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跨境争议解决 Cross-border Dispute Resolution

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编者按:本刊旨在报道中国法下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 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.

<u>立法新闻</u> <u>LEGISLATIVE NEWS</u>

- 《最高人民法院关于审理涉台民商事案件法律适用问题的规定》于 2011 年 1 月 1 日 起施行(来源:最高人民法院,2011 年 1 月 1 日)
 The Rule of the Supreme People's Court regarding Applicability of Law in the Trial of Civil and Commercial Cases involving Taiwan (source: Supreme People's Court, 1 January 2011)
- 《最高人民法院关于对因资不抵债无法继续办学被终止的民办学校如何组织清算问题的批复》自 2010 年 12 月 31 日起施行(来源:最高人民法院,2011 年 1 月 1 日) The Reply of the Supreme People's Court on the question of how to organize the liquidation of non-government schools that are terminated on account of being insolvent and unable to continue operating entered into force on 31 December 2010 (source: Supreme People's Court, 1 January 2011)
- 发改委制定《反价格垄断规定》(来源:国家发展和改革委员会,2011年1月3日)
 NDRC Formulated the Anti-pricing Monopoly Provisions (source: National)

Development and Reform Commission, 3 January 2011)

国家发展和改革委员会制定了《反价格垄断规定》和《反价格垄断行政执法程序 规定》,自 2011 年 2 月 1 日起施行。

The National Development and Reform Commission (NDRC) formulated the Anti-pricing Monopoly Provisions and the Provisions for Execution Procedures of Anti-pricing Monopoly, which shall come into force as of February 1, 2011.

《反价格垄断规定》对价格垄断协议、滥用市场支配地位和滥用行政权力等价格 垄断行为的表现形式、法律责任作了具体规定。主要包括:禁止具有竞争关系的经营 者达成固定或者变更价格的八种价格垄断协议;禁止经营者与交易相对人达成固定商 品转售价格和限定商品最低转售价格的协议;具有市场支配地位的经营者,不得从事 不公平高价销售、不公平低价购买、在价格上实行差别待遇、附加不合理费用等六类 价格垄断行为。

The Anti-pricing Monopoly Provisions stipulated the forms of and liabilities for such pricing monopoly activities as pricing monopoly agreements, abuse of dominant market position and abuse of administrative power. The following measures are mainly included: prohibiting undertakings with competitive relationship from concluding eight types of pricing monopoly agreements; prohibiting the undertakings from fixing transfer prices or from restricting the minimum transfer prices with their counterparts; undertakings with dominant market positions must not be engaged in six pricing monopoly activities including unfair high-pricing sales, unfair low-pricing sales, providing differentiated treatment in pricing, or increasing irrational charges.

最高法就非法集资发布司法解释(来源:人民法院报,2011年1月3日)
 SPC released Judicial Interpretations on Illegal Fund-raising (source: People's Court Daily, 3 January 2011)

最高人民法院公布《关于审理非法集资刑事案件具体应用法律若干问题的解释》 (《解释》),自 2011 年 1 月 4 日起施行。

The Supreme People's Court (Court) released the Judicial Interpretations to Issues Concerning Applications of Laws for Trial of Criminal Cases on Illegal Collection of Funds (Interpretations), which shall come into force as of January 4, 2011.

《解释》规定,"未经国家有关主管部门批准,向社会不特定对象发行、以转让 股权等方式变相发行股票或者公司、企业债券,或者向特定对象发行、变相发行股票 或者公司、企业债券累计超过 200 人的",均应当认定为刑法第 179 条规定的擅自发 行股票、公司、企业债券行为;构成犯罪的,以擅自发行股票、公司、企业债券罪定 罪处罚。

Under the Interpretations, "where any party or individual offer, or offer in such disguised form as equity transfer the stocks or company or enterprise bonds to unspecific objects without approval of the relevant authorities, or offer, or offer in disguised form



stocks or company or enterprise bonds to more than 200 individuals", such activities shall be deemed as issuing stocks or, company or enterprise bonds without due approval as stipulated by Article 179 of the Criminal Law; where the any crime is found, the relevant party or individual shall be investigated and punished as the crime of issuing stocks or, company or enterprise bonds without due approval.

