

March 2021

Brexit – its impact on jurisdiction clauses 英国脱欧对于管辖权条款的影响



Introduction

In 2016, the United Kingdom (the "UK") voted to leave the European Union (the "EU") as a Member State. Since then, the UK has maintained its participation in the EU for a transition period during which the EU legislative framework continued to apply to the UK. The transition period has since ended on 31 December 2020 ("**IP Completion Day**") and today, the UK is officially no longer a member of the EU. One major ramification relates to the recognition and enforcement of English court judgements in EU Member States which is key in respect of transactions involving borrowers or security parties located or based in the EU. If enforceability of a judgment in the EU is a significant factor in the choice of jurisdiction, where does this leave parties to financing transactions which often provide for submission to the jurisdiction of the English courts?

介绍

英国在 2016 年通过全民公投退出欧盟后的脱欧过渡期内仍然遵循着欧盟规则，维持欧盟的立法框架。过渡期于 2020 年 12 月 31 日（“**过渡期完成日**”）结束，英国已正式地脱离了欧盟成员国身份。脱欧对于英国的一个重要影响是英国法院的判决在欧盟成员国的承认和执行发生改变，这对涉及到位于或总部在欧盟的借款人或担保方的交易至关重要。如果判决在欧盟的可执行性是选择管辖权的重要因素，那么脱欧对于通常自愿将争议递交英国法院管辖的融资交易方意味着什么呢？

Jurisdiction clauses

1. Pre and Post IP Completion Day

Prior to IP Completion Day, the jurisdiction of the English courts was largely dictated by Regulation (EU) No 1215/2012 (the "**Recast Brussels Regulation**"). If an agreement included a submission to the courts of a particular EU Member State (which includes the UK), the courts of other EU Member States were generally required to decline jurisdiction, and to defer to and enforce the judgement of the courts of that particular EU Member State pertaining to such an