

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。您若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**

- 全国人大常委会就《中华人民共和国民事诉讼法修正案（草案）》公开征集意见（来源：NPC.gov.cn, 2011 年 11 月 1 日）

NPC Standing Committee seeks public comments on Amendments to the Civil Procedure Law of the People's Republic of China (Draft) (source: NPC.gov.cn, 1 November 2011)

2011 年 10 月 29 日，全国人大常委会将《中华人民共和国民事诉讼法修正案（草案）》及其说明在中国人大网公布，向社会公开征集意见。

The Standing Committee of the National People's Congress (NPC) published the Amendments to the Civil Procedure Law of the People's Republic of China (Draft) and the draft instructions on its website on October 29, 2011, to publicly seek comments.

该草案增加了公益诉讼制度，规定对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，有关机关、社会团体可以向人民法院提起诉讼。

The Amendment Draft to the Civil Procedure Law added the public interest litigation system, prescribing that relevant entities and social groups may file litigations with the people's court against acts that pollution environment, infringe the legitimate rights and interests of consumers or otherwise damage social public interest.

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- 《商务行政处罚程序规定（试行）》征求意见（来源：商务部网站，2011 年 11 月 14 日）

Public Opinions Wanted with regard to the "Provisions on the Administrative Penalty Procedures of Commercial Departments (for Trial Implementation)" (source: Ministry of Commerce website, 14 November 2011)

近日，商务部发布了《商务行政处罚程序规定（试行）》（《规定》），公开征求意见。

Recently, the Ministry of Commerce has issued the "Provisions on the administrative penalty procedures of Commercial Departments (for Trial Implementation)" (the "Provisions") for the solicitation of public comments.

根据《规定》，责令停产停业的；暂扣、撤销或吊销许可证、资格证等的；对公民处以 5000 元以上罚款，对法人或其他组织处以 5 万元以上罚款的行政处罚决定的，商务主管部门应告知当事人有要求举行听证的权利。

According to the Provisions, if any person is ordered to suspend its production or business; its license or certification, etc is suspended, revoked, or withdrawn; more than CNY5, 000 fine is imposed on such individual, or more than CNY50, 000 fine is imposed on such legal person or other organization in a administrative penalty decision, the competent commercial department shall inform such person concerned of the right to request a hearing.

当事人要求听证并且符合规定的，商务主管部门应当在收到当事人申请听证材料后 30 日内组织听证，并在举行听证的 7 日前，以《商务行政处罚听证通知书》的形式通知当事人举行听证的时间、地点、听证人员及有关事项。

If any person concerned requests a hearing and is in compliance with relative regulations, the competent commercial department shall, within 30 days after the receipt of hearing application material, organize the hearing, and before 7 days prior to the hearing, notify the person concerned of the time, location, hearers and related matters of the hearing in the form of notice of the "Administrative Penalty Hearing Notice of Commercial Department".

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- 最高法就《关于审理买卖合同纠纷案件适用法律问题的解释》（征求意见稿）向社会公开征求意见（来源：最高人民法院，2011 年 11 月 16 日）

SPC seeks public comments on Interpretation on Issues Concerning the Application of Law in Hearing Cases Involving Disputes over Purchase and Sale Contracts (Draft for Comments) (source: Supreme People's Court, 16 November 2011)

买卖合同是现实经济生活中最基本、最常见、也最重要的交易形式。为了保障人民法院在民商事审判工作中正确适用合同法第九章关于买卖合同的相关规定，提高买卖合同法则的可操作性，最高人民法院专门起草了《关于审理买卖合同纠纷案件适用法律问题的解释》（征求意见稿）。为了进一步完善该司法解释，使该司法解释更符合市场交易实际和审判实践的要求，更好地保护各方当事人的合法权益，通过最高人民法院网、中国法院网、人民法院报等向社会公开征求意见。意见征集截止日期为 12 月 31 日。

Purchase and sale contracts serve as the most common and important transaction mode. In order to ensure the correct application of provisions on purchase and sale contracts as stipulated in Chapter 9 of the Contract Law in the hearing of civil and commercial cases, and improve the operability of rules on purchase and sale contract, the Supreme People's Court drafted the Interpretation on Issues Concerning the Application of Law in Hearing Cases Involving Disputes over Purchase and Sale Contracts (Draft for Comments). With a view to further improving this Interpretation, and better protecting the legal rights and interests of all parties concerned, SPC decided to seek public comments on the Interpretation via Chinacourt.org, etc. The deadline for comment submission is December

31, 2011.

