

# 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**

- 财政部国税总局：夫妻间房产证加名免征契税（来源：财政部网站，2011 年 9 月 2 日）  
**Ministry of Finance and State Administration of Taxation: Adding Name of a Spouse on Property Ownership Certificates Exempted from Deed Tax (source: website of the Ministry of Finance, 2 September 2011)**

2011 年 8 月 31 日，财政部、国家税务总局发布《关于房屋、土地权属由夫妻一方所有变更为夫妻双方共有契税政策的通知》（《通知》）。

On August 31, 2011, the Ministry of Finance and the State Administration of Taxation promulgated the Circular on Policy for Deed Tax on Change from the Ownership of house

and Land by One Spouse to the Joint Ownership by Both Husband and Wife (Circular).

《通知》规定：婚姻关系存续期间，房屋、土地权属原归夫妻一方所有，变更为夫妻双方共有的，免征契税。本通知自印发之日起执行。

The Circular prescribes: during the existence of marriage, deed tax shall be exempted from the change from the ownership of house and land by one spouse to the joint ownership by both husband and wife. This Circular shall come into effects as of the date it is printed and distributed. [Top](#)

■ 企业并购反垄断审查细则今实施（来源：商务部，2011 年 9 月 5 日）

**Monopoly Review Rules on Corporate M&A Come into Effect Today (source: Ministry of Commerce, 5 September 2011)**

2011 年 8 月 29 日，商务部公布了 2011 年第 55 号公告《关于评估经营者集中竞争影响的暂行规定》（《暂行规定》），自 9 月 5 日起施行。

The Interim Provisions on the Review of the Impact of Undertaking Concentrations on Competition (the Interim Provisions) promulgated by the Announcement of the Ministry of Commerce [2011] No. 55 on August 29 this year officially will take effect as of September 5 this year.

《暂行规定》明确，商务部审查经营者集中，根据个案具体情况和特点，综合考虑下列因素：（一）参与集中的经营者在相关市场的市场份额及其对市场的控制力；（二）相关市场的市场集中度；（三）经营者集中对市场进入、技术进步，对消费者和其他相关经营者的影响，对国民经济发展的影响等因素。

The Interim Provisions specify that the following factors will be taken into consideration by the Ministry of Commerce in the undertaking concentration review in light of the actual conditions of individual cases: (1) the market shares and control of the participants in the concentration at the market concerned; (2) The extent of concentration of the market concerned; and (3) The impact of such undertaking concentration on market access, technological progress as well as the impact on the consumers, other business undertakings concerned and the development of the national economy.

《暂行规定》明确了经营者集中对竞争产生不利影响的可能性、市场控制力、市场集中度等因素的评价标准，以及反垄断审查应考虑集中对公共利益、经济效率的影响，经营者是否为濒临破产的企业、是否存在抵消性买方力量等因素。

The Interim Provisions stipulate clear identification standards for such factors as the possibility of adverse impact of undertaking concentration on competition and the extent of market domination and concentration, as well as that the monopoly review should cover such factors as the effect of undertaking concentrations on public interest and economic efficiency of the country, whether any of the business undertakings involved is on the verge of bankruptcy and whether there exists any countervailing buyer power. [Top](#)

■ 商标法修订草案征求意见稿公布（来源：国务院法制办，2011 年 9 月 5 日）

**Revised Draft of the Trademark Law Is Issued for Comments Has Been Issued (source: Legal Affairs Office of the State Council, 5 September 2011)**

9 月 2 日，国务院法制办公布了《中华人民共和国商标法（修订草案征求意见稿）》，公开征求社会各界意见。

On September 2, the Legal Affairs Office of the State Council issued the Revised Draft of the Trademark Law of the People's Republic of China for Comments to publicly solicit opinions from the general public.

与现行商标法相比，征求意见稿规定，声音可以作为商标申请注册，增加了电子注册方式。征求意见稿改革了异议程序，把异议主体限定为“在先权利人或者利害关系人”。

Compared with the existing Trademark Law, the Draft provides that sound may be applied for registration as a trademark and the electronic registration form is added. The Draft reforms the objection procedures by limiting the objection subjects to "holders of prior rights or interested parties".

征求意见稿的第 34 条加大了对恶意抢注的制止范围，增强了商业竞争中的诚信义务。“申请人因与该他人具有合同、业务往来、地域关系或其他关系而明知该他人商标存在的”，也被认定为恶意抢注。第 64 条加重了处罚力度，对 5 年内两次以上侵权的加重处罚。第 67 条还提高了法定赔偿上限，由现有的“50 万元以下”提高到“100 万元以下”。

Article 34 of the Draft expands the scope of prevention for malicious preemptive registration and strengthens the obligation of credit in business competition. "If the applicant knows the existence of another person because the applicant has contract and business transactions, geological relationships or other relationships with the person," it shall be deemed as malicious preemptive registration. Article 64 increases the severity of punishment. The punishment for any violator who commits infringements for more than two times within 5 years shall be aggravated. Article 67 also raises the upper limits of statutory compensation by increasing the existing "more than 500,000 Yuan" to "less than 1,000,000 Yuan."

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■ 国家安监总局修改生产安全事故罚款处罚规定（来源：国家安全监管总局，2011 年 9 月 8 日）

**The State Administration of Work Safety Revises the Provisions on Fines for Work Safety Accidents (source: State Administration of Work Safety, 8 September 2011)**

2011 年 9 月 1 日，国家安全监管总局发布《关于修改〈生产安全事故报告和调查处理条例〉罚款处罚暂行规定〉部分条款的决定》（《决定》），自 2011 年 11 月 1 日起施行。

On September 1, 2011, the State Administration of Work Safety issued the Decision on



Revising Some Clauses of the Interim Provision on Fines in the Regulations on the Reporting, Investigation and Handling of Work Safety Accidents (the Decision), which shall come into effect on November 1, 2011.

《决定》规定，事故发生单位有《条例》第三十六条第一项规定行为之一的，处 200 万元的罚款；同时贻误事故抢救或者造成事故扩大或者影响事故调查的，处 300 万元的罚款；同时贻误事故抢救或者造成事故扩大或者影响事故调查，手段恶劣，情节严重的，处 500 万元的罚款。谎报、瞒报事故或者事故发生后逃匿的，处上一年年收入 100% 的罚款。

The Decision provides that if any entity in which an accident occurs has any of the acts specified in Item 1 of Article 36 of the Regulations, a fine of 2 million Yuan shall be imposed; if, in addition, accident rescue is also adversely affected, the accident is caused to worsen, or the investigation of the accident is affected, a fine of 3 million Yuan shall be imposed; if, in addition, accident rescue is also adversely affected, the accident is caused to worsen, or the investigation of the accident is affected, despicable means are used and the circumstances involved are serious, a fine of 5 million Yuan shall be imposed. If any accident is misreported or concealed or the responsible person escapes after the occurrence of any accident, a fine equal to 100% of the income in the previous year shall be imposed.

