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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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Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters -- Better enforcement of judgments abroad: bye bye exequatur! (Author: Professor Denis Philippe)

司法动态
JUDICIAL DEVELOPMENTS

- **最高院、保监会发布《关于在全国部分地区开展建立保险纠纷诉讼与调解对接机制试点工作的通知》（来源：人民法院报，2013 年 1 月 5 日）**

  SPC and CIRC Promulgate the Circular on the Pilot Program of Establishing the Mechanism of Linking Insurance Dispute Litigation and Mediation in Certain Regions of China (Source: rmfyb.chinacourt.org, January 5, 2013)

最高人民法院、中国保险监督管理委员会发布《关于在全国部分地区开展建立保险纠纷诉讼与调解对接机制试点工作的通知》，决定在全国部分地区联合开展建立保险纠纷诉讼与调解对接机制试点工作。

The Supreme People's Court ("SPC") and the China Insurance Regulatory Commission ("CIRC") have jointly promulgated the Circular on the Pilot Program of Establishing the Mechanism of Linking Insurance Dispute Litigation and Mediation in Certain Regions of China, deciding to jointly launching the pilot program of establishing the mechanism to link insurance dispute litigation and mediation in certain regions of China.

此次工作的目标是建立、完善保险纠纷多元解决机制，促进依法、公正、高效、妥善化解矛盾纠纷，为保险纠纷当事人提供更多可选择的纠纷解决渠道，维护各方当事人的合法权益，推进保险业持续健康发展。

Such efforts are made to establish and improve diversified resolution mechanism for insurance disputes, to promote lawful, fair, efficient and proper resolution of disputes, to provide more alternative dispute resolutions for parties involved in the insurance disputes

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and to protect the lawful rights and interests of each involved party so as to promote the sustainable and healthy development of insurance industry.

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- **最高人民法院发布《关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》（来源：人民法院报，2013 年 1 月 8 日）**

SPC Promulgates the Interpretations on Several Issues Concerning Application of the Law of the People's Republic of China on Law-Application for Foreign-Related Civil Relations (I) (Source: rmfyb.chinacourt.org, January 8, 2013)

2012 年 12 月 28 日，最高人民法院出台了《最高人民法院关于适用〈中华人民共和国涉外民事关系法律适用法〉若干问题的解释（一）》（《解释》），于 2013 年 1 月 7 日起施行。

On December 28, 2012, the Supreme People's Court ("SPC") promulgated the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People’s Republic of China on Law-Application for Foreign-Related Civil Relations (I) (the "Interpretations") which shall come into effect as of January 7, 2013.

《解释》共计 21 条，规定民事关系具有下列情形之一的，人民法院可以认定为涉外民事关系：当事人一方或双方是外国公民、外国法人或者其他组织、无国籍人；当事人一方或双方的经常居所地在中华人民共和国领域外；标的物在中华人民共和国领域外；产生、变更或者消灭民事关系的法律事实发生在中华人民共和国领域外；可以认定为涉外民事关系的其他情形。

The Interpretations are composed of 21 articles, providing that a people’s court may recognize any civil relations under one of the following circumstances as the foreign-related civil relations: one or both of the parties are foreign citizens, foreign legal persons or other foreign organizations or stateless persons; the habitual residence of one or both of the parties are outside the territory of the People's Republic of China; the subject matter is outside the territory of the People's Republic of China; the legal facts that result in the establishment, modification or cancellation of civil relations occur outside the territory of the People's Republic of China; or other circumstances that may be recognized as the foreign-related civil relations.

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- **最高人民法院公布《最高人民法院关于审理劳动争议案件适用法律若干问题的解释（四）》（来源：人民法院报，2013 年 2 月 1 日）**

SPC Promulgates the Interpretations on Several Issues on the Application of Law in Hearing the Cases Involving Labor Disputes (IV) (Source: rmfyb.chinacourt.org, February 1, 2013)

2013 年 1 月 18 日，最高人民法院公布《最高人民法院关于审理劳动争议案件适用法律若干问题的解释（四）》，自 2013 年 2 月 1 日起施行。

On January 18, 2013, the Supreme People's Court ("SPC") promulgated the Interpretations of the Supreme People's Court on Several Issues on the Application of Law

in Hearing the Cases Involving Labor Disputes (IV), effective as of February 1, 2013.

《解释（四）》全文共 15 条，主要包括裁审衔接、调解、经济补偿、竞业限制、口头变更的劳动合同、涉外劳动关系以及用人单位经营期限届满的经济补偿、用人单位违法解除劳动合同的赔偿金、中级人民法院审理撤销终局裁决案件的程序等问题。

The 15-article Interpretations (IV) mainly covers the following issues, namely ruling and trial convergence, mediation, financial compensation, non-competition, orally revised labor contracts, f foreign-related labor relations and matters related to financial compensation after the expiry of duration of the operation term of employers, damages for the breach of labor contracts by employers, and the procedures for intermediate people's courts to trial the cases involving the cancelation of final awards.