根据该意见稿，出卖人履行交付义务后诉请买受人支付价款，买受人以出卖人违约在先进行抗辩的，买受人拒绝支付违约金、拒绝赔偿损失或者主张出卖人应当采取减少价款等补救措施的，属于行使抗辩权；买受人主张出卖人应支付违约金、赔偿损失或者要求解除合同的，应当提起反诉。

The draft stipulates that where a seller has fulfilled the delivery obligations and then files a lawsuit with court requesting the buyer to pay the contract price, while the buyer defends on the ground that the seller commits a breach of contract before the buyer's failure to perform the payment obligation, refuses to compensate the losses incurred by the seller, or claims that the seller should make remedies by lowering the price, it should be deemed that the buyer is exercising the right of defense; where the buyer claims that the seller should pay penalty or damages, or compensate losses incurred by the buyer, or requests the termination of contract, the buyer should file a counterclaim.

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- 国家工商行政管理总局发布《公司债权转股权登记管理办法》（来源：国家工商行政管理总局，2011年11月24日）

SAIC releases Measures for the Registration and Administration of Company Debt-for-Equity Swaps (source: State Administration for Industry and Commerce, 24 November 2011)

2011年11月23日，国家工商行政管理总局发布了《公司债权转股权登记管理办法》。该办法共19条，对公司债权转股权的登记管理的适用范围等内容作出了规定。该办法自2012年1月1日起实施。

On November 23, 2011, the State Administration for Industry and Commerce (SAIC) promulgated the Measures for the Registration and Administration of Company Debt-for-Equity Swaps. The 19-article Measures stipulate the application of the registration and administration of company debt-for-equity swaps, and become effective on January 1, 2012.

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- 国家版权局公布《使用音乐作品进行表演的著作权许可使用费标准》（来源：国家版权局，2011年11月28日）

NCAC issues Copyright License Royalty Standards for Performances of Musical Works (source: National Copyright Administration, 28 November 2011)

2011年10月27日，国家版权局公布了《使用音乐作品进行表演的著作权许可使用费标准》。此次公布的标准分为现场表演收费标准及机械表演收费标准两大类。此外，该许可标准在我国中部、西部等经济相对落后的地区执行时，可以根据实际情况进行适当调整后适用；在连锁企业就其所属门店统一解决音乐作品表演权时，可以基于连锁企业经营规模将本标准进行适当调整后适用；在行业协会就其会员单位统一解决音乐表演权时，可以基于行业覆盖率将本标准进行适当调整后适用。

The National Copyright Administration (NCAC) issued the Copyright License Royalty

Standards for Performances of Musical Works on October 27, 2011. The Standards apply to two kinds of performances, live performances and mechanical performances. Furthermore, the Standards specify that appropriate adjustments to the Standards are allowed under the following circumstances: (1) the Standards are implemented in the central and western regions of China where the economy is relatively backward; (2) musical works are performed in a uniform manner in all stores of a chain enterprises; and (3) trade associations handle matters related to musical performances for their membership enterprises in a unified manner.

