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DACHENG LAW OFFICES
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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.

目录
CONTENTS

立法新闻 LEGISLATIVE NEWS [1]

[1] 全国人大公布《消费者权益保护法修正案（草案）条文及草案说明》
NPC Promulgates Draft Amendment to the Consumer Protection Law and the Relevant Explanations

司法动态 JUDICIAL DEVELOPMENTS [2]

[2] 最高人民法院公布《关于依据国际公约和双边司法协助条约办理民商事案件司法文书送达和调查取证司法协助请求的规定》
SPC Promulgates Provisions on the Service of Judicial Documents in Civil or Commercial Matters and the Request for Judicial

[3] 最高人民法院通过《关于审理出口信用保险合同纠纷案件适用相关法律问题的批复》

SPC Adopts Official Reply to Issues Concerning the Application of Relevant Laws in Trying Cases of Export Credit Insurance Contract Disputes

仲裁动态 ARBITRATION DEVELOPMENTS [1]

[4] GAR《2013 区域仲裁指南》将北仲列为重点关注对象

GAR's Guide to Regional Arbitration 2013 names the Beijing Arbitration Commission as Ones to Watch

判例研究 CASE ANALYSIS [1]

[5] 法院在执行中可以通过限制被执行人的特许经营资格来促使其履行义务（作者：邓永泉）

Can court limit the franchise license of the enforced party in the Enforcement Procedure to impel the enforced party to perform obligation (By: Dennis Deng)

立法新闻
LEGISLATIVE NEWS

- **全国人大公布《消费者权益保护法修正案（草案）条文及草案说明》（来源：全国人大网站，2013 年 5 月 2 日）**

  NPC Promulgates Draft Amendment to the Consumer Protection Law and the Relevant Explanations (Source: www.npc.gov.cn, May 2, 2013)

2013 年 4 月 28 日，全国人大公布《消费者权益保护法修正案（草案）条文及草案说明》，现公开征集意见。草案规定，经营者使用格式条款，应当以明显方式提请消费者写明商品或者服务的数量和质量、价款或者费用等内容。同时，经营者不得以格式条款等方式作出排除或者限制消费者权利、减轻或者免除经营者责任、加重消费者责任等对消费者不公平、不合理的规定。

On April 28, 2013, the National People's Congress (NPC) promulgated the Draft Amendment to the Consumer Protection Law and the Relevant Explanations (the "Draft"). According to the Draft, when using standard terms, a business operator shall expressly direct the consumer's attention to matters such as the quantity and quality, price or cost, etc., of products or services. Moreover, no business operator may specify provisions that are unfair or unreasonable to consumers such as those that exclude or restrict the consumers' rights, reduce or exempt the business operators' liability, and increase the consumers' liability through the use of standard terms or other means.

Top

司法动态
JUDICIAL DEVELOPMENTS

- **最高人民法院公布《关于依据国际公约和双边司法协助条约办理民商事案件司法文书送达和调查取证司法协助请求的规定》（来源：最高人民法院网站，2013 年 5 月 3 日）**

  SPC Promulgates Provisions on the Service of Judicial Documents in Civil or Commercial Matters and the Request for Judicial (Source: www.court.gov.cn, May 3, 2013)

最高人民法院 4 月 28 日公布《关于依据国际公约和双边司法协助条约办理民商事案件司法文书送达和调查取证司法协助请求的规定》，自 2013 年 5 月 2 日起施行。

On April 28, 2013, the Supreme People's Court (SPC) promulgated the Provisions on the Service of Judicial Documents in Civil or Commercial Matters and the Request for Judicial Assistance in Evidence Investigation and Collection Pursuant to International Conventions and Bilateral Judicial Assistance Treaties, effective as of May 2, 2013.