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仲裁动态
ARBITRATION DEVELOPMENTS

- **中国贸仲委将筹建专门机构调解两岸投资争端（来源：新华社，2013 年 1 月 23 日）**

CIETAC to Prepare to Establish Special Organization to Mediate the Investment Disputes between Taiwan and Mainland (Source: www.xinhuanet.com.cn, January 23, 2013)

1 月 22 日获悉，为加强对两岸投资者权益的保护，中国国际经济贸易仲裁委员会正筹建投资争端解决中心，这一专门机构建成后将以调解方式受理特定类型的两岸投资争端。

It was informed on January 22 that, in order to strengthen the protection of the rights and interests of investors from Taiwan and mainland, the China International Economic and Trade Arbitration Commission ("CIETAC") is preparing to establish an investment dispute resolution center that is designed accept specific types of investment disputes between Taiwan and mainland and settle such disputes through mediation.

中国国际经济贸易仲裁委员会（贸仲委）是世界主要的常设商事仲裁机构之一。贸仲委副主任兼秘书长于健龙 22 日对记者表示，上述投资争端解决中心将以调解方式解决争议，主要受理《海峡两岸投资保护和促进协议》项下私人投资者和投资所在地一方的投资争端。

CIETAC is one of the permanent commercial arbitration organizations in the world. Yu Jianlong, vice director and secretary general of the CIETAC, told to the reporter on January 22 that the above mentioned dispute resolution center will settle the disputes through mediation and mainly accept the investment disputes between the parties under the Agreement of Protection and Promotion of Investments between Taiwan and Mainland or of

any party that falls in the investment region under such Agreement.

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实务经验
PRACTICAL EXPERIENCE

欧盟《民商事管辖权及判决承认与执行条例 1215/2012/EU》

——成员国法院判决执行的简化：废除执行许可令制度！（1215/2012/EU 条例仍不适用于仲裁）

Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Better enforcement of judgments abroad: bye bye exequatur! No change for arbitration

作者：Denis Philippe 教授
Author: Professor Denis Philippe

1. 废除执行许可令制度的目的与原因
PURPOSE and GENESIS

欧盟《民商事管辖权及判决承认与执行条例 44/2001/EC》（以下称“44/2001/EC 条例”）是欧盟共同规则中最成功的条例之一。

Regulation 44/2001/EC was and remains one of the most successful Regulations of the EU acquis communautaire.

而经过修正后的欧盟《民商事管辖权及判决承认与执行条例 1215/2012/EU》（以下称“1215/2012/EU 条例”）对 44/2001/EC 条例又进行了显著的改进，受到了普遍的好评。

The recasting of this Regulation was desirable and the improvements are significant.

欧盟理事会于 2012 年 12 月 6 日通过了该修正案。[1]

On 6 December 2012, the EU Council approved the recast.

现任欧盟委员会副主席和欧盟司法委员的 Viviane Reding 女士指出：“移除由于 27 个成员国相异和经常冲突的法律体系带来的繁琐的程序障碍，避免额外的费用并消除法律的

[1] Official Journal, 20 December 2012 L 351/1.

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不确定性会使欧盟统一市场更加具有活力和吸引力。这是一个司法制度促进发展的极好典范。这次改革将为企业和消费者节省时间和金钱，因为一个成员国法院的判决会自动得到另一个成员国法院的承认。对欧盟整个司法体制来说，这只是一个小的改革，但它使我们更接近于美国的一体化市场模式。按照美国宪法的规定，司法判决应当在联邦的每一个州获得‘完全的诚意与信任’。”

“Removing bureaucratic obstacles, extra costs and the legal uncertainty of having 27different and often contradictory systems makes the single market more attractive. This is a very good example of how justice policies can stimulate growth” said Vice-President Viviane Reding, the EU's Justice Commissioner. “This reform will save time and money for businesses and consumers because judgments from one EU Member State will be automatically recognised in another EU Member State. It is a small revolution for the European area of justice which brings us closer to the model of the U.S. Single Market, where, in the words of the U.S. Constitution, judicial proceedings are given ‘full faith and credit’ in every other state of the union”.

经预测，废除执行许可令制度将能够节省 48000000（四千八百万）欧元。

It is expected that this simplification will allow a saving of 48 million Euros.