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- 北京市财政局等三部门联合发出《关于加强存量房交易税收征管工作的通知》（来源：北京市人民政府，2011 年 11 月 28 日）

Beijing issues Notice on Strengthening Tax Collection Work Related to the Trading of Inventory Houses (source: Beijing Municipal People's Government, 28 November 2011)

2011 年 11 月 22 日，北京市财政局、北京市地方税务局、北京市住房和城乡建设委员会联合发出《关于加强存量房交易税收征管工作的通知》（京财税[2011]418 号），明确：存量房交易双方当事人应当在申请权属转移登记前，进行存量房买卖合同网上签约并如实申报房屋成交价格；在存量房交易税收征管工作中，对于纳税人报送资料齐全、符合受理条件的，主管税务机关受理后，对纳税人申报的存量房成交价格符合存量房交易价格评估值的，按照申报价格征收税款；对于申报价格明显偏低且无正当理由的，按核定计税价格征收税款，有正当理由的，按申报价格征收税款。

On November 22, 2011, Beijing Municipal Finance Bureau, Beijing Local Taxation Bureau, and Beijing Municipal Commission of Housing and Urban-Rural Development jointly issued the Notice on Strengthening Tax Collection Work Related to the Trading of Inventory Houses (Document No.: Jing Cai Shui [2011] No. 418). The Notice clearly states that parties to an inventory house transaction should sign an online sale and purchase contract on inventory house and report the authentic house transaction price before applying for the registration of the housing ownership transfer. With respect to tax collection on the trading of inventory houses, the Notice stipulates that where a taxpayer has submitted the complete materials and meets the relevant requirements, the competent taxation authority should levy tax based on the transaction price reported by the taxpayer if such reported price complies with the price assessment standard for inventory housing trading. Where the reported price is obviously below the standard without justifiable reasons, the taxation authority shall levy tax according to the price assessment standard; but the tax should be levied based on the reported price if there are justifiable reasons for such below-standard price.

该通知自 2011 年 12 月 10 日起执行。以存量房交易双方当事人办理存量房买卖合同（网上）签约的时间为准。《北京市地方税务局关于调整二手房交易计税价格的通知》（京地税地[2006]302 号）同时废止。

The Notice becomes effective on December 10, 2011. The time when an online sale

and purchase contract for inventory house is signed should serve as the basis for whether the Notice should apply to an inventory house trading case. The Notice of Beijing Local Tax Bureau on Adjusting Tax Calculation Standards for Second-hand Housing Transactions (Document No.: Jing Di Shui Di [2006] No. 302) shall be simultaneously repealed.

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司法动态 **JUDICIAL DEVELOPMENTS**

- 我国将开展专项行动整治非法集资问题（来源：新华网，2011年11月11日）
China to launch special campaign to crack down on illegal fund-raising activities (source: Xinhuanet.com, 11 November 2011)

2011年11月10日，新华网记者从当日召开的全国整治非法集资问题专项行动电视电话会议上获悉，处置非法集资部际联席会议决定，从即日起至2012年2月底，我国将集中开展为期3个月的整治非法集资问题专项行动，以严厉整治非法集资违法犯罪活动，最大限度地维护国家经济安全、社会稳定和人民群众根本利益。

A video conference on national campaign for cracking down on illegal fund-raising activities was held on November 10, 2011, Xinhua News Agency reported. The conference announced that inter-ministerial meeting on dealing with illegal fund-raising activities has decided to launch a three-month special campaign at the end of February 2012 to crack down on illegal fund-raising activities, aiming to safeguard the national economic security, maintain social stability, and protect people's fundamental interests.

处置非法集资部际联席会议召集人、中国银监会主席尚福林在会上要求，加强对民间借贷的监管，试行建立地方登记和监测管理体系，加强对民间借贷的资金来源、流向和利率水平的跟踪监控，严禁银行业金融机构信贷资金流入民间借贷市场，严禁担保、典当、投资咨询等中介机构从事高利贷和非法集资活动。

The China Banking Regulatory Commission (CBRC) chairman Shang Fulin set forth the following requirements at the inter-ministerial meeting: (1) to strengthen supervision and administration of private lending activities; (2) to institute local registration, monitoring and administration systems on a trial basis; (3) to strengthen tracking and control of interest rates, flows and sources of private lending funds; (4) to implement strict measures to prevent loans issued by banking institutions from entering into private lending market; and (5) to prohibit the involvement in loan-sharking and other illegal fund-raising activities by intermediary institutions engaged in guarantee, mortgage or investment consulting business.