《解释》还规定,明知他人从事欺诈发行股票、债券,非法吸收公众存款,擅自 发行股票、债券,集资诈骗或者组织、领导传销活动等集资犯罪活动,为其提供广告 等宣传的,以相关犯罪的共犯论处。

The Interpretations also stipulated that where any party or individual provide advertisement services and other promotion services for the relevant parties or individuals under the precondition that the party or the individual is aware that they are engaged in issuing stocks and bonds in fraud manner, illegally raising public funds, issuing stocks or bonds without any due approval, fraud fund-raising or organizing and leading pyramid marketing, such party or individual shall be deemed as complicity of the crimes.

 人保部公布新修订的《非法用工单位伤亡人员一次性赔偿办法》(来源:人力资源和 社会保障部,2011年1月3日)

MOHRSS Released the Newly-revised Measures for One-off Compensations on Injuries and Deaths by Employers with Illegal Employment (source: Ministry of Human Resources and Social Security, 3 January 2011)

人力资源和社会保障部公布了新修订的《非法用工单位伤亡人员一次性赔偿办法》(《办法》),自 2011 年 1 月 1 日起施行。劳动和社会保障部 2003 年 9 月 23 日颁 布的《非法用工单位伤亡人员一次性赔偿办法》同时废止。

The Ministry of Human Resources and Social Security (MOHRSS) released the newly-revised Measures for One-off Compensations on Injuries and Deaths by Employers with Illegal Employment (Measures), which shall come into force as of January 1, 2011. The Measures for One-off Compensations on Injuries and Deaths by Employers with Illegal Employment, which was promulgated by the Ministry of Labor and Social Security on September 23, 2003, shall be repealed at the same time.

根据《办法》,一次性赔偿包括受到事故伤害或者患职业病的职工或童工在治疗 期间的费用和一次性赔偿金。一次性赔偿金数额应当在受到事故伤害或者患职业病的 职工或童工死亡或者经劳动能力鉴定后确定。

Under the Measures, the one-off compensations shall include the expenditures for the cure and one-off compensations for the employees or child labor who are injured or suffer from occupational diseases. Sum of the one-off compensation shall be calculated upon death of the employees or child labor who are injured or suffer from occupational diseases or upon the labor capability identification.

最高法院出台司法解释规范期货案件审理(来源:人民法院报,2011年1月5日)



SPC Issues Interpretations on Futures Disputes (source: People's Court Daily, 5 January 2011)

最高人民法院发布《关于审理期货纠纷案件若干问题的规定(二)》(《规定(二)》), 自 2011 年 1 月 17 日起施行。

The Supreme People's Court (SPC) promulgated the Provisions on Issues Concerning the Hearing of Futures Dispute Cases (II) (the Provisions (II)), which will come into effect on January 17, 2011.

《规定(二)》明确,以期货交易所为被告或者第三人的因期货交易所履行职责引起的商事案件,由期货交易所所在地的中级人民法院管辖。

The Provisions (II) expressly provides that commercial cases, incurred during the performance of the duties of futures exchanges, with futures exchange as the defendant or the third party, shall be under jurisdiction of the competent local intermediate people's courts.

《规定(二)》规定,法院在办理案件过程中,依法需要通过期货交易所、期货公司查询、冻结、划拨资金或者有价证券的,期货交易所、期货公司应当予以协助。

The Provisions (II) also provides that during the hearing of such cases, where according to the applicable laws, the investigation, freezing or transfer of the funds or securities must be conducted via the competent futures exchange or futures companies; the futures exchange or the futures company must provide the necessary assistance.

