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# 中国法通讯
# China Law Newsletter

# 跨境争议解决
# Cross-border Dispute Resolution

**第 11 期 • Issue 11**
**2012 年 5 月 • May 2012**

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

- **上海试点建立涉税争议前置处理机制（来源：www.csj.sh.gov.cn，2012 年 4 月 17 日）**
  **Shanghai established Pilot Pre-Processing Mechanism for Tax-Related Disputes (Source: www.csj.sh.gov.cn, April 17, 2012)**

上海市国家税务局、上海市地方税务局日前联合发布了《关于试点建立涉税争议前置处理机制的意见》。该意见明确规定了涉税争议前置处理的范围、申请人、各相关部门职责分工及处理工作流程。此外，符合条件的涉税争议应于申请当日受理，于



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次日流转至牵头部门。

Recently the Shanghai Office of SAT and the Shanghai Local Taxation Bureau jointly issued Opinions on the Establishement of Pilot Pre-Processing Mechanisms for Tax-Related Disputes. The Opinions clarifies the scope, applicants, division of responsibilities, and processing workflow of pre-processing mechanisms for tax-related disputes. In addition, eligible tax-related disputes should be accepted on the date of application, and transferred to the leading department the following day.

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- **最高人民法院公布《关于审理侵犯信息网络传播权民事纠纷案件适用法律若干问题的规定（征求意见稿）》（来源：中国法院网，2012 年 4 月 23 日）**

**SPC Issues Provisions on Several Issues Concerning Application of Law in Civil Dispute Cases of Infringing Right to Network Dissemination of Information (Draft for Comments) (Source: www.chinacourt.org, April 23, 2012)**

最高人民法院公布《关于审理侵犯信息网络传播权民事纠纷案件适用法律若干问题的规定（征求意见稿）》，全文共计 20 条，向社会各界广泛征求意见。征求意见的截止日期为 2012 年 6 月 1 日。

The Supreme People's Court (the"SPC") issued the Provisions on Several Issues Concerning Application of Law in Civil Dispute Cases of Infringing Right to Network Dissemination of Information (Draft for Comments), including 20 articles in total to seek opinions from the public. Comments on the Provisions are due by June 1, 2012.

征求意见稿指出，网络用户、网络服务提供者未经许可，通过信息网络提供他人享有权利的作品、表演、录音录像制品，法院应当判令其承担侵犯信息网络传播权的民事责任。通过上传到网络服务器或者以其他方式，将作品、表演、录音录像制品置于向公众开放的信息网络中，使公众可以以下载、浏览或者其他方式获得的，法院应当认定其构成作品、表演或者录音录像制品的提供行为。

According to the Draft for Comments, if network users or service providers provide through information network without prior permit, the works, performance as well as audio and video record products whose rights are available to others, the court shall order them to take the civil-law responsibilities arising from infringing the right to network dissemination of information. If network users or service providers put such works, performance as well as audio and video record products to the information network open to the public through uploading to network servers or otherwise, rendering the public able to download, browse or obtain otherwise such works, performance as well as audio and video record products, the court shall determine that such users and service providers have"provided" the works, performance as well as audio and video record products.

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- **十一届全国人大常委会举行第二十六次会议再次审议民诉法修正草案（来源：China.com.cn，2012 年 4 月 25 日）**

**26th meeting of 11th NPC Standing Committee reviews for the second time the draft revision to the Civil Procedure Law (Source: China.com.cn, April 25, 2012)**

2012 年 4 月 24 日，十一届全国人大常委会举行第二十六次会议，再次审议民事诉讼法修正案草案。二审稿规定：基层人民法院和它派出的法庭审理标的额人民币 1 万元以下的民事案件，实行一审终审。草案二审稿将草案一审稿规定的 5000 元标的额抬高到 1 万元。2011 年 10 月，十一届全国人大常委会第二十三次会议曾初次审议该修正草案；11 月曾公开征求意见。我国现行民诉法是 1991 年七届全国人大四次会议通过的。2007 年，十届全国人大常委会第三十次会议曾小幅修改，重新修订了民诉法审判监督程序和执行程序等内容。