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- 人社部：在华就业外国人可参加社会保险（来源：人力资源和社会保障部，2011 年 9 月 9 日）

**Ministry of Human Resources and Social Security: Foreigners Employed in China May Participate in Social Insurance (source: Ministry of Human Resources and Social Security, 9 September 2011)**

2011 年 9 月 6 日，人力资源和社会保障部发布《在中国境内就业的外国人参加社会保险暂行办法》（《办法》），自 2011 年 10 月 15 日起施行。

On September 6, 2011, the Ministry of Human Resources and Social Security issued the Interim Measures for the Participation of Foreigners Employed in China in Social Insurance (the Measures) which will come into effect on October 15, 2011.

《办法》明确，招用外国人的用人单位，应当自办理就业证件之日起 30 日内为其参保。来我国就业的外国人在办理就业手续并取得相应的就业证件后，就应当参加职工类社会保险，包括职工基本养老保险、职工基本医疗保险、工伤保险、失业保险和生育保险。

The Measures specifies that employers who employ foreigners shall, within 30 days of the date on which the employment certificated is handled, make arrangements for the foreigners to participate in social insurance. Foreigners employed in China, after going through employment procedures and obtaining corresponding employment certificates, shall participate in social insurance for employees, including basic endowment insurance for employees, basic medical insurance for employees, work-related injury insurance,

unemployment insurance and maternity insurance.

在中国境内就业的外国人，是指依法获得《外国人就业证》、《外国专家证》、《外国常驻记者证》等就业证件和外国人居留证件，以及持有《外国人永久居留证》，在中国境内合法就业的非中国国籍的人员。

Foreigners employed in China refer to people without Chinese nationality who have obtained the Employment Certificate for Foreigner, the Certificate of Foreign Expert, the Certificate of Permanent Foreign Correspondent and other employment certificates and residence certificates for foreigners in accordance with the law, possess the Permanent Residence Certificate for Foreigner, and have been employed in China in accordance with the law. [Top](#)

- 公安部下发指导意见要求进一步规范醉驾案件办理（来源：公安部网站，2011 年 9 月 14 日）

**The Ministry of Public Security Gives Guiding Opinions to Require the Handling of Drunk Driving Cases to be Further Standardized (source: www.mps.gov.cn, 14 September 2011)**

近日，公安部下发了《关于公安机关办理醉酒驾驶机动车犯罪案件的指导意见》，就进一步规范现场调查、办案期限、立案侦查等方面提出要求。

Recently, the Ministry of Public Security issued the Guiding Opinions on the Handling of Criminal Cases Involving Driving Motor Vehicles under the Influence of Alcohol by public security organs, giving requirements for further standardizing such aspects as the on-spot investigations, the period for the handling of case and placing a case on file for investigation.

《意见》要求，交通民警检查中发现机动车驾驶人有酒后驾驶机动车嫌疑的，立即进行呼气酒精测试；当事人对呼气酒精测试结果有异议，或者拒绝配合呼气酒精测试等以及涉嫌饮酒后、醉酒驾驶机动车发生交通事故的，应当立即提取血样检验血液酒精含量。

The Opinions requires that if a traffic police discovers in the course of inspections that a motor vehicle driver is suspected to drive the motor vehicle under the influence of alcohol, the police shall immediately conduct a breath alcohol test; if the party involved objects to the results of the breath alcohol test, or refuse to cooperate with the breath alcohol test, or the party is suspected to drive a motor vehicle after drinking or under the influence of alcohol and as a result, a traffic accident occurs, the police shall immediately draw a blood sample to test the content of alcohol in the blood.

《意见》指出，对经检验驾驶人血液酒精含量达到醉酒驾驶机动车标准的，一律以涉嫌危险驾驶罪立案侦查。在案件侦查终结后，对醉酒驾驶机动车犯罪事实清楚，证据确实、充分的，在案件移送人民检察院审查起诉前，依法吊销犯罪嫌疑人的机动车驾驶证。



The Opinions points out that if the content of alcohol in the blood of the tested driver reaches the level for driving under the influence of alcohol, the driver shall be investigated for suspected crime of dangerous driving. After the investigation of the case is concluded, if the facts of the crime of driving motor vehicle under the influence of alcohol is are clear and the evidence is reliable and sufficient, the driving license of the suspected criminal shall be revoked in accordance with the law before the case is transferred to the people's procuratorate for examination and prosecution. [Top](#)

- 浙江高法就《关于审理物业服务纠纷案件适用法律若干问题的意见（征求意见稿）》征求修改意见（来源：浙江法院网，2011 年 9 月 14 日）

**Zhejiang High People's Court seek comments on Opinions on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Property Services (Draft for Comments) (Source: ZJcourt.cn, 14 September 2011)**

2011 年 9 月 13 日，浙江法院网公布了由浙江高法起草的《关于审理物业服务纠纷案件适用法律若干问题的意见》（征求意见稿）（以下简称《意见稿》），公开征求修改意见。

Zhejiang High People's Court published the Opinions on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Property Services (Draft for Comments) ("Draft") on ZJcourt.cn on September 13, 2011, to publicly seek comments.

该意见稿共 28 条，主要对业主委员会的诉讼主体地位、物业服务合同的效力、物业服务费的核减、物业服务企业的安全保障义务、物业服务纠纷案件中的举证责任分配等司法实务中常见问题进行了规定。

The 28-article Draft sets forth provisions on whether a homeowners association has the competency to be a party to a civil action, effect of the property service contract, verification and reduction of service charges, obligation of property service companies for guaranteeing safety in the neighborhood, allocation of the burden of proof in cases involving disputes over property services, and other common issues in judicial practice.