该司法解释指出，人民法院协助外国办理民商事案件司法文书送达和调查取证请求，应当进行审查。外国提出的司法协助请求，具有海牙送达公约、海牙取证公约或双边民事司法协助条约规定的拒绝提供协助的情形的，人民法院应当拒绝提供协助。

According to the judicial interpretation, a people's court shall examine the service of judicial documents in civil or commercial matters or the request for judicial assistance in evidence investigation and collection when assisting a foreign country in handling the same. Where a request for judicial assistance made by a foreign country is under any circumstance for refusing to providing assistance as provided in the Hague Convention on Service, the Hague Evidence Convention or any bilateral treaty on judicial assistance in civil matters, the people's court shall refuse to provide any assistance.

Top

- **最高人民法院通过《关于审理出口信用保险合同纠纷案件适用相关法律问题的批复》（来源：最高人民法院网站，2013 年 5 月 8 日）**

  SPC Adopts Official Reply to Issues Concerning the Application of Relevant Laws in Trying Cases of Export Credit Insurance Contract Disputes (Source: www.people.gov.cn, May 9, 2013)

2013 年 4 月 15 日,《最高人民法院关于审理出口信用保险合同纠纷案件适用相关法律问题的批复》（《批复》）由最高人民法院审判委员会第 1575 次会议通过，现予公布，自 2013 年 5 月 8 日起施行。

On April 15, 2013, the Official Reply to Issues Concerning the Application of Relevant Laws in Trying Cases of Export Credit Insurance Contract Disputes (the "Reply"), adopted at the 1575th meeting of the Judicial Committee of the Supreme People's Court

(SPC), was promulgated, effective as of May 8, 2013.

《批复》指出，对出口信用保险合同的法律适用问题，保险法没有作出明确规定。鉴于出口信用保险的特殊性，人民法院审理出口信用保险合同纠纷案件，可以参照适用保险法的相关规定；出口信用保险合同另有约定的，从其约定。

The Reply states that the insurance law does not clearly provide for the application of laws in relation to export credit insurance contracts. In view of the particularity of export credit insurance contracts, a people's court may refer to relevant provisions of the insurance law in trying cases of export credit insurance contract disputes; where the export credit insurance contracts stipulate otherwise, such stipulations shall apply.

Top

仲裁动态
ARBITRATION DEVELOPMENTS

- **GAR《2013 区域仲裁指南》将北仲列为重点关注对象（来源：www.bjac.org.cn，2013 年 5 月 27 日）**

  GAR's Guide to Regional Arbitration 2013 names the Beijing Arbitration Commission as Ones to Watch (Source: www.bjac.org.cn, May 27, 2013)

近日，由英国 Law Business Research Limited 公司创办并经营的世界领先的法律信息平台及国际仲裁新闻的权威集散地《国际仲裁评论》（Global Arbitration Review，以下简称 GAR）发布了《2013 区域仲裁指南》将北仲列为值得重点关注的对象进行深入介绍和剖析。

Recently, the Global Arbitration Review ("GAR"), the world's leading legal information service and authoritative hub for international arbitration news founded and run by the UK-based Law Business Research Limited, published its Guide to Regional Arbitration 2013, in which, it named the Beijing Arbitration Commission ("BAC") as Ones to Watch with an in-depth introduction and analysis.

该 GAR 表示，有很多专业人士推崇北仲，认为北仲是中国本土具备国际水准的仲裁机构。同时肯定了北仲的专业性、竞争力和透明度。

According to GAR, the BAC has many admirers and is described as a local arbitration commission which meets global standards. The professionalism, competence and transparency of the BAC is highly recognized.