On April 24, 2012, the 11th NPC Standing Committee held the 26th meeting to review for the second time the draft revision to the Civil Procedure Law. This second draft submitted for review stipulates that the judgment of first instance being final shall apply to civil disputes with the amount of subject matter less than RMB 10,000 that are heard by grassroots courts and their dispatched tribunals. The aforesaid amount of subject matter is increased from RMB 5,000 in the first draft to RMB 10,000 in this second draft. In October 2011, the 23rd meeting of 11th NPC Standing Committee reviewed for the first time the draft revision and solicited public opinions in November 2011. The existing Civil Procedure Law was adopted at the 4th meeting of the 7th NPC on April 9, 1991, and was amended according to the Decision on Amending the Civil Procedure Law of the People's Republic of China adopted at the 30th meeting of the 10th NPC's Standing Committee on October 28, 2007.

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# 司法动态
# JUDICIAL DEVELOPMENTS

- **最高人民法院为防止利益冲突又出廉政新规（来源：最高人民法院网站，2012 年 4 月 5 日）**

  **Supreme People's Court Again Comes Up With New Regulations for Clean and Honest Administration to Prevent Conflicts of Interest (Source: Supreme People's Court, April 5, 2012)**

为了进一步规范法院工作人员的行为，防止法院工作人员个人利益与公共利益发生冲突，最高人民法院近日出台了《关于人民法院落实廉政准则防止利益冲突的若干规定》（《规定》）。

For the purpose of further regulating the conduct of court personnel and preventing the personal interests of court personnel from conflicting with public interests, the Supreme People's Court recently published the Several Regulations on People's Courts' Implementing the Guidelines to Clean and Honest Administration to Prevent Conflicts of Interests (the "Regulations").

《规定》共计二十四条，具体包括八个方面的内容：禁止利用职权和职务上的影

响谋取不正当利益；禁止私自从事营利性活动；禁止为他人的经济活动提供担保；禁止违反规定买卖股票或者进行其他证券投资；禁止违反规定在经济实体、社会团体兼职或者兼职取酬；禁止利用职权和职务上的影响为特定关系人谋取利益；禁止放任配偶子女在本人管辖地区和业务范围内从事可能发生利益冲突活动；禁止违反规定干预和插手市场经济活动。

The Regulations contain a total of 24 provisions and specifically consist of eight aspects: prohibit using official power and influence of one's position to seek illegitimate interests; prohibit engaging in for-profit activities without permission; prohibit providing guarantees for others' economic activities; prohibit buying and selling stocks or carrying out other investments in securities in violation of relevant rules; prohibit taking up part-time jobs in economic entities or social organizations or being remunerated for part-time jobs in violation of relevant rules; prohibit using official power and influence of one's position to seek benefits for specific related persons; prohibit giving one's spouses and children free reign to engage in activities that may give rise to a conflict of interests in areas and business areas under one's jurisdiction; prohibit interfering with and intervening in market economic activities in violation of relevant rules.

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- **《最高人民法院知识产权案件年度报告（2011）》发布（来源：人民法院报, 2012 年 4 月 20 日）**

**SPC's 2011 annual report on IP cases published (Source: RMFYB.chinacourt.org, April 20, 2012)**

最高院 19 日发布了《最高人民法院知识产权案件年度报告（2011）》，对其在过去一年审结的知识产权和竞争案件中明确的审判标准、裁判方法和司法政策进行了系统总结并予以公开展示。根据该报告披露统计数据，最高院知识产权审判庭 2011 年全年共新收各类知识产权案件 420 件，比 2010 年增长 34.19%。加上 2010 年旧存案件 46 件，2011 全年共有各类在审案件 466 件，全年共审结各类知识产权案件 423 件。该报告指出，2011 年最高人民法院审理的知识产权和竞争案件呈现专利商标行政案件增长迅猛，在全部案件中所占比重增加，尤其是专利商标授权确权案件增长明显等六大特点。

On April 19, 2012, the Supreme People's Court (SPC) issued the Annual Report of the Supreme People's Court on Intellectual Property Cases (2011), which systematically sums up the trial standards, judging methods and judicial policies for intellectual property (IP) and competition cases tried in 2011 and demonstrate the same to the public. According to statistical data in this Report, IP cases admitted by Intellectual Property Division of the SPC amounted to 420 in 2011, a year-on-year increase of 34.19%; IP cases in the trial, including 46 carried over cases of 2010, totaled 466 in 2011, and a total of 423 IP cases were closed in 2011. This Report pointed out that there were six characteristics of the IP and competition cases trialed by the SPC in 2011, including that patent and trademark administrative cases, cases involving authorization of patent and trademark in particular, increased rapidly in number and proportion.