该意见稿明确规定，业主委员会可以成为物业服务纠纷中的被告，并明确了业主委员会败诉时的责任承担顺序和财产范围。根据该意见稿，人民法院裁判结果涉及业主委员会依法承担财产给付责任的，除全体业主已有约定外，首先以业主大会赋予业主委员会自行管理的资金支付；不足部分以物业服务区域内属于全体业主所有的共有经营用房、公共部位的收益支付；仍不足的，由业主按照专有部分占建筑区划内建筑物总面积的比例分担。

The Draft clearly stipulates that a homeowners association may be the defendant in a case involving property service disputes, and the association should be subject to certain liability in case of losing the lawsuit. According to the Draft, where a court determines to subject a homeowners association to the liability of payments for property, the association should cover such payments with funds under its own management authorized by the homeowner's general meeting, unless otherwise agreed between the association and all

homeowners; where said funds are not enough to cover all the payments, proceeds from commercial-purpose houses and public areas that are within the property service scope and belong to all homeowners. [Top](#)

- 反家暴法立法立项论证工作将于 2011 年底前完成 (来源: 新华网, 2011 年 9 月 21 日)  
**Anti-domestic violence law enters China's legislation plan (source: Xinhuanet.com, 21 September 2011)**

2011 年 9 月 21 日, 全国妇联权益部部长、全国妇联法律帮助中心主任蒋月娥在北京开幕的联合国多部门合作预防和应对家庭暴力项目国家级培训研讨班上致辞时介绍, 全国人大常委会法制工作委员会社会法室 2011 年年初以来与全国妇联密切合作, 共同开展了实地调研、国内外研讨会等一系列有关反家庭暴力法的立法必要性、可行性的调研论证工作。蒋月娥表示, 法工委立法规划室将反家暴法列入常委会首批立法立项论证试点项目, 立项论证工作计划 10 月份开始, 年底前完成。

At the national training seminar of UN multiple-department cooperation project for preventing and coping with domestic violence on September 21, 2011, Jiang Yue'e, official from the All-China Women's Federation (ACWF), revealed that the Commission of Legal Affairs of Standing Committee of the National People's Congress has, through on-site investigation and survey, and domestic and international seminars, closely cooperated with ACWF since the beginning of 2011 to discuss and study the necessity and feasibility of anti domestic violence law. Jiang said that the Commission of Legal Affairs has incorporated anti-domestic violence law into its legislation agenda. The lawmaking process will kick off in October and will be completed by the end of this year. [Top](#)

- 《上海市国有土地上房屋征收与补偿实施细则 (草案)》向社会公开征求意见 (来源: 上海市人民政府, 2011 年 9 月 22 日)  
**Detailed Implementing Rules of Shanghai Municipalities for the Expropriation of Houses on State-owned Land and Compensation on Expropriated Houses (Draft) in process of comment solicitation (source: Shanghai Municipal People's Government, 22 September 2011)**

2011 年 9 月 21 日, 上海市人民政府法制办公室公布了《上海市国有土地上房屋征收与补偿实施细则 (草案)》, 向社会公开征求意见。

On September 21, 2011, the Legislative Affairs Office of Shanghai Municipal People's Government published the Detailed Implementing Rules of Shanghai Municipalities for the Expropriation of Houses on State-owned Land and Compensation on Expropriated Houses (Draft) to publicly seek comments. [Top](#)

- 两年内中国将出台三部反垄断法配套规则 (来源: 新华网, 2011 年 9 月 22 日)  
**China to promulgate 3 sets of supporting rules for anti-monopoly law within 2 years (source: Shanghai Municipal People's Government, 22 September 2011)**

2011 年 9 月 21 日，商务部反垄断局局长尚明在第二届金砖国家国际竞争大会上透露，今后两年将出台《关于经营者集中附加限制性条件的规定》、《关于未依法申报的经营者集中调查处理办法》、《未达申报标准涉嫌垄断经营者集中调查处理办法》三部反垄断配套规则。

On September 21, 2011, Shang Ming, director of anti-monopoly bureau of the Ministry of Commerce (MOFCOM), said at the Second BRICS International Competition Conference that China will introduce three sets for supporting rules for the anti-monopoly law within 2 years, including the Provisions on Additional Restrictive Conditions for Concentrations of Operators, the Measures for the Investigation and Handling of Cases Where Concentrations of Operators Are not Legally Reported, and the Measures for the Investigation of Cases Involving Concentrations of Operators Which Fail to Satisfy the Reporting Threshold and Are Suspected of Monopoly Operations.

其中，《关于经营者集中附加限制性条件的规定》，将对限制性条件的提出、类型、确定及其执行和监督做出明确规定。

The Provisions on Additional Restrictive Conditions for Concentrations of Operators will set forth clear provisions related to restrictive conditions in terms of the introduction, types, determination, and implementation of those conditions. [Top](#)

- 《最高人民法院关于人民法院委托评估、拍卖工作的若干规定》发布（来源：最高人民法院，2011 年 9 月 22 日）

**Certain Provisions of the Supreme People's Court on Circumstances Where People's Courts Entrust Relevant Institutions with Appraisal and Auction Matters promulgated (Source: Supreme People's Court, 22 September 2011)**

2011 年 9 月 7 日，最高法发布《最高人民法院关于人民法院委托评估、拍卖工作的若干规定》（法释[2011]21 号）。

On September 7, 2011, the Supreme People's Court (SPC) promulgated the Certain Provisions of the Supreme People's Court on Circumstances Where People's Courts Entrust Relevant Institutions with Appraisal and Auction Matters (Document No.: Fa Shi [2011] No. 21).

根据规定，法院将实现审判执行与委托拍卖分离，通过统一信息平台使拍卖标的的信息披露最大化，法院不再编制委托评估、拍卖机构名册。

The Provisions stipulate that courts should separate trial and enforcement work from entrusted evaluation and auction matters, and maximize information disclosure related to auction subjects through a unified information platform; thus courts should no longer prepare and produce the brochure of appraisal and auction institutions.

该司法解释将于 2012 年 1 月 1 日起施行。

The Provisions become effective on January 1, 2012. [Top](#)

- 国家质检总局征求《家用汽车产品修理、更换、退货责任规定》修改意见（来源：国家质量监督检验检疫总局，2011 年 9 月 22 日）

**AQSIQ seeks comments to revise Provisions on the Determination of Liability in Cases Where Sold Family Car Products Need to be Repaired, Replaced, or Taken Back (Source: General Administration of Quality Supervision, Inspection and Quarantine, 22 September 2011)**

2011 年 9 月 20 日，质检总局发布了《家用汽车产品修理、更换、退货责任规定（征求意见稿）》，并拟于 10 月下旬举行听证会，征求修改意见。

The General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) issued the Provisions on the Determination of Liability in Cases Where Sold Family Car Products Need to be Repaired, Replaced, or Taken Back (Draft for Comments) on September 20, 2011, and will hold a hearing in late October to seek revision comments.