北仲的专业性不仅体现在制度、规则的设计上，更体现在北仲仲裁员处理疑难复杂案件的能力和经验上。北仲对于仲裁程序公正性和透明性的追求，是体现在细节中的。指南特别提及在北仲的国际商事程序中，允许当事人在调解不成后更换参与调解

的仲裁员，以保证案件裁决的公正性。GAR 认为，这样的规则设计对于跨国公司来说非常人性化。而正是这种人性化的设计和适用，保证了仲裁程序的公正和透明。

The professionalism of the BAC is not only reflected in the design of its systems and rules, but also in the capability and experience of its arbitrators in handling complex difficult cases. The BAC's desire for justice and transparency in its arbitration proceedings is embodied in the minutiae details. The Guide specifically notes that its rules are friendly towards international companies, in that they allow the parties to change arbitrators involved in a Med-Arb process, which is often part of a foreign-related dispute, be unsuccessful. It is such friendly designs and applications thereof that ensure justice and transparency in the arbitration proceedings.

北仲的核心竞争力在软硬件两个方面都有所体现。在软件方面，指南中指出，北仲已经具有处理国际案件的经验和能力。在 17 年的发展过程中，北仲共处理过 490 余件涉外案件，近几年更是每年受理 30 到 50 件国际案件，而总受理案件的数量在每年 1500 件左右。在积累如此多个案经验的同时，北仲的仲裁程序并不会显得冗长，而是力争所有的争议案件都在 6 个月之内解决。硬件方面，GAR 认为，北仲有出色的秘书团队，并通过先进的电子案件管理系统实现对案件信息的系统化管理；此外北仲的仲裁厅设备齐全，环境舒适，望向窗外可以尽览北京 CBD 全景。

The core competitiveness of the BAC lies in both its software and hardware. In terms of software, GAR notes that the BAC has much experience and competency in handling international work. The BAC has handled around 490 foreign-related matters in its 17-year span. That equates to about 30 to 50 new international cases in recent times, and it handles around 1,500 matters each year. While gaining so much experience from individual cases, the BAC does not run as in-depth a process as some might want. The BAC aims to complete all matters within six months. In terms of hardware, GAR notes that the BAC has a helpful team of staff, and has the benefit of an advanced electronic case-management system for effective management of case information. In addition, the BAC hearing rooms are fully equipped and comfortable with a lovely view of the CBD area of Beijing.

据了解，近年来随着北仲国际影响力的日益提升，国际仲裁界对北仲的关注度日益增加。2009 年《美国国际仲裁评论》(The American Review of International Arbitration）刊登了对北仲的长篇实证研究文章，全面剖析北仲为确保独立、胜任与公正所采取的各种有力措施。2010 年英国的《建设工程法律杂志》（Construction Law Journal）刊登文章，以北仲为例全面介绍机构仲裁的中国经验。2011 年《世界仲裁通讯》（World Arbitration Reporter）在第二版中增加一章，对北仲规则进行评介。2012 年《国际仲裁评论》（GAR）还曾就北仲受理的一起争议金额达几十亿人民币的涉及中国公司与美国公司的仲裁案件进行专门报道。

With the international influence of the BAC rising over the past years, the attention of the international arbitration arena is increasingly focused on the BAC. In 2009, the American Review of International Arbitration published a long case study of the BAC, providing a full analysis of the various effective measures taken by the BAC to ensure independence, competency and justice of its arbitral proceedings. In 2010, the UK based Construction Law Journal published an article which takes the BAC as an example to

illustrate the Chinese experience with institutional arbitration. In 2011, a new chapter was added in the second edition of the World Arbitration Reporter to comment on the rules of the BAC. In 2012, GAR ran a special report on a multi-billion Renminbi BAC arbitration case involving a dispute between a Chinese company and a US company.