2. 执行许可令制度的废除
ABOLITION OF THE EXEQUATUR REQUIREMENT

根据 44/2001/EC 条例第 38 条 a 款和 f 款的规定，一成员国法院做出的判决要在另一成员国得到执行必须先申请执行许可令。而申请执行许可令的程序实际上就是宣布一成员国法院的判决在另一成员国内具有可执行性。这需要执行地成员国的律师协助向执行地法院进行申请，然后由执行地法院审核原判决的可执行性并通过判决书的形式决定是否允许原判决在本国的执行。毫无疑问，这既耗费时间又耗费金钱。

Under Regulation 44/2001/EC, judgements rendered in Member States of origin must be submitted to the formality of the exequatur in Member States of enforcement (article 38 a) f) of Regulation 44/2001EC). The procedure of exequatur is the procedure for the declaration of enforceability of judgments in other Member States. A lawyer of the State of enforcement must be called upon and the Court of the State of enforcement has to check the enforceability and render a judgement allowing the enforcement. This requires time and, of course, money.

而根据 1215/2012/EU 条例的规定，仅需要提供经核准的原判决副本，一成员国法院作出的判决就应当在另一成员国得到执行。当然，债务人仍然保有法律上申诉的权利。如果原判决法院没有依法传唤债务人，或者发生了意外情形致使债务人无法参加庭审，那么债务人可以向原判决地成员国法院进行申诉；如果原判决违反了公正审判原则，债务人也可以向执行地法院提起对原判决执行的抗辩。

Under Regulation 1215/2012EU: ***A judgement can be enforced in an EU member state of enforcement, on the mere production of a certified copy of the judgement pronounced in the Member state of origin.*** Recourses are of course still available for the debtor; he can introduce a recourse in the Member State of origin if the summon was not served validly to him or if

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extraordinary circumstances impeded him/her to appear before the Court. The debtor can also challenge the enforcement in the Member State of enforcement if the principles of fair trial are not respected.

3. 司法管辖权扩大到包括被告住所地不在欧盟境内的案件——未决诉讼原则的改进
Extension of the jurisdiction rules to disputes involving defendants domiciled outside the EU - Improvement of the rules on lis pendens

3.1. 改革的焦点之一：未决诉讼
An important reform concerns: lis pendens

对于未决诉讼，布鲁塞尔公约第 27 条赋予先受理法院优先的司法管辖权。而 1215/2012/EU 条例允许成员国的法院依据自由裁量处理案件，即使该案件已由其他成员国法院或者第三国法院受理。这样规定的目的是为了通过两个平行的审判程序避免诉讼受阻或者拖延。在过去，的确有精明的诉讼律师选择向诉讼进展缓慢的法院提起诉讼以能够拖延案件的审理。这就是诉讼律师熟知的“意大利鱼雷”。

Article 27 of the Brussels Convention gave priority to the Court which was the first seized. In Regulation 1215/2012/EU, the Courts of a given Member State will be allowed to deal with the case on a discretionary basis even if the Court of the Member State or of a third party state was first seized. This rule aims at avoiding that, through the introduction of two parallel procedures, the handling of the claim will be blocked or slowed down. Indeed, in the past, an astute litigator was free to introduce first the procedure before a jurisdiction reputedly moving slowly so as to delay substantially the procedure. It was known by litigators as the “Italian torpedo”.

1215/2012/EU 条例对未决诉讼原则进行了更加明确的规定，使法官能够依其管辖权迅速地裁决案件。

The rules on lis pendens are also more precise so that the judge can take a decision on his competence quickly.

3.2. 专有管辖权原则
Exclusive rules of competence

如果根据保护雇员、消费者和被保险人的专有管辖权原则的规定欧盟成员国具有司法管辖权，那么，无论雇主、生产者/销售者和保险人的住所地是否在欧盟境内，都应当适用与雇员、消费者和被保险人有关的专有管辖权原则。举例来说，只要雇员在欧盟境内一成员国履行雇佣合同，那么雇员就可以向该成员国法院起诉住所地在欧盟境外的雇主。

The rules on competence in relation to employees, consumers or insured will also apply independently of the domicile of respectively employer, enterprise or insurer apply when an exclusive competence rule protecting these three categories of person give competence to the EU Jurisdiction. This means for instance that an employer not domiciled in the EU can be sued in the Member State where the employment contract was performed by the employee.

对于其它不以直接保护弱者为基础的专有管辖权情形，该原则同样适用，例如与不动产、商标和公司等相关的专有管辖权的规定。

The same rule applies for the other grounds for exclusive competences which are not directly based on the protection of the weaker party (immovable property, trademarks, companies, etc.).

3. 3. 协议司法管辖权
Court agreements

过去，当事人可以通过协议确定司法管辖权。1215/2012/EU 条例进一步加强了司法管辖权协议的效力，体现在如下三个方面：

As in the past, parties can choose their jurisdiction; the effects of court agreements have now been strengthened.