刑诉法和民诉法修改已启动全国人大法律委建议列入常委会 2011 年立法工作计划(来源:法制日报,2011 年 1 月 6 日)

Initiatives to amend the Criminal Procedural Law and the Civil Procedural Law have started, and the Law Committee under the National People's Congress suggests to include such initiatives in the legislative work program of the Standing Committee of the National People's Congress this year (source: Legal Daily, 6 January 2011)

 工商总局出台《反垄断法》三个配套规章(来源:国家工商总局,2011年1月7日)
 SAIC Released Three Regulations Corresponding to the Anti-monopoly Law (source: State Administration for Industry and Commerce, 7 January 2011)

国家工商总局公布了《工商行政管理机关禁止垄断协议行为的规定》、《工商行政 管理机关禁止滥用市场支配地位行为的规定》、《工商行政管理机关制止滥用行政权力 排除、限制竞争行为的规定》,自 2011 年 2 月 1 日起施行。

The State Administration for Industry and Commerce (SAIC) released the Rules of Administration for Industry and Commerce on Prohibition against Monopoly Agreements, the Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position and the Provisions of Industrial and Commercial Administration



for Banning the Abuse of Administrative Power to Eliminate or Restrict the Competitive Activities, which shall come into force as of January 1, 2011.

《工商行政管理机关禁止垄断协议行为的规定》对垄断协议的概念作了进一步细 化规定,垄断协议是指违反《反垄断法》第13条、第14条、第16条的规定,经营 者之间达成的或者行业协会组织本行业经营者达成的排除、限制竞争的协议、决定或 者其他协同行为。

The Rules of Administration for Industry and Commerce on Prohibition against Monopoly Agreements further specified the concept of monopoly agreements, which shall refer to an agreement, decision or other concerted conduct concluded by undertakings or carried out by undertakings in the industry under the auspices of an industry association which eliminates or restricts competition in violation of Articles 13, 14 or 16 of the Anti-Monopoly Law.

《工商行政管理机关禁止滥用市场支配地位行为的规定》,对市场支配地位的概念、如何认定市场支配地位以及市场支配地位的推定与反证制度作了细化规定。

The Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position identified the dominant market position, and specified cognition of dominant market position and etc.

《工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定》,对行政机 关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力,实施的排除、限 制竞争行为的表现形式作了细化规定。

In addition, the Provisions of Industrial and Commercial Administration for Banning the Abuse of Administrative Power to Eliminate or Restrict the Competitive Activities specified the indicators of excluding or restricting competitions via abuse of administrative power by administrative organizations and organizations with power of managing public affairs upon authorization in line with laws and regulations.

 最高法院最高检察院公安部联合出台意见,严惩知识产权犯罪(来源:人民法院报, 2011年1月12日)

Supreme People's Court, Supreme People's Procuratorate and Ministry of Pubic Security Jointly Promulgated Opinions on Severe Punishment of Crimes Infringing Intellectual Property Rights (source: People's Court Daily, 12 January 2011)

最高人民法院、最高人民检察院、公安部联合出台了《关于办理侵犯知识产权刑 事案件适用法律若干问题的意见》(《意见》),对侵犯知识产权刑事案件的犯罪地认定、 管辖争议、并案管辖等作了明确规定。

The Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Pubic Security jointly promulgated the Opinions on Certain Issues Concerning Application of Laws for Handling Criminal Cases on Infringement of Intellectual Property Rights (Opinions), setting out explicit provisions on the determination of place of crime, dispute



over jurisdiction, consolidated jurisdiction and other matters relating to criminal cases on infringement of intellectual property rights.

《意见》明确了商标犯罪中"同一种商品"、"与其注册商标相同的商标"的认定问题,规定名称相同的商品以及名称不同但指同一事物的商品,可以认定为"同一种商品","与其注册商标相同的商标"的情况包括:改变注册商标的字体、字母大小或文字横竖排列仅有细微差别的,改变注册商标的文字、字母和数字等之间的间距的,改变注册商标颜色等。

The Opinions specify the determination of the "same product" and the "trademark identical to the registered trademark" in trademark crimes, setting out that products having the same name and products having the different names but referring to the same thing may be deemed as "same products" and circumstances of "trademark identical to the registered trademark" shall include where the typeface or size of the registered trademark is changed or the horizontal or perpendicular arrangement of words of the trademark is slightly different from that of the registered trademark, where the space among words, characters and numbers of the registered trademark is changed, where the color of the registered trademark is changed, etc.