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- **最高法设立两个医药产业知识产权司法保护调研基地（来源：人民法院报，2012 年 4 月 24 日）**

  **Supreme People's Court Establishes Two Survey Bases for Judicial Protection of Intellectual Property in Medical Industry (Source: People's Court Daily, April 24, 2012)**

为了加强涉及医药产业知识产权审判的业务指导及调研工作，最高人民法院日前发布《最高人民法院关于设立医药产业知识产权司法保护调研基地及增加知识产权审判基层示范法院和知识产权司法保护理论研究基地、调研基地的决定》(《决定》)。根据《决定》，我国将在江苏省泰州市中级人民法院、连云港市中级人民法院设立医药产业知识产权司法保护调研基地。

For the purpose of strengthening the operational guidance and survey of trials concerning intellectual property in medical industry, the Supreme People's Court recently issued the Decision of the Supreme People's Court on Establishing Survey Bases for Judicial Protection of Intellectual Property in Medical Industry and Increasing Demonstration Local Courts for Hearing Cases Involving Intellectual Property and Theoretical Research Bases and Survey Bases for Judicial Protection of Intellectual Property (the "Decision"). According to the Decision, China will establish survey bases for judicial protection of intellectual property in medical industry in Jiangsu Taizhou Intermediate People's Court and Lianyungang Intermediate People's Court.

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# 仲裁动态
# ARBITRATION DEVELOPMENTS

- **北仲进行多项制度创新 开创北仲公正审判新局面**

  **Beijing Arbitration Commission implements a suite of institutional innovations, opening a new chapter for just and fair arbitration at the institution**

2011 年，北京仲裁委员会围绕“公正审判”这一核心，着力推动了多项制度创新，包括：加强仲裁案件材料送达程序的管理、制定案件材料送达的内部规范；加强计算机办案系统相同当事人的查询功能；重新开发办案系统、强调办案秘书及时录入、规范办案；重视仲裁员专业能力和仲裁业务的培训、规定参加业务培训并达到一定标准的仲裁员才能担任首席和独任仲裁员；加强仲裁员网上办公系统的各项功能，使仲裁员和办案秘书之间的工作流程衔接更加透明；加强了办案秘书的内部培训和学习交流，在程序和实体两方面提高秘书的业务能力等多个方面。

In 2011, Beijing Arbitration Commission (“BAC”) heavily promoted a suite of institutional innovations around the core objective of fair and just arbitration, such as strengthening its management of the procedure for submission of arbitration files, and

formulating internal rules for submission of arbitration files; strengthening the search function of the computerized case handling system with regard to the same parties; re-developing the case handling system, and laying an emphasis on timely input of case information by the case-handling secretary to standardize the case handling; putting a special premium on the professional skills and training of arbitrators, and stipulating that only arbitrators who have undergone professional training and met certain standards could be appointed to serve as chief arbitrator and sole arbitrator; strengthening the various functions for the on-line office system of arbitrators, making the work interface between arbitrators and case-handling secretaries more transparent; strengthening internal training and educational exchanges for case handling secretaries, to improve their professional development both in terms of procedural and substantive aspects.

特别需要指出的是，北京仲裁委会计算机软件管理系统的运用，真正体现了法治的精神和理念：保障管理依据的数据客观、真实；程序高度透明、规范，避免暗箱操作；使各项仲裁制度规定流程化，成为多数人参与、强制执行、不可逆转的活的制度。

It is worth special notice that the application and adoption of computer software management system at BAC truly reflects the spirit and concept of the rule of law, and it safeguards the objectivity and authenticity of the basis of management, ensures a highly transparent and standardized system that prevents under-table dealings, and forms process flows for arbitration rules, and promotes an enforceable, irreversible living system with majority participation.