该意见稿明确了家用汽车产品消费者的合法权益，界定了从销售商、制造商到修理商义务和责任。其中明文规定，“因严重安全故障累计修理两次仍不能解决，可要求退货”等退换条款。

The Opinions set forth the legitimate rights and interests of family car consumers, and define the obligations and responsibilities of sellers, manufacturers, and car repair service suppliers. The Opinions clearly stipulate that "where a car has been repaired accumulatively on two occasions due to serious safety failures, but the problem continues to exist, the customer may require the concerned party to take back the car product. [Top](#)

- 最高法出台司法解释规范受理企业破产案件适用法律问题（来源：人民法院报，2011 年 9 月 26 日）

**Supreme People's Court Issued Judicial Interpretations to Regulate Issues Concerning Application of Law in Accepting Enterprise Bankruptcy Cases (source: People's Court Daily, 26 September 2011)**

9 月 25 日，最高人民法院公布《最高人民法院关于适用〈中华人民共和国企业破产法〉若干问题的规定（一）》，自 2011 年 9 月 26 日起施行。

On September 25, the Supreme People's Court has promulgated the Provisions of the Supreme People's Court on Issues Concerning Application of the Enterprise Bankruptcy Law of the People's Republic of China (I), which shall come into effect on September 26, 2011.

该解释共九条，详细规定了人民法院审查企业破产原因时应注意的事项、破产清算权利、举证责任分配、审查破产申请时应注意的事项、诉讼费用收取、申请人对不予受理裁定的上诉权等问题。

These Provisions have nine articles specifying matters the people's courts ought to pay attention to when reviewing the cause for an enterprise's bankruptcy, bankruptcy liquidation rights, allocation of burden of proof, matters that shall be paid attention to when reviewing

the application for bankruptcy, collection of litigation fees, and applicant's right to appeal in case of ruling of dismissal of accusation, etc.

就破产原因，该解释规定，债务人不能清偿到期债务并且具有资产不足以清偿全部债务、明显缺乏清偿能力两种情形中任意一种情形的，人民法院应当认定其具备破产原因。相关当事人以对债务人的债务负有连带责任的人未丧失清偿能力为由，主张债务人不具备破产原因的，人民法院应不予支持。

With respect to the cause for bankruptcy, these Provisions regulate that where the debtor is unable to discharge any due liabilities and its assets is insufficient to satisfy all debts or it is obviously insolvent, as the case may be, the people's court shall affirm that it has the cause for bankruptcy. Where relevant parties claim that the debtor does not have the cause for bankruptcy upon the grounds that the person jointly liable for the debts of the debtor has not become insolvent, the people's courts shall not support such claim. [Top](#)

- 国资委规范中央企业国有产权置换有关事项（来源：国有资产监督管理委员会，2011年9月28日）

**SASAC Regulated Matters Concerning the State-owned Equity Exchange Between Central Enterprises (source: State-owned Assets Supervision and Administration Commission, 28 September 2011)**

国有资产监督管理委员会发布《关于中央企业国有产权置换有关事项的通知》（《通知》），明确了央企实施产权置换的诸多要求。

The State-owned Assets Supervision and Administration Commission (SASAC) has promulgated the Circular on the Relevant Matters concerning State-owned Equity Exchange between Central Enterprises (Circular) to specify the requirements for central enterprises to exchange equity.

《通知》规定，属公司制企业的国有单位，其置换事项需由股东大会做出决议的，应在央企或国务院国资委出具意见后，提交股东大会审议。

The Circular states that, for state-owned units falling into the scope of corporate enterprises, where the exchange matters must be resolved by the general meeting of shareholders, they shall, upon the issuance of opinions by the central enterprise or SASAC, submit to the general meetings of shareholders for deliberation.

《通知》对牵涉到上市公司的央企资产重组做出了更为严格的规定。第八条指出，“国有产权置换事项由央企按照内部决策程序审议后批准或者出具意见，同时抄报国务院国资委；其中，实际控制企业为上市公司的，由国务院国资委审核批准或者出具意见。”

The Circular formulates stricter rules on reorganization concerning the assets of central enterprises of listed companies. Article 8 points out that "state-owned equity exchange shall be approved or issued opinions after the deliberations by the central enterprises as per internal decision-making process, which shall be simultaneously forwarded to the SASAC



of the State Council; inter alia, where the actual control enterprises are listed corporations, the SASAC of the State Council shall approve or issue opinions after examination and verification."

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- 海关总署发布公告，加强知识产权保护（来源：海关总署，2011 年 9 月 29 日）

**GAC Issued Announcement to Strengthen IPR Protection (source: General Administration of Customs, 29 September 2011)**

为保障合法货物的正常通关，保护知识产权有关当事人的合法权益，海关总署发布公告，对有关事项做出明确。

For the purpose of safeguarding the normal customs clearance of legitimate goods and protecting the legitimate rights and interests of relevant parties of intellectual property rights, the General Administration of Customs (GAC) has issued announcement to specify relevant matters.

根据公告，凡已经海关核准且属于《知识产权海关保护条例》（《条例》）第九条和第十一条第二款规定情形的知识产权海关保护备案，海关总署有权予以撤销。

According to the Announcement, any filing for customs protection for intellectual property rights that has been approved by the customs and that is under circumstances as provided in Article 9 and Paragraph 2 of Article 11 of the Regulations on Customs Protection for Intellectual Property Rights ("Regulations") may be cancelled by the General Administration of Customs.

知识产权海关保护的利害关系人根据《条例》第十一条的规定申请撤销备案的，应当向海关总署提交申请书。申请书应当有明确的申请人和被申请人、请求事项、基本事实和理由，并随附相关证明文件。

Where the stakeholders of the customs protection for intellectual property rights apply for cancellation of filing in accordance with the provisions of Article 11 of the Regulations, they shall submit the application to GAC. The application shall specify the applicant, respondent, matters of claim, basic facts and reasons and accompany relevant proofing documents.

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- 最高法印发《关于审理证券行政处罚案件证据若干问题的座谈会纪要》（来源：最高人民法院，2011 年 9 月 30 日）

**SPC prints and distributes Minutes of the Seminar on Evidence-related Issues in the Trials of Securities Administrative Punishment Cases (Source: Supreme People's Court, 30 September 2011)**

2011 年 7 月 13 日，最高法发出法[2011]225 号通知，印发了《关于审理证券行政处罚案件证据若干问题的座谈会纪要》。

On July 13, 2011, the Supreme People's Court (SPC) issued a notice numbered Fa



[2011] No. 225 to print and distribute the Minutes of the Seminar on Evidence-related Issues in the Trials of Securities Administrative Punishment Cases.