国家知识产权局公布《专利行政执法办法》(来源:国家知识产权局,2011年1月13 日)

SIPO Promulgated the Measures for Administrative Law-enforcement on Patents (source: State Intellectual Property Office, 13 January 2011)

国家知识产权局公布了《专利行政执法办法》(《办法》),自 2011 年 2 月 1 日起施行。

The State Intellectual Property Office (SIPO) promulgated the Measures for Administrative Law-enforcement on Patents (the Measures), which shall come into effect on February 1, 2011.

《办法》适用于管理专利工作的部门开展专利行政执法,即处理专利侵权纠纷、 调解专利纠纷以及查处假冒专利行为。

The Measures shall apply to the to administrative law-enforcement on patents conducted by departments administering patent work, i.e. the handling of disputes over infringement of patents, mediating patent disputes and investigating and penalizing forgery of patents.

请求管理专利工作的部门处理专利侵权纠纷的,应当符合下列条件:1.请求人是 专利权人或者利害关系人;2.有明确的被请求人;3.有明确的请求事项和具体事实、 理由;4.属于受案管理专利工作的部门的受案和管辖范围;5.当事人没有就该专利 侵权纠纷向法院起诉。

Any applicant requesting the department administering patent work to handle disputes over patent infringement shall satisfy the following conditions: 1. The applicant shall be the



holder of a patent or an interested party; 2. The respondent is definite; 3. The claims are clear and the facts and reasons are specific; 4. The case is within the authority and jurisdiction of the department administering the patent work; and 5. No party concerned has filed a lawsuit with the court for the patent infringement dispute.

<u>司法动态</u> JUDICIAL DEVELOPMENTS

 最高人民法院发布五件侵犯知识产权和制售假冒伪劣商品典型案例(来源:最高人民 法院网站 2011 年 1 月 15 日)

The Supreme People's Court publicizes five typical cases involving infringement of intellectual property rights and the manufacture and sale of counterfeit goods

为配合全国打击侵犯知识产权和制售假冒伪劣商品专项行动的开展,震慑不法分子,切实保护知识产权,维护社会主义市场经济秩序,最高人民法院发布了第二批共 五件侵犯知识产权和制售假冒伪劣商品的典型案例。

In the interests of assisting in the national campaign against the infringement of property rights and the manufacture and sale of counterfeit goods, and in order to deter criminal elements, safeguard intellectual property rights and uphold the socialist market order, the Supreme People's Court has published the second round of typical cases involving the infringement of intellectual property rights and the manufacture and sale of counterfeit goods. There are five cases in this second round of cases.

 经济形势与商事审判 — 访最高人民法院副院长奚晓明(来源:人民法院报 2011 年 1月16日)

Economic conditions and commercial trial work – interview with Vice-President of the Supreme People's Court, Mr. XI Xiaoming (source: People's Court Daily, 16 January 2011)

最高人民法院副院长奚晓明在接受人民法院报专访时指出,在当前和今后一个时期,商事审判能动司法的重点应围绕以下几项工作来开展:

In an interview conducted with the People's Court Daily, Vice-President of the Supreme People's Court, Mr. XI Xiaoming, indicated that, in the coming period, commercial trial work should be focused on the following tasks:

第一,要妥善审理金融、商贸、物流、消费等方面的纠纷案件,保障和服务经济 结构优化和调整。

First of all, ensuring the proper trial of financial, commercial, transport and logistics, consumer and other such disputes, guaranteeing the adjustment and improvement of the



overall structure of the economy.

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第二,依法妥善审理各类投资纠纷案件,加强和规范投资行为。

Secondly, ensuring the proper trial of all kinds of investment disputes in accordance with the law, in order to strengthen and regulate investment behavior.

第三,要依法受理、稳妥处理企业破产和公司清算案件。

Thirdly, ensuring the lawful trial and appropriate handling of enterprise bankruptcy and company liquidation cases.