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- 切实抓好反规避执行专项活动 努力提高执行案件质量和效率（来源：人民法院报，

2011年11月11日)

To effectively implement the special campaign against avoidance of enforcement, to improve the quality and efficiency in handling of enforcement cases (source: People's Court Daily, 11 November 2011)

全国法院反规避执行专项活动经验交流视频会近日在最高人民法院召开。最高人民法院副院长江必新出席会议并讲话，要求各级人民法院抓好“五个结合”强化反规避执行专项活动，切实提高执行案件的整体质量和效率，努力改善执行环境。

A video conference was recently held at the Supreme People's Court to share experiences across the national court systems on the special campaign against avoidance of enforcement, at the meeting, Jiang Bixin, Vice President of the Supreme People's Court, delivered a speech, requesting the courts at each level to strengthen the special campaign against avoidance of enforcement on the basis of the "Five Combination", to improve the overall quality and efficiency of enforcement cases and endeavor to improve the environment for enforcement.

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- **北京首家格式条款专家评审委员认定格式合同5条款涉“霸王”**(来源: 北京法院网, 2011年11月22日)

The first Expert Review Committee on Form Provisions in Beijing holds five clauses in various form contracts are inequitable clauses (source: Beijing Court Net, 22 November 2011)

日前, 北京市首个专门评判“霸王条款”的房山格式条款专家评审委员会召开首次联席会议, 5条格式合同条款被定性为“霸王条款”, 涉及房屋买卖合同、居间服务合同、汽车销售、预付款消费卡、超市会员卡等多个方面。

Fangshan Expert Review Committee on Form Provisions, the first of its kind in Beijing charged to review and evaluate inequality provisions, held its first joint meeting recently, at which, five form provisions were determined to be inequality provisions, involving house sale and purchase contract, intermediary service contract, auto sales, pre-paid consumer cards, supermarket membership cards.

北京市工商部门和法院组成了格式条款专家评审委员会, 房山区则成为试点。目前, 门头沟、怀柔等区也相继成立了类似的评审委员会。

The relevant administration for industry and commerce and the courts in Beijing jointly set up expert review committees on form provisions, and Fangshan District was designated as a pilot. So far, the other districts in Beijing, including Mentougou and Huairou have also set up similar review committees.

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- **最高院副院长奚晓明强调法院审判须坚持调解优先原则**(来源: 最高人民法院, 2011年11月24日)

XI Xiaoming, Vice President of the Supreme People's Court, emphasizes that priority

should be given to mediation in court proceedings (source: Supreme People's Court, 24 November 2011)

2011年11月22日，最高法院副院长奚晓明在吉林省委政法委召开的全省政法机关推广法院系统“调解优先、调判结合”经验工作会议上讲话时要求，要着力把调解优先原则更好地体现在依法调节经济社会关系中，有效化解矛盾纠纷，充分发挥好人民司法的社会调控功能。

On November 22, 2011, XI Xiaoming, Vice President of the Supreme People's Court, delivered a speech at the working meeting on sharing the experiences of the court systems with regard to “priority on mediation, and combining trial with mediation” held by Jilin Province Political and Legislative Affairs Committee, in which he requested the courts to redouble efforts to reflect the principle of “priority on mediation” in the regulation of social and economic relationships, to effectively resolve disputes and fulfill the role of the courts in social regulation.

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仲裁动态

ARBITRATION DEVELOPMENTS

- **厦门海事法院和厦门仲裁委成立区域性海事纠纷解决中心（来源：人民法院报，2011年11月17日）**

Xiamen Maritime Court, Xiamen Arbitration Commission set up regional maritime dispute resolution center (source: People's Court Daily, 17 November 2011)

据人民法院报2011年11月17日消息，近日，厦门海事法院和厦门仲裁委签订合作协议，成立区域性海事纠纷解决中心。双方将充分发挥各自优势，在委托调解、对台服务保障、人才资源共享、业务交流等方面加强合作。

Xiamen Maritime Court and Xiamen Arbitration Commission recently signed a cooperation agreement to establish a regional maritime dispute resolution center, the People's Court Daily reported on November 17, 2011. The two sides aim to strengthen cooperation in commission mediation, services on Taiwan related matters, human resources sharing, etc.