该纪要从证券行政处罚案件的听证程序、电子证据的主要取证方式和程序、专业意见的取证及认定、上市公司信息披露违法行为责任人员和认定证据规则、内幕交易行为举证责任分配与转移的证据规则等五个方面对证券行政执法的证据问题进行了规定和完善。

The Minutes include five aspects of content: (1) the hearing procedure for securities administrative punishment cases; (2) approaches to and procedure for obtaining electronic evidence; (3) the gathering and determination of professional opinions that serve as evidence; (4) rules of evidence for determining persons subject to liability for illegal disclosure of listed companies' information; and (5) rules of evidence for the allocation of burden of proof in activities involving insider trading. [Top](#)

- 广东省高院出台《关于审理保险合同纠纷案件若干问题的指导意见》（来源：最高人民法院，2011 年 10 月 8 日）

**Guangdong High Court releases the Guiding Opinions on Certain Issues Related to Trial of Cases Involving Disputes over Insurance Contract (Source: Supreme People's Court, 8 October 2011)**

最高人民法院网站 9 月 30 日消息，广东省高院近日出台《关于审理保险合同纠纷案件若干问题的指导意见》，首次对保险合同中免责条款的订立标准等内容进行了规范。根据该意见，保险公司在订立合同时，必须依照一定的标准对免责条款进行提示和明确说明。该意见还放宽了受害方在第三者责任保险中直接向保险公司请求赔偿的条件。

Guangdong High People's Court recently released the Guiding Opinions on Certain Issues Related to Trial of Cases Involving Disputes over Insurance Contract, which for the first time regulates the standards of exemption clauses in insurance contracts. According to the said Opinions, when concluding contracts, insurance companies must give reminders and explicit explanations on the exemption clauses in accordance with certain standards. The Opinions have also relaxed the conditions on directly claiming compensation with the insurance companies by the injured party in third person liability insurance. [Top](#)

- 国税总局发出《关于纳税人资产重组有关营业税问题的公告》（来源：国家税务总局，2011 年 10 月 11 日）

**SAT releases the Announcement on Business Tax Issues Relating to Asset Reorganization of Taxpayers (Source: State Administration of Taxation, 11 October 2011)**

2011 年 9 月 26 日，国家税务总局发出《关于纳税人资产重组有关营业税问题的公告》（国家税务总局公告 2011 年第 51 号），明确自 2011 年 10 月 1 日，纳税人在资产重组过程中，通过合并、分立、出售、置换等方式，将全部或者部分实物资产以及

与其相关联的债权、债务和劳动力一并转让给其他单位和个人的行为，不属于营业税征收范围，其中涉及的不动产、土地使用权转让，不征收营业税。

On September 26, 2011, State Administration of Taxation (SAT) released the Announcement on Business Tax Issues Relating to Asset Reorganization of Taxpayers (Announcement No. 51 [2011] of SAT). From October 1 onwards, during the process of asset reorganization, taxpayers' acts of transferring all or part of the real assets and other related creditor's rights, debts, and labor force to other entities and individuals, by means of merger, division, sale, and swap do not fall under the scope of business tax levy, and the transfer of real property or land use right shall not be subject to paying business tax. [Top](#)

■ 民事诉讼法迎来首次大修（来源：新华网，2011 年 10 月 21 日）

**Civil Procedure Law to be amended (Source: Xinhuanet.com, 21 October 2011)**

新华网 10 月 20 日转引《光明日报》消息，全国人大常委会会议将首次审议民事诉讼法修正案草案，这将是该法实施 20 年来进行的一次全面修改。该消息透露，民诉法将明确规定，法院在开庭审判案件之前，要对当事人提出的诉讼首先进行调解，调解不成的再进行审判。

The executive meeting of the National People's Congress will deliberate the amendment drafts to the Civil Procedure Law, which will be the first amendment to the Civil Procedure Law for 20 years since its promulgation. It is revealed that the new Civil Procedure Law will require mediation to be conducted first regarding an action filed by the parties prior to court hearing, and court hearing will be needed if mediation fails.

据新华网消息，提交人大常委会审议的民诉法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 pollute environment, infringe the legitimate rights and interests of consumers or otherwise damage social public interest. [Top](#)

■ 国家安全监管总局印发《安全生产非法违法行为查处办法》（来源：国家安全生产监督管理局，2011 年 10 月 27 日）

**SAWS prints and distributes the Measures on the Investigation and Punishment of Work Safety-Related Illegal or Irregular Acts (Source: State Administration of Work Safety, 27 October 2011)**

2011 年 10 月 14 日，国家安全监管总局发出安监总政法[2011]158 号通知，印发《安全生产非法违法行为查处办法》。该办法规定，生产经营单位因非法违法行为造成重大、特别重大生产安全事故或者一年内发生 2 次以上较大生产安全责任事故并负主要责任，以及存在重大隐患整改不力的，省级安全监管监察部门应当会同有关行业

主管部门向社会公告，并向投资、国土资源、建设、银行、证券等主管部门通报，作为一年内严格限制其新增的项目核准、用地审批、证券融资、银行贷款等的重要参考依据。该办法自 2011 年 12 月 1 日起施行。

State Administration of Work Safety (SAWS) issued a notice numbered "An Jian Zong Zheng Fa [2011] No. 158" on October 14, 2011, to print and distribute the Measures on the Investigation and Punishment of Work Safety-Related Illegal or Irregular Acts. According to the Measures, where a production and operation entity has caused major or extraordinary work safety accidents due to illegal or irregular acts, or incurred two or more relatively large work safety responsibility accidents for which it bears main responsibilities, or failed to effectively rectify major hidden problems, the provincial safety supervision department should make a public announcement in conjunction with the relevant competent department, and circulate a notice thereon to the investment, land and resources, construction, banking, and securities departments. The punishment results will serve as an important basis for strictly restricting the project approval, land use approval, securities financing, and bank loan for newly-added projects of the enterprise. The Measures will come into force on December 1, 2011. [Top](#)

## 司法动态

### JUDICIAL DEVELOPMENTS

- 最高人民法院表示知识产权案件数量持续增长（来源：国家知识产权局，2011 年 9 月 8 日）

**Number of IPR cases increases steadily: SPC (source: State Intellectual Property Office, 8 September 2011)**

据国家知识产权局 2011 年 9 月 7 日消息，最高人民法院知识产权审判庭副庭长金克胜 6 日在“2011 中国专利信息年会”上介绍，2010 年全国地方法院共新收知识产权民事一审案件 42931 件，同比增长 40.18%；审结 41718 件，同比增长 36.74%。2010 年全国地方法院新收一审知识产权行政案件 2590 件，同比增长 25%；审结 2391 件，同比增长 21.31%。

2011 China Patent Information Annual Meeting was held on September 6, 2011, in Beijing. Jin Kesheng, vice president of the Third Civil Division (Intellectual Property Division) of the Supreme People's Court (SPC) delivered a report at the meeting, stating that in 2010, local courts newly accepted 42,931 first instance civil cases involving intellectual property rights (IPR), up 40.18% year on year; and closed 41,718 IPR civil cases, up 36.74% year on year; and local courts newly accepted 2,590 first-instance administrative cases involving IPR, up 25% year on year; and closed 2,391 IPR administrative cases, up 21.31%.