广电总局开展行动打击电视购物领域侵犯知识产权和制售假冒伪劣商品(来源:国家 广播电影电视总局)

SARFT to Clamp Down on the IPR Infringement and Production & Sale of Counterfeit & Substandard Commodities in TV shopping (Source: State Administration of Radio, Film and Television)

国家广播电影电视总局发布《关于开展打击电视购物领域侵犯知识产权和制售假 冒伪劣商品专项行动的通知》(《通知》),决定于 2011 年 1 月至 3 月集中开展全国打 击电视购物领域侵犯知识产权和制售假冒伪劣商品等行为的专项行动。

According to the Circular on Carrying Out the Special Campaign against Intellectual Property Infringement and Production & Sale of Counterfeit & Substandard Commodities in Television Shopping (the Circular) promulgated by the State Administration of Radio, Film and Television (SARFT), intensive efforts will be made under a special campaign from January to March in 2011 to crack down on violations in connection with intellectual property and fake and substandard products.

《通知》提出,各相关部门要切实做好合作电视购物企业的资质审查工作,要求 相关企业如实向管理部门进行备案

The Circular requires that the relevant governmental departments must conduct qualification review of cooperative TV shopping enterprises, and enterprises concerned must complete the record-filing procedure with competent administrative authority.

《通知》要求相关部门要切实督促合作的电视购物企业做好售后服务工作,切实履行一定期限内可"无条件退货"和"验货付款"的承诺。

The Circular further requires relevant governmental departments to urge TV shopping enterprises to provide proper after-sales service, keep the promises of "unconditional goods return within the prescribed time limit" and "inspection before payment".



<u>仲裁动态</u> ARBITRATION DEVELOPMENTS

两岸仲裁、调解及争议审查委员会(DRB)制度及实践研讨会在台北召开(来源:中国国际经济贸易仲裁委员会)

The Cross-Strait Workshop on Arbitration, Mediation and Dispute Review Board (DRB) Rules and Practices was held in Taipei (source: China International Economic and Trade Arbitration Commission)

2010 年 11 月 16 日,中国国际经济贸易仲裁委员会(以下简称"贸仲")、台湾 中华仲裁协会、北京市律师协会和台北律师公会在台北市联合举办了仲裁、调解及争 议审查委员会(DRB)制度及实践研讨会。

On November 16, 2010, a Workshop on Arbitration, Mediation and Dispute Review Board (DRB) Rules and Practices was held in Taipei under the joint auspices of China International Economic and Trade Arbitration Commission ("CIETAC"), the Chinese Arbitration Commission of Taiwan, Beijing Bar Association and Taipai Bar Association.

 中国仲裁法学研究会第四届中国仲裁与司法论坛暨 2010 年年会在重庆召开(来源: 中国国际经济贸易仲裁委员会)

The 4th Forum on Chinese Arbitration and Justice cum the Annual Conference 2010 of the China Academy of Arbitration Law was held in Chongqing (source: China International Economic and Trade Arbitration Commission)

2010 年 12 月 10 日,中国仲裁法学研究会、中国国际经济贸易仲裁委员会、中国海事仲裁委员会、最高人民法院民四庭主办、中国国际经济贸易仲裁委员会西南分会、中国国际贸易促进委员会重庆市委员会承办的中国仲裁法学研究会第四届中国仲裁与司法论坛暨 2010 年年会在重庆召开。

On December 10, 2010, the 4th Forum on Chinese Arbitration and Justice cum the Annual Conference 2010 of the China Academy of Arbitration Law, sponsored by the China Academy of Arbitration Law, China International Economic and Trade Arbitration Commission, China Maritime Arbitration Commission, and the 4th Civil Division of the Supreme People's Court, was hosted in Chongqing by the Southwest Chapter of China International Economic and Trade Arbitration Commission and Chongqing Committee of China Council for the Promotion of International Trade.



<u>热点追踪</u> HOT TOPICS

首例环保基金资助环境公益案宣判(来源:人民法院报,2011年1月1日) Ruling issued in the first environmental public interest case funded by environmental fund (source: People's Court Daily, 1 January 2011)

中华环保联合会、贵阳公众环境教育中心起诉贵阳市乌当区定扒造纸厂水污染侵 权纠纷环境公益诉讼案,2010年12月30日贵阳清镇市人民法院环保法庭当庭一审 宣判,判决被告立即停止向南明河排放工业污水,消除对南明河的危害,并支付原告 为搜集证据而支付的合理费用及承担案件中的分析检测费、诉讼费。这是我国首个环 境公益诉讼案件中鉴定费用得到基金会资助的案例。