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典型案例

CLASSICAL CASE

■ **全国首例公民诉通信公司信息不公开案有果（来源：法制日报，2011年11月3日）**

我国颁布的信息公开条例规定，与人民群众利益密切相关的公共企事业单位对在提供社会公共服务中制作、获取的信息，有公开的义务。然而，中国联合网络通信有限公司河南省南阳市分公司在客户向其发出手机计费信息公开申请后，在长达15个工作日内不见任何答复，被客户一怒之下告上法庭。近日，南阳市卧龙区人民法院一审判决该公司败诉，并限期向客户公开计费信息。这是全国首例公民起诉通信公司不履行信息公开职责的案例。

法院认定，根据国家工商总局《关于禁止公用企业限制竞争行为的若干规定》，已界定邮政、电讯等行业经营者属于公用企业(即公共企事业单位)，应该按照信息公开条例公开有关信息。被告南阳联通公司属于公用企业，应该按照信息公开条例公开有关信息。

宣判后，南阳联通公司不服，表示将向南阳市中级人民法院上诉。本案后续情况将继续追踪。

反思本案，当前，我国的移动通信行业仍处于垄断状态，凭借庞大的用户基数，每个移动运营商都赚得盆满钵满。正是基于这样的现实，中国的移动运营商需要勇于承担企业社会责任。一是对用户和消费者的责任；二是对社会的公益责任；三是对国家法律政策的遵守义务。运营商只有承担起这些责任，才可能真正在将来的竞争中始终获得用户和社会的信赖。

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公报案例 **CASE FROM SPC**

■ **股权转让纠纷：周益民诉上海联合产权交易所、华融国际信托有限责任公司股权转让纠纷案（来源：最高人民法院公报，2011年6月第六期）**

原告周益民因与被告上海联合产权交易所(以下简称联交所)、被告华融国际信托有限责任公司(以下简称华融公司)发生股权转让纠纷，系因华融公司挂牌转让其持有的银联数据公司的股份，并在挂牌期间变更期限及交易方式，最终原告没有竞得股权而引起的纠纷。

法院认为，产权交易所发布的产权交易信息是向不特定主体发出的要约邀请。根据产权交易市场的交易管理办法和交易习惯，信息一经发布，公告期内一般不得变更，但在无举牌申请人举牌的情况下，可以按照产权出让人的意愿，根据产权交易所的有关规则进行信息变更。举牌申请人在信息变更之后签收载明新信息的相关法律文件并举牌参加交易，应视为清楚并认可产权交易信息的变更。举牌申请人知晓变更情况并

参加交易，在交易结束之后，又请求确认该信息变更无效的，人民法院不予支持。

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- **股东知情权纠纷：李淑君、吴湘、孙杰、王国兴诉江苏佳德置业发展有限公司股东知情权纠纷案(来源：最高人民法院公报，2011年8月第八期)**

本案原告李淑君、吴湘、孙杰、王国兴诉被告江苏佳德置业发展有限公司一案，起因是原告作为被告的股东，欲行使股东知情权，但遭到被告以原告具有不正当目的为由拒绝，原告遂起诉法院。

法院认为，股东知情权是指股东享有了解和掌握公司经营管理等重要信息的权利，是股东依法行使资产收益、参与重大决策和选择管理者等权利的重要基础。账簿查阅权是股东知情权的重要内容。《中华人民共和国公司法》第三十四条第二款对此进行了规定。股东要求查阅公司会计账簿，但公司怀疑股东查阅会计账簿的目的是为公司涉及的其他案件的对方当事人收集证据，并以此为由拒绝提供查阅的，不属于《公司法》规定的股东具有不正当目的、可能损害公司合法利益的情形。

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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、苏州、香港、台北、莫斯科、新加坡、巴黎、首尔、华盛顿、东京、纽约、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 Suzhou Hefei 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.