此外，金克胜还表示，未来人民法院将继续妥善审理各类知识产权案件，依法惩

处各类侵犯知识产权的犯罪行为，防止滥用知识产权限制创新，加强服务推动自主创新。同时，也会继续通过发布《中国法院知识产权司法保护状况》白皮书和开展评选“中国法院知识产权司法保护十大案件和五十个典型案例”等活动来向社会公布我国知识产权司法保护的新进展。

Jin Kesheng also said that people's courts should continue to take effective measures to prevent IPR infringements, thus promoting technological innovations. Meanwhile, SPC will continue to release Report on the Situations of Judicial Protection of Intellectual Property Rights in China (white paper) and carry out a series of IPR protection publicity activities to disclose the IPR judicial protection progress in China. [Top](#)

■ 房产成中国家庭诉讼“首恶”（来源：新华网，2011 年 9 月 20 日）

**Property becomes the primary evil in family – related lawsuits in China (source: Xinhua Net, 20 September 2011)**

2011 年 9 月 20 日，新华网转引《经济参考报》消息，据北京市朝阳区法院的调查，除了常见的房屋买卖合同纠纷数量激增以外，婚姻家庭类案件中，也有八成以上的纠纷系因房产而起或与房产争议有一定关联。该统计数据指出，房产问题日益成为影响家庭和睦和社会和谐的重要因素，也成为导致家庭关系矛盾的导火索。该消息还总结了房产纠纷的 4 个类型，其中包括为争房产权属影响婚姻关系、因房价上涨亲属间产生买卖纠纷等。

On September 20, 2011, Xinhua Net reprinted a new report of the Economic Information Daily, which says that according to a survey by Chaoyang Court in Beijing, aside from a surge in commonplace disputes related to the sale and purchase of houses, about 80% of the disputes in family and marriage related lawsuits arose in connection with properties or were related to property disputes. According to the statistics, property has increasingly become an important factor affecting harmony in households and in society at large, and has become the trigger of family frictions. This news report also summarized four types of property disputes, including fights between spouses for property ownership which affected their marriage, sales and purchase contract disputes between relatives due to the steep rise of the property prices. [Top](#)

■ 最高法将规范民商审判自由裁量权（来源：法制网，2011 年 10 月 17 日）

**SPC to regulate the exercise of judicial discretion in trial of civil and commercial cases (source: Legaldaily.com.cn, 17 October 2011)**

《法制日报》记者在 10 月 16 日于湖北省仙桃市召开的第三届“汉江杯”啄木鸟审判论坛暨自由裁量与司法正义研讨会上获悉，最高人民法院将对法官在民商事审判领域的自由裁量权作出明确约束和规范。出席会议的最高人民法院研究室副主任、应用法学研究所所长罗东川介绍，拟出台的该司法文件，将从程序和实体上全面规范法官的自由裁量权，“旨在统一司法尺度，保障司法正义，进而提升司法公信力与司法权威”。

At the Third "Jiangnan Cup" Zhuomuniao Adjudication Forum & Judicio Discretion and Justice Seminar held in Hubei, the Supreme People's Court (SPC) revealed that it will make explicit prescriptions on judicial discretion in trial of civil and commercial cases. The judicial document to be released soon will comprehensively regulate the judges' exercise of judicial direction, for the purposes of unifying judicial measurement, guaranteeing judicial justice, and enhancing the judicial credibility and authoritativeness, said Luo Dongchuan, vice-director of the Research Office of SPC. [Top](#)

- 截至 2010 年底全国法院共受理上市公司破产重整案件 27 件（来源：法制网，2011 年 10 月 19 日）

**27 cases involving bankruptcy of listed companies have been accepted by end 2010 (source: Legaldaily.com.cn, 19 October 2011)**

《法制日报》记者从 10 月 19 日在太原召开的全国法院审理企业破产案件工作座谈会上获悉，全国各级人民法院慎重对待利益涉及面较广的上市公司的破产重整工作，截至 2010 年底共受理上市公司破产重整案件 27 件。截至 2011 年 6 月底，全国各级人民法院共受理证券公司破产案件 26 件。

At the national court work symposium on trial of enterprise bankruptcy cases held in Tianyuan on October 19, the nationwide people's courts at all levels have taken a prudent attitude towards the bankruptcy of listed companies which involves multiple stakeholders and have accepted 27 such cases by the end of 2010. By the end of June 2011, the people's courts nationwide have accepted a total number of 26 cases involving bankruptcy of securities companies. [Top](#)

- 北京海淀法院引入专家陪审员（来源：中国保护知识产权网，2011 年 10 月 20 日）

**Haidian court to implement expert juror system (source: IPR.gov.cn, 20 October 2011)**

2011 年 10 月 19 日上午，北京市海淀区人民法院召开专利案件专家陪审员公布仪式暨启动培训会。来自科研院所和高科技企业的 5 名专家陪审员参会。据悉，2010 年，陪审员共审理知识产权案件 334 件，参与 343 人次，主要审理的案件类型包括著作权纠纷、商标权纠纷、技术合同纠纷等。自 8 月 25 日正式召开审理部分专利民事纠纷案件发布会后，海淀法院现已陆续收到了相关专利案件的立案要求，首起涉及许诺销售的实用新型专利案件已经进入立案审查阶段。鉴于专利案件本身的专业性和复杂性，海淀法院特别引入专家陪审员，以提升专利案件审判质量，推进专利司法在社会经济发展中的积极作用。

Beijing Haidian District People's Court held a Patent-Related Case Expert Juror Announcement Ceremony & Training Session on October 19, 2011. Five expert jurors from science institutions and high-tech enterprises participated in the ceremony. It is learnt that in 2010, jurors have participated in 334 IPR cases involving copyright dispute, trademark dispute, and technical contract dispute, etc. After the press release on trial of certain patent-related civil dispute cases held on August 25, Haidian Court has received a number of patent-related case initiation requests, and the first case involving "offering for sell"



utility model has entered the case initiation review stage. Considering the complexity and specialization of patent-related cases, Haidian Court decides to engage expert jurors to improve the quality of trial of patent-related cases and fully leverage the positive role of patent-related judicial power in promoting social economic development. [Top](#)

- 最高人民法院民二庭召开证券市场侵权民事赔偿案件座谈会（来源：最高人民法院，2011 年 10 月 27 日）

**SPC holds seminar on civil compensation cases involving securities market infringement (source: Supreme People's Court, 27 October 2011)**