On 30 December 2010, the Environmental Court of the Qingzhen Municipal People's Court in Guiyang Province issued its first instance judgment in the public interest proceedings initiated by the All-China Environment Federation and the Guiyang Environmental Protection Education Center against the Dingba Paper Mill located in the Wudang District of Guiyang, the plaintiffs having claimed that the paper mill had committed an environmental tort by polluting local water supplies. The Court ordered that the defendant immediately stop discharging its industrial waste water into the Nanming River, thus eliminating the harm caused to the Nanming River, and pay the reasonable expenses incurred by the plaintiffs in its collection of evidence and undertake the legal expenses and analysis and testing fees incurred in the conduct of the case. This is the first environmental public interest case in China in which court appraisal fees have been subsidized by a fund.

法国欧莱雅状告杭州欧莱雅获赔(来源:人民法院报,2011年1月1日)

Loreal France obtains compensation in proceedings against "Hangzhou Loreal" (source: People's Court Daily, 1 January 2011)

一家名为杭州欧莱雅的化妆品公司,使用与世界知名化妆品品牌"欧莱雅"相近 似的字母商标,宣称自己是"法国欧莱雅化妆品有限公司(香港)技术授权",将"莱 雅丽晶"等系列产品打入中国的许多商场、超市、化妆品店。法国欧莱雅公司将其诉 至法院,江苏省高级人民法院终审维持了南通中院的判决,判令杭州欧莱雅公司与上 海美莲妮公司(与杭州欧莱雅公司共同生产销售化妆品)停止商标侵权,共同赔偿因 商标侵权给法国欧莱雅公司造成的损失 40 万元;杭州欧莱雅公司停止使用"欧莱雅" 文字的企业名称,并赔偿由不正当竞争给法国欧莱雅公司造成的损失 10 万元。

A company going by the name "Hangzhou Loreal Cosmetics Co.", which has been using a Chinese-language trademark similar to the world-famous cosmetics company Loreal and claiming to be licensed by "Loreal France Cosmetics Co. (Hong Kong)", and has been selling the "Loreal Loiyir" product range in shopping centers, supermarkets and cosmetics stores throughout China, has been sued by Loreal France. In its final instance judgment, the



Jiangsu Municipal People's Court has upheld the judgment of the Nantong Intermediate People's Court, ordering the Hangzhou Loreal Cosmetics Co. and the Shanghai Milene Co. (the company manufacturing and selling the cosmetics products together with the Hangzhou Loreal Cosmetics Co.) to cease their trademark infringement and jointly compensate Loreal France for losses caused by the trademark infringement in the total amount of RMB400,000; further, the Court has ordered Hangzhou Loreal Cosmetics Co. to stop using the Chinese transliteration of "Loreal" in its company name, and to compensate Loreal France for losses arising on account of its unfair competition, in the total amount of RMB100,000.

<u>实务经验</u> PRACTICAL EXPERIENCE

诉讼仲裁不是一场战斗,而是一场战争 Litigation and Arbitration: a War, not Just a Battle

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1. 案件背景

Background

公司 A 是一家从事某特种设备生产的外国企业。在中国境内只有列入主管部门名单的 企业方可合法生产该设备,公司 B 为该名单内的中国企业。A 公司为进入中国市场,与 B 公司合作,于 2007 年与 B 公司签订合资合同,共同出资设立一家合资企业,从事该特种 设备的生产。双方在合资合同中约定,合资公司设立后 B 公司将协调主管部门在约定期限 内将合资公司列入名单,使合资公司在中国合法生产该设备,此后 A 公司才会向合资公司 出资。合资公司到期未被列入名单的,合资合同自动终止。

Company A is a foreign enterprise whose business is the production of certain specialist machinery. In China, only approved entities which are on a list compiled by the department in charge are permitted to manufacture such machinery. Company B, a Chinese enterprise, is one such entity. To enter the Chinese market, company A signed a joint venture agreement with company B in 2007. Each company agreed to contribute capital to establish a joint venture to manufacture such machinery. They agreed that after the JV was set up, company B would liaise with the department in charge to get the JV put on the list of approved entities within a certain timescale, so that it could start production legally. Only after this would company A be obliged to make its capital contribution. If the JV did not get onto the list within that time, the agreement would automatically terminate.

