：中国海事仲裁委员会，2012 年 3 月 23 日）
A maritime mediation center was set up in Anhui province (Source: China Maritime Arbitration Commission, March 23, 2012)

2012 年 3 月 22 日，经安徽省地方海事局和中国贸促会批准，在芜湖地方海事局内设立了中国海事仲裁委员会安徽海事调解中心。该中心的成立，不仅为水上事故当事人提供了一条更加高效灵活、成本低廉的海事纠纷解决途径，也有助于分担海事管理机构行政调解的职能。

Upon approval by the Anhui Provincial Maritime Bureau and China Council for the Promotion of International Trade (“CCPIT”), China Maritime Arbitration Commission Anhui Maritime Mediation Center was set up on March 22, 2012, and it was organized under Wuhu Regional Maritime Bureau. The setting up of this center will not only provide a more efficient, flexible and cost effective means for resolution of maritime disputes, but also helpful in taking on the functions of administrative mediation currently administered by the maritime administrative authority.

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典型案例

CLASSICAL CASE

- 经授权的涉外定牌加工行为不构成侵权（来源：人民法院报，2012 年 3 月 1 日）

2009 年 12 月 2 日，韩国公司 A4 Style Co., Ltd.（以下简称“韩国艾弗公司”）委托原告无锡艾弗国际贸易有限公司生产加工 3500 条鳄鱼牌女士牛仔裤，金额与数量允许 5% 增减。原告审查了以下内容：新加坡鳄鱼公司自 1987 年起在韩国注册核定使用商品为长裤的“Crocodile 及图”、“CROCODILE”、“Crocodile”三个商标；新加坡

鳄鱼公司许可韩国亨籍公司使用上述商标；韩国亨籍公司（买方）与韩国艾弗公司（卖方）就 3500 条女士牛仔裤签订的合同书；韩国亨籍公司及新加坡鳄鱼公司分别出具了确认书及授权书，确认原告有权加工涉案商品，但所制造的鳄鱼牌服装必须全部发回韩国，在中国境内不得进行销售。

2010 年 1 月 29 日，原告申报出口，报关单显示：运抵国为韩国，商品名称为棉制女裤，数量 3484 条。2010 年 2 月 10 日，上海海关向原告发出《扣留侵权嫌疑货物告知书》，告知上述货物吊牌及腰背贴显示“CROCODILE LADIES”，吊牌及水洗标上有“Crocodile 及图”标识，涉嫌侵犯被告在我国享有的“CROCODILE”注册商标专用权，海关已予以扣留。

故，原告起诉至法院，请求法院判令：确认原告在服装上使用的“Crocodile 及图”商标和“CROCODILE”商标不侵犯被告享有的“CROCODILE”注册商标专用权。

上海市浦东新区人民法院经审理认为，涉外定牌加工是指境外委托方提供商标，委托我国境内加工方加工贴附商标的产品，产品加工完成后全部返回境外销售，境内加工方获取加工费的贸易方式。涉外定牌加工行为是否侵犯我国境内注册商标专用权，应主要审查：该涉外定牌加工行为是否因商标混淆给境内商标权人造成损害后果。

TRIPS 协定第 16 条规定，商标注册人拥有商标权。商标权的核心在于避免消费者对商品或服务的出处产生混淆。注册商标所有人应享有专用权，防止任何第三方未经许可在商业中使用与注册商标相同或近似的标志，去标示相同或类似的商品或服务，以造成混淆的可能。因此，“混淆的可能性”是商标侵权行为的一项独立构成要件。《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》第九条第二款规定：“商标法第五十二条第（一）项规定的商标近似，是指被控侵权的商标与原告的注册商标相比较，其文字的字形、读音、含义或者图形的构图及颜色，或者其各要素组合后的整体结构相似，或者其立体形状、颜色组合近似，易使相关公众对商品的来源产生误认或者认为其来源与原告注册商标的商品有特定的联系。”

从上述解释可以看出，商品来源的混淆是判断商标侵权的一个重要因素。本案中，虽然涉案商标与被告的注册商标近似，也被使用在相同的商品上，但涉案产品吊牌上标明了商标权利人新加坡鳄鱼公司的名称及韩国的品牌认证等，原告基于境外相关权利人的明确委托加工涉案产品后全部发往韩国，产品不在中国境内销售。涉案商标仅在中国境外产生商品来源的识别作用，不可能造成国内相关公众的混淆、误认；而被告取得的商标权仅在我国境内发生效力，产生商品来源的识别作用，其商品的销售对象是我国境内公众。两者占据的市场不同，销售对象不同，不会带来相关公众的混淆，不会给被告的商标专用权带来损害。由于没有损害后果，侵权行为即不成立。

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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：

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- (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;
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