据最高人民法院 2011 年 10 月 26 日消息，最高人民法院民二庭和中国证监会在浙江省宁波市联合召开了证券法司法解释研讨会，就《关于审理证券市场侵权民事赔偿案件的若干规定（征求意见稿）》中涉及的一些重大问题进行了研讨。最高人民法院副院长奚晓明指出：要充分注意证券市场的重要性；资本市场的发展与法制建设密不可分；司法的介入是维护市场稳定发展的重要因素；正确行使司法解释的权利等。此外，奚晓明还指出，司法解释的起草，一定要注意中国市场的实际情况，在注重保护中小投资者利益的同时也要考虑维护市场的稳定，要进行利益的平衡。据悉，此次会议后，证券侵权民事责任司法解释小组将按预定计划进一步修改完善司法解释稿，尽快召开全国法院征求意见座谈会。

Supreme People's Court (SPC) and China Securities Regulatory Commission (CSRC) jointly held a judicial interpretation seminar on securities law, and discussed major issues involved in the Certain Provisions on Trial of Civil Compensation Cases Involving Securities Market Infringement (Draft for Comment). Xi Xiaoming, vice-president of the Supreme People's Court (SPC), pointed out (1) we should be fully aware of the importance of the securities market; (2) development of the capital market is closely related with legal system building; (3) judicial means is essential in maintaining steady development of market; and (4) rights of judicial interpretation should be correctly exercised. Xi also pointed out that judicial interpretation should be drafted in consideration of the realities of Chinese market, which should also take into account the interests of small and medium investors and the stability of the market. After the seminar, the securities infringement civil liability judicial interpretation team will further amend and improve the draft of judicial interpretation and will convene a national court opinion solicitation seminar as soon as possible. [Top](#)

## **仲裁动态**

### **ARBITRATION DEVELOPMENTS**

- 邯郸保险仲裁中心成立（来源：中国商事仲裁网，2011 年 9 月 5 日）

**Handan Insurance Arbitration Center was established (source: China Commercial**



## **Arbitration Net, 5 September 2011)**

据中国商事仲裁网 2011 年 9 月 4 日消息，日前，邯郸保险仲裁中心成立。该中心由邯郸仲裁委员会、市保险行业协会联合组建，专门受理各类保险合同纠纷。

According to news posted on the China Commercial Arbitration Net on September 4, 2011, Handan Insurance Arbitration Center was established jointly by Handan Arbitration Commission and Handan Insurance Industry Association recently to specifically hear insurance contract related disputes. [Top](#)

### ■ **杭州汽车交易仲裁院成立（来源：中国商事仲裁网,2011 年 9 月 5 日）**

**Hangzhou Court of Arbitration for Auto Trading was established (source: China Commercial Arbitration Net, 5 September 2011)**

据中国商事仲裁网 2011 年 9 月 4 日消息，近日，杭州仲裁委员会汽车交易仲裁院成立。据悉，该仲裁员属于杭州仲裁委员会派驻杭州汽车市场相关协会、商会专门处理汽车争议的机构。据相关工作人员介绍，该仲裁院对内将作为杭州仲裁委员会的内设机构，对外具体承办汽车交易仲裁案件，同时组建了杭州汽车交易仲裁管理委员会，拥有专门的汽车交易仲裁员队伍，制订了专门的汽车交易仲裁工作规则。该仲裁院通过仲裁的方式解决日常汽车消费过程中的各种纠纷将是该机构的主要职能之一。包括汽车整车生产、整车交易、二手车交易、汽车零部件交易、汽车配件用品交易、汽车维修与服务等与汽车相关的生产、销售及服务过程中所发生的争议，今后都可以向杭州汽车交易仲裁院申请仲裁。

According to news posted on the China Commercial Arbitration Net on September 4, 2011, a court of arbitration for auto trading was established under Hangzhou Arbitration Commission recently. According to the report, this court of arbitration is assigned by Hangzhou Arbitration Commission to the relevant trade associations of the auto market in Hangzhou in order to specifically deal with auto related disputes. According to people working with the Commission, the court of arbitration will be an internal department of Hangzhou Arbitration Commission, and will specifically hear auto-trading related arbitration cases. Hangzhou Auto Trading Arbitration Commission was also established, which has a dedicated group of auto trading arbitrators and has specific arbitration rules for cases related to auto trading. The main functions of the court of arbitration is to resolve various disputes in the day-to-day auto related transactions by means of arbitration, including disputes arising in the production, sales and service of autos covering vehicle production, vehicle trading, second-hand vehicle trading, auto parts trading, auto accessories trading, auto repair and services. [Top](#)

### ■ **仲裁业确定涉外仲裁突破口（来源：中国国际经济贸易仲裁委员会，2011 年 9 月 22 日）**

**The arbitration profession is set to make a breakthrough in the acceptance of foreign related arbitration cases (source: China International Economic and Trade Arbitration Commission, 22 September 2011)**

全面推进涉外仲裁工作，被确定为继商贸、建设、金融、保险、证券期货和非公经济之后，中国发展仲裁事业的又一工作重点。在贵州省贵阳市召开的 2011 年全国仲裁工作年会上，负责仲裁工作的国务院法制办卢云华司长再次将上述任务予以明确。

A full-throttled effort to push foreign related arbitration is named as a new focus in the development of the arbitration profession in China following the previous focuses on areas of commerce and trading, construction, finance, insurance, securities and futures, and the private economic sector. At the annual nation-wide arbitration meeting 2011 held in Guiyang City, Guizhou Province, Lu Yunhua, who is responsible for arbitration at the Legal Affairs Office of the State Council, reiterated the above task.

2010 年，贸仲总计新受理案件 1352 件，其中涉外案件 418 件，占受案总数的 30.9%。与其他国内仲裁机构相比，贸仲在受理及处理涉外案件方面仍占据优势地位。但整体而言，目前国内仲裁机构涉外案件的受理不尽如人意。据统计，2010 年，全国 209 个仲裁委员会受理的涉外案件总数是 1219 件，仅占受理案件数的 1.6%。

In 2010, CIETAC has a caseload of 1352 new cases, of which, 418 cases are foreign related, accounting for 30.9% of the total new caseload. In relation to other arbitration commissions in China, CIETAC is well positioned to accept and hear foreign related cases. However, the overall picture in the acceptance of foreign related cases by domestic arbitration commissions left a lot to be desired. According to statistics, the 209 arbitration commissions in China accepted an aggregate of 1219 foreign related arbitration cases in 2010, which was a mere 1.6% of all the arbitration cases accepted. [Top](#)