合资公司于 2008 年初设立, 此后 B 公司未能按期使合资公司列入名单, 且 A 公司在



合资公司为 B 公司代工产品的价格上也未能与 B 公司达成一致,故 A、B 公司均未实际出资,合资公司也未开始经营。2009 年年底, 合资公司因未办理 2008 年度的企业年检而被吊销营业执照。A 公司认为合资合同已自动终止,为尽早进入中国市场,与新的合作方签订了资产收购协议,并拟报请审批机关批准生效。

The JV was set up in early 2008. Company B failed to ensure that it became an approved entity within the agreed timescale. Moreover, the two joint venture partners could not agree on the price for the goods manufactured by the JV on company B's behalf. Therefore, neither party made any capital contribution, and the JV never started trading. At the end of 2009, the JV lost its business license because it failed to submit its 2008 annual report. Company A decided that the joint venture agreement had automatically terminated. As it aimed to enter the Chinese market as soon as possible, company A entered into an asset purchase agreement with a third party and proceeded to apply for approval for its new venture from the relevant authorities.

此后, B 公司向仲裁机构提起仲裁, 认为 A 公司因为代工产品价格未能达成一致而终 止合同的行为构成违约, 要求判决 A 公司继续履行合同、按期出资并赔偿 B 公司。B 公司 同时认为 A 公司新的投资项目违反了合资合同中的限制竞争条款, A 公司应予赔偿。

Company B therefore initiated arbitration proceedings, claiming that company A was in breach of their agreement by terminating it on the grounds of the failure to reach agreement on the price of the goods manufactured for company B. It sought an order to force company A to continue to perform the agreement and compensate company B for its losses. Company B also believed that company A's new venture was in breach of the agreement's non-competition clause, and therefore it should be entitled to compensation.

在此种情形下, A 公司如何才能最大限度的保护自身的商业利益?

Under these circumstances, what is the best way to protect company A's business interests?

2. 法律策略

Legal Strategy

投资者由于各种商业风险,不可避免的会遇到不成功的投资。此时投资者需要以最低的成本从该项投资中抽身,以便开始新的投资活动。因此在前述案件中,A 公司必须赢得仲裁案件。但仲裁毕竟是一项对抗性的游戏,裁决结果取决于仲裁双方对事实的证明、对合同及法律的理解与判断、仲裁员被双方说服的程度、仲裁员个人的经验判断等,这些变量导致仲裁结果在相当程度上存在不确定性。

By definition, commercial risk may often lead to failure. If this happens, the investor involved needs to extricate itself from the investment at minimal cost, so that it can start a new venture. However, litigation is, ultimately, an adversarial game; the final result depends on the way the parties present their case, their understanding and assessment of the contract and relevant laws, whether the court is convinced of their arguments, and the experience and judgment of court officials. All these variants mean that the outcome of litigation is always, to a large extent, uncertain.



A 公司如何确保在仲裁中取得有利的裁决?一种方式,是将仲裁案件的审理作为主要 战场,通过可靠的证据与严谨的法律分析说服仲裁庭做出有利裁决。另一种方式,是将仲 裁案的审理作为战争中的一场战役,将仲裁案置身于更广阔的视角,通过与其他法律手段 及商业计划互相配合,促使仲裁庭只能作出有利于 A 公司的裁决,并保证 A 公司的整体 商业计划。

How should company A ensure that the case will end in its favor? One method is for the company to see the courtroom as the main battleground, trying to obtain a favorable judgment by presenting reliable evidence and precise legal analysis. Alternatively, it can treat the court process as a mere battle in a war, and look at it from a wider perspective. However, by combining the court process with other legal processes and business planning, it is possible to ensure a favorable end result, thus protecting company A's overall business interests.