首先，司法管辖权协议具有独立于其它合同条款的效力。因此，司法管辖权协议条款的效力不受合同其它条款效力的影响；

Firstly, the agreement shall be treated as an agreement independent of the other terms of the contract; thus, the clause remains valid even if the rest of the contract is not.

其次，司法管辖权协议的有效性条件不再要求至少一方当事人的住所地在欧盟境内；

Secondly, the validity of the clause does no longer require that at least one of the parties should be domiciled in a Member State.

最后，依据未决诉讼原则，即使一方当事人已经向其它法院提起诉讼，司法管辖权协议指定的法院仍有权对案件进行裁决。

Thirdly, referring to the rules on lis pendens, the Court seized on the basis of the Court agreement will be entitled to deal with the case, even if one of the parties has submitted beforehand the case to another Court.

4. 仲裁
ARBITRATION

1215/2012/EU 条例第一条 d 款将仲裁从条例的适用范围中排除，这和 44/2001/EC 条例的规定一致。在第一份提案中，欧盟委员会试图协调仲裁和司法诉讼程序。[2]因此，该提案规定，如果当事人依据仲裁条款对法院的司法管辖权提起抗辩或者仲裁程序正在进行，法院应当中止诉讼程序。

Arbitration is excluded from the scope of application of the Regulation by article 1, d) as it was under Regulation 44/2001/EC. In its first proposal, the Commission aimed to improve the coordination between arbitration and judicial procedure. So the court was obliged to stay the proceedings if the jurisdiction was contested on the basis of an arbitration clause or if an

[2] Com/2010/0748 final COD 2010/0383. Celex 52010PC0748.

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arbitration procedure was pending.

但是，许多仲裁机构和欧盟议会一致强调指出[3]，《承认和执行外国仲裁裁决公约》即 1958 年纽约公约的规定仍然发挥着良好的作用，而在欧盟条例中引入新的原则则会阻碍纽约公约确立的有效机制继续发挥作用。

But most arbitration institutions as the European Parliament stressed that the rules of the New York Convention work satisfactorily and the introduction of new rules in the European Regulation could jeopardize the efficient mechanism of the New York Convention.

最终，1215/2012/EU 条例既没有规定是否支持仲裁条款的有效性，也没有规定仲裁条款的有效性对法院诉讼程序的影响。

The Regulation will neither interfere with the appreciation of the validity of an arbitration clause, nor with the effects of this question on the proceedings pending before the national judge.

然而，如果一成员国法院在判决中认定仲裁条款无效，那么依据 1215/2012/EU 条例该判决中的实体性判决应当得到执行地成员国的执行。

If, however, in a judgement, an arbitration clause is declared null and void by a Court, the Court judgement on the substance of the case can be enforced in the Member state of enforcement by virtue of the commented Regulation.

5. 1215/2012/EU 条例的适用时间和适用范围
APPLICATION RATIONE TEMPORIS AND RATIONE LOCI

1215/2012/EU 条例的适用范围也包括英国和爱尔兰[4]。2015 年 1 月 10 日以后提起的司法诉讼将适用 1215/2012/EU 条例的规定。

The Regulation will also apply in the UK and Ireland. It will apply to the proceedings instituted after 10 January 2015[5].

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[3] 参见 European parliament draft report committee on legal affairs, 2011 年 6 月 28 日, COD 2010/0383; 也可参见, the observations of the International Bar Association Arbitration Committee, 2009 年 6 月 15 日, ICC 法国,2009 年 6 月 17 日; http://ec/europa.eu/justice/news/consulting_public/news_consulting_002_en.htm.

[4] 布鲁塞尔条例将继续适用于丹麦，除非丹麦明确表示适用布鲁塞尔公约的规定。

[5] 2007 卢加诺公约继续有效。

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名仲裁机构的资深仲裁员。Philippe 教授不仅在国际仲裁法、国际商法、合同法和欧盟法等方面具有丰富的实践经验，而且发表了大量的学术文章。关于 Philippe 教授的更多个人信息，欢迎访问 www.philippelaw.eu 。

Denis Philippe is a professor at the Catholic University of Louvain and visiting professor at the University of Paris X. As the founding and managing partner of Philippe & Partners Law Firm, Professor Philippe is listed respectively by the Bar Association of Brussels and the Bar Association of Luxembourg. In addition, Professor Philippe is an experienced arbitrator for famous arbitration institutions, such as ICC and CEPANI. Professor Philippe has not only rich experience but also many publications in International Commercial Arbitration, International Trade Law, Contract Law, European Law, etc. More information about Professor Philippe, please visit: www.philippelaw.eu.

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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:

(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.