北京仲裁委员会通过各项制度创新，能够更有力地维护当事人合法权益，保障北仲仲裁制度的健康发展，并进一步推进仲裁裁判更公正、高效地进行。北京仲裁委员会仲裁员公正、合理的审判逐步赢得了案件当事人的普遍信服，以及各级法院的广泛尊重。

Such institutional innovations enable BAC to more forcefully safeguard the legitimate interests of the parties, ensure sound development of arbitration rules at BAC, and further promote more just and efficient arbitration proceedings. The arbitrators at BAC conduct just and rational arbitration proceedings, and have won widespread trust and confidence of the parties, and extensive respect of the court system at each level.

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# 典型案例
# TYPICAL CASES

- **最高院发布第二批指导性案例（来源：最高人民法院，2012 年 4 月 16 日）**

最高人民法院继 2011 年 12 月 20 日发布第一批指导性案例后，于 4 月 13 日发布第二批指导性案例。此次发布的 4 个指导案例，行政和民事案例各 2 个。其中，指导

案例 5 号是一个规范工业盐管理的典型案例，该指导案例进一步明确，地方政府规章违反法律规定设定许可、处罚的，人民法院在行政审判中不予适用；指导案例 6 号法律没有明文列举的“没收较大数额财产”的行政处罚也列入必须举行听证的范围；指导案例 7 号涉及抗诉、当事人撤诉和民事诉讼法第 140 条裁定适用范围等法律适用问题；指导案例 8 号是准确适用公司法第 183 条、妥善处理公司僵局问题的典型案例，既严格限定了公司解散的条件，又依法保护了股东权利，有利于规范公司治理结构，促进市场经济健康发展。

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- **“支付宝”账户纳入强制执行范围（来源：人民网，2012 年 4 月 16 日）**

2012 年 4 月 10 日上午，在一起民间借贷纠纷案的执行过程中，北京市朝阳区人民法院将被告王某“支付宝”内余额划扣至申请执行人刘某“支付宝”账户，使该案执行进程得以前进。据了解，这是北京首次对被执行人的“支付宝”账户予以强制执行。办案法官表示，“支付宝”账户属于被执行人名下的财产，账户内的交易资金可以视为被执行人的收入，根据法律规定，属于法院可执行的财产范围。本案办结后，法院还将向支付宝公司发出司法建议，提出改变执行钱款只能在“支付宝”账户间划拨的做法。

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- **北京市二中院评析“QQ 与 360”等 5 起不正当竞争案（来源：法制网，2012 年 4 月 26 日）**

4 月 26 日是第 12 个世界知识产权日，北京市第二中级人民法院召开新闻通报会，对近三年受理的“QQ 与 360” 不正当竞争案等 5 起具有典型意义和重大影响的网络不正当竞争案件及该类型案件的审理工作进行通报。近年来北京市二中院审理的网络不正当竞争案件主要包括：涉及关键词竞价排名服务类，涉及软件冲突类，涉及网络域名、网站名称类，虚假宣传类、商业诋毁类等六种类型。同时，网络不正当竞争案件具有三大特点：一是案件社会影响重大；二是案件涉及的事实问题和法律问题新；三是认定构成不正当竞争的案件居多。

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- **PE 与被投资公司纠纷爆发 法律不支持对赌条款（来源：21 世纪经济报道，2012 年 5 月 5 日）**

2012 年 4 月下半旬，PE 界上空的“浮盈税”疑云刚散开些，又陷入另一重隐忧：PE 机构与被投资公司因对赌纠纷闹上法庭，一审二审都已判对赌条款无效。这一纠纷现正在最高人民法院审理中。

PE 机构苏州工业园区海富投资有限公司(以下简称“海富投资”)与被投公司甘肃世恒(全名“甘肃世恒有色资源再利用有限公司”)为五年前投资合约中的对赌条款，把官司打到了最高法院。虽然仍无定论，但海富投资董事长张亦斌明确告知，目前是甘肃世恒不服二审结果，才上诉到最高院。

甘肃世恒的对赌条款被判无效，几乎已成定局。据了解，这是我国首个对赌被判无效的司法判例。我国虽不是判例法系，但若最高法院判对赌无效，那么等于司法实

践表明：法律不支持“对赌条款”。这将打击大量手执对赌条款的 PE 机构，并对 PE 行业未来的走向造成深远影响——目前，对赌是 PE 基金，尤其是人民币基金重要的保护自身权益的措施。

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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、南昌、苏州、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 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 Nanchang Suzhou 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:

(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.