如前所述,合资公司已被吊销营业执照。根据中国法律,公司被吊销营业执照后未及 时清算的,股东或债权人可申请人民法院指定清算组进行清算。如合资公司已进入清算与 解散的司法程序,合资合同在客观上将再无继续履行的必要性,故仲裁庭将不再可能支持 任何有关继续履行合资合同的请求。因此 A 公司决定通过司法途径先开始合资公司的清 算。

As mentioned above, the JV lost its business license. Under Chinese law, if a company is not liquidated promptly after it has lost its business license, its shareholders or creditors can petition a People's Court to have it liquidated. If the JV enters into liquidation, any agreements it has entered into can no longer objectively be said to be capable of further performance. The tribunal will not be able to support such an application. Accordingly, company A decided to start liquidation proceedings.

为避免在合资公司清算前仲裁案件已审理完毕并作出裁决结案, A 公司需要合法地利 用仲裁程序延缓仲裁案件的审理。但是, A 公司新的投资项目一旦经审批机关批准后生效, 则 A 公司违反了合资合同限制竞争的条款, 因此为了保证新项目的进程, A 公司需要加速 仲裁案件的审理。在延缓或是推动仲裁案件的问题上 A 公司陷入了两难。合资合同约定, 违反限制竞争条款的违约金是 A 公司在新投资项目中获得的利润, 而根据 A 公司在新投 资项目的商业计划, 新投资项目最初三年并不产生利润, 因此 A 公司实际无须支付竞业禁 止违约金。

In order to prevent the tribunal from making a judgment before the liquidation process was completed, company A needed to slow down the arbitration. On the other hand, once its new venture was approved, A was in breach of the original agreement's non-competition clause, so company A needed to speed up the arbitration. Company A was therefore in a catch-22 situation. Under the agreement, the compensation payable for a breach of the non-competition clause was the profit received in the new venture. Since under its business plans, A would not be making any profit for the first three years of its new venture, in practice it would not be required to pay any compensation for such a breach.

因此 A 公司立即着手通过与 B 公司在仲裁庭调解的方式争取时间,并同时向人民法院申请清算。此后合资公司清算一案顺利地被人民法院受理,仲裁庭在得知此情况后也认为合资合同缺乏继续履行的必要性,并支持了 A 公司关于确认合同终止的请求。人民法院



在获悉仲裁裁决已确认合资合同终止后,更加积极地推动公司清算工作,使 A 公司较快了 结了一项不成功的投资,并保证了新的投资项目未受到不利影响。

Accordingly, company A immediately started speeding up the arbitration process, and simultaneously applied to the People's Court for liquidation. After hearing in due course that liquidation has started, the arbitration tribunal ruled that the agreement could no longer be performed, thus granting company A's application to have it terminated. After hearing this, the People's Court speeded up the liquidation proceedings. Company A was therefore able to get out of its unsuccessful investment, and its new venture was not adversely affected.

诉讼或仲裁不是一场战斗,而是一场战争 Litigation and Arbitration: a War, not Just a Battle

前述案件中,合资合同纠纷的仲裁案件、合资公司的司法清算、投资者新的投资项目 均按着合适的节奏一一推动,仲裁案件不再是唯一的战场,而成为了一场战争的一部分, 并通过对全局的运筹安排而实现了最后的胜利。

In this case, the arbitration of the dispute, the liquidation of the JV and the investor's new venture all went ahead in an appropriate fashion. The arbitration was no longer the sole battleground; it became part of a larger war. Through careful overall planning, ultimate victory was achieved.

事实上,任何争议的解决,战场不只是诉讼或仲裁的庭审。诉讼仲裁的庭审应当与其 他法律途径结合起来。作为诉讼或仲裁的律师不仅需要精妙的诉讼或仲裁技巧与经验,更 必须具备丰富的地方性知识,并统筹兼顾各种法律途径,促使诉讼或仲裁对委托人有利地 发展,并使委托人的商业利益最大化。

Whatever the dispute, the battleground is not just the court room or the tribunal. Litigation should work hand in hand with other legal solutions. A dispute resolution lawyer must possess not only the skills and experience of a litigator, but also expert local knowledge, so that he or she can draw upon various legal solutions to achieve a favorable result for his or her client, and maximize the benefit to the client's commercial interests.



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