## **典型案例** **CASE STUDY**

### ■ 中美轮胎特保案终结（来源：法制日报，2011 年 9 月 13 日）

历经两年多的中美轮胎特保案历经起起伏伏，终于在 9 月 5 日走完了 WTO 争端解决程序。WTO 上诉机构最终驳回了中国的上诉，判定美国对中国出口至美国的轮胎征收惩罚性关税符合 WTO 规则。

归结失利最根本的原因在于：根据《中国入世议定书》的相关规定，一国对来自中国的进口采取特别保障措施的门槛相对较低，如对“快速增加”的要求包括绝对增加和相对增加，对相关产业的损害以“市场扰乱”替代“严重损害”，在因果关系上以“重要原因”替代“主要原因”，且证明的要求也相对较低。如此低的门槛导致了一旦出现类似本案的情况，极难抗辩。 [Top](#)

### ■ 新婚姻法司法解释类推案例：法院认定婚后转至男方一人名下拆迁安置房不算夫妻共同财产（来源：法制日报，2011 年 9 月 6 日）

徐小姐诉王先生离婚财产纠纷案件中，争议的焦点在于婚姻关系存续期间王先生从其母亲及哥哥名下以 1 万元价格受让的房屋产权是否应作为夫妻共同财产进行分割（该房产原本是王先生及其兄长、母亲 3 人共同拥有的拆迁安置房）。

法院认为，鉴于 1 万元的价格远低于系争房屋三分之二产权的市场价格，且并无证据证明王先生实际支付 1 万元的情况下，可认定为王先生母亲与兄长将系争房屋三分之二产权赠与王先生。虽然发生在徐小姐、王先生夫妻关系存续期间，但产权登记于王先生一个人名下的事实，可推定为系对王先生个人的赠与。因此，系争房屋完全属于王先生的个人财产，法院最终认定徐小姐无权要求进行分割。[Top](#)

■ **“微博第一案”尘埃落定（来源：人民法院报，2011 年 10 月 31 日）**

利用有互联网“自媒体”之誉的微博平台，奇虎 360 科技公司周鸿祎与北京金山安全软件有限公司大打口水战，金山公司称此导致其股票市值缩水 6 个亿，提出 1200 万元名誉侵权索赔，此案近日由北京市第一中级人民法院做出终审判决：北京奇虎 360 科技公司董事局主席兼 CEO 周鸿祎被判删除其微博中 2 条带有侮辱性的博文，并发表致歉声明，赔偿原告北京金山安全软件有限公司 5 万元。

在“微博第一案”的判决书中，法院对于“微博”的特点首次进行了司法意义上的归纳：“微博作为一个自由发表言论的空间，可以以个人的视角，通过寥寥片语，表达对人、对事的所感所想，为实现我国宪法所保障的言论自由提供了一个平台。同时，由于微博上的言论具有随意性，主观色彩浓厚，甚至一些语惊四座的表达方式，都成为吸引‘粉丝’关注的要素。特别是涉及批评的内容，还往往起到了舆论监督的积极作用。鉴于微博对丰富人们的精神生活具有一定的积极意义，每个网民都应该维护它，避免借助微博发表言论攻击对方，避免微博成为相互谩骂的空间。否则人人都有可能被他人的博文所侵害。”[Top](#)

■ **最新关注：国航将起诉欧盟碳排放交易体系（来源：法制日报，2011 年 10 月 22 日）**

10 月 18 日，由欧洲委员会气候行动总司司长德尔贝克率领的欧洲委员会气候与环境代表团访问中国航协，他认为欧盟碳排放交易体系未违反国际法，并希望在此基础上进行进一步研讨。对此，中航协立场非常明确：中国航空运输业坚决反对欧盟将国际航空运输业强行纳入欧盟碳排放交易体系。欧盟碳排放交易体系将抵离欧盟的商业航班全程计算碳排放量，超越了欧洲的管辖权，违反了国际法，本身也实现不了促进节能减排的目的。国航表示虽然诉讼会很艰难，但走法律途径保护中国航空公司的合法权益必须坚持，同时更重要的是我国政府应出台有针对性的法律，来维护航空企业的合法权益。[Top](#)

## **公报案例**

### **CASE FROM SPC**

- **宁夏瀛海建材集团有限公司与宁夏瀛海银川建材有限公司、第三人中国石油宁夏化工厂债权纠纷上诉案（来源：最高人民法院公报，2011年7月第七期）**

原告瀛海集团（宁夏中宁县第二水泥厂改制而来，法定代表人是范海龙）诉被告瀛海银川公司（第二水泥厂与宁夏化工厂共同出资设立，法定代表人是范海龙），要求确认其对瀛海银川公司的债权，后宁夏化工厂（瀛海银川股东之一）作为第三人参加诉讼。

法院认为，对于股东主张其与公司之间存在债权债务关系且公司予以认可，但公司其他股东对此持有异议的案件，人民法院应对各方证据进行综合分析。证据不足以证明该债权债务关系存在的，人民法院对该债权债务关系不予认定。 [Top](#)

- **南通双盈贸易有限公司诉镇江市丹徒区联达机械厂、魏恒聂等六人买卖合同纠纷案(来源：最高人民法院公报，2011年7月第七期)**

双盈公司诉联达厂支付所欠货款及利息一案，由于被告联达厂由个人独资改为合伙企业，却未更改营业执照，合伙人不承认合伙企业的存在、不愿支付欠款而使案件变得复杂。

法院认为，在当事人约定合伙经营企业仍使用合资前个人独资企业营业执照，且实际以合伙方式经营企业的情况下，应据实认定企业的性质。各合伙人共同决定企业的生产经营活动，也应共同对企业生产经营过程中对外所负的债务负责。合伙人故意不将企业的个人独资企业性质据实变更为合伙企业的行为，不应成为各合伙人不承担法律责任的理由。 [Top](#)

- **浙江省德清县上武汽车修理厂诉董艳峰损害赔偿纠纷案（来源：最高人民法院公报，2011年6月第六期）**

原告上武汽车修理厂诉被告董艳峰一案，被告的雇员驾驶超载汽车发生故障，原告雇员在抢修过程中由于轮胎内胎爆破，导致死亡。原告已对死者家属给予足额补偿，现向被告追偿。

法院认为，在侵权法律关系中，承担侵权责任的条件之一是侵权行为与损害后果之间存在因果关系，否则侵权行为不能成立，行为人对损害后果不承担法律责任。依据出入境检验检疫鉴定所的报告显示：“维修操作不当造成人身伤亡是后果亦是关键因素”。发生故障后，被告雇员采取了适当措施予以预防，原告雇员在修理时已明确知晓轮胎损伤的事实，应查明原因，并采取有效措施避免修理过程中发生意外。事故的发生与处置不当直接关联，与车辆受损原因无关。因此，法院驳回原告的诉讼请求。 [Top](#)

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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 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.