Top

判例研究
CASE ANALYSIS

Case Analysis on How Chinese Courts and Arbitration Institutes Decide Cases
判例研究—中国法院和仲裁机构如何判案

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法院在执行中可以通过限制被执行人的特许经营资格来促使其履行义务
Can court limit the franchise license of the enforced party in the Enforcement Procedure to impel the enforced party to perform obligation

【申请执行人】某工贸公司

【Claimant】 A trading company

【被执行人】某民营企业

【Enforced Party】 A private company

【背景情况】申请执行人与被执行人因买卖合同纠纷诉至法院，被执行人败诉，并须履行一定金钱给付义务。被执行人不按期履行义务，申请执行人申请法院强制执行，因被执行人确无可供执行的财产，于是申请执行人请求法院对被执行人的特许经营资格予以限制，以促使被执行人履行义务。

【Background】 A sales contract dispute brought by the claimant and the enforced party before a court, and an adverse judgment was made against the enforced party and the enforced party is ordered to make monetary payments. The enforced party failed to perform this obligation within the specified timeframe, and the claimant petitioned the court to enforce the court judgment. As the enforced party has no enforceable property, the claimant petitioned the court to limit the franchise license of the enforced party,

so as to impel the enforced party to perform the obligation.

【执行法院】可以

【Court of the Enforcement Proceeding】Yes.

【裁判理由】根据北京高院的意见，企业所拥有的特许经营资格，从性质上是一种特殊的经营资格，该项资格不仅是一般企业所不具有的能力，也是企业可用以盈利的手段，具有一定的财产价值，应属一种无形财产权。依据最高法院《关于人民法院执行工作若干问题的规定（试行）》第 38 条的规定，“被执行人无金钱给付能力的，人民法院有权裁定对被执行人的其他财产采取查封、扣押措施。”企业的特许经营资格属于上述规定中的其他财产权，被执行人不履行生效法律文书确定的义务，执行法院可对其采取强制执行措施，以促使被执行人主动履行义务。

【Basis of the Decision】 According to Beijing Superior Court, the franchise license of a company is in nature a special operating qualification which an ordinary business lacks and which can be used by the company as a means of making profit, and it thus has certain property values and should be a type of invisible property right. According to Article 38 of *the Regulations of the Supreme Court regarding Several Issues in the Enforcement Activities of the People's Court (Trial)*, “Where an enforced party is incapable of making monetary payments, the court has the power to order the attachment or detainment of other properties of the enforced party.” The franchise license of a company is the said “other properties”. If the enforced party fails to perform the obligation specified in the effective judgment, the Court of the Enforcement Proceeding can take mandatory enforcement measures to impel the enforced party to voluntarily perform the obligation.

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，在长春、长沙、常州、重庆、福州、广州、哈尔滨、海口、杭州、合肥、黄石、吉林、济南、昆明、南昌、南京、南宁、南通、内蒙古、宁波、青岛、上海、沈阳、深圳、四川、苏州、太原、天津、温州、武汉、乌鲁木齐、无锡、厦门、西安、西宁、银川、郑州、舟山、珠海、香港、台北、莫斯科、新加坡、巴黎、首尔、华盛顿、东京、纽约、芝加哥、旧金山、多伦多、墨西哥、圣保罗、利马、伦敦、布鲁塞尔、柏林、阿姆斯特丹、马德里、斯德哥尔摩、迪拜、开罗、开普敦、阿布贾、特拉维夫、悉尼等城市设有分支机构或联盟机构。

Founded in 1992, Dacheng Law Offices is one of the largest law firms of full services in Asia. Headquartered in Beijing, Dacheng has the largest global legal services network of any law firm in China, with branch offices or alliance partners in Changchun, Changsha, Changzhou, Chongqing, Fuzhou, Guangzhou, Harbin, Haikou, Hangzhou, Hefei, Huangshi, Jilin, Jinan, Kunming, Nanchang, Nanjing, Nanning, Nantong, Inner Mongolia, Ningbo, Qingdao, Shanghai, Shenyang, Shenzhen, Sichuan, Suzhou, Taiyuan, Tianjin, Wenzhou, Wuhan, Urumqi, Wuxi, Xiamen, Xi'an, Xining, Yinchuan, Zhengzhou, Zhoushan, Zhuhai, Hong Kong, Taipei, Moscow, Singapore, Paris, Seoul, Washington, Tokyo, New York, Chicago, 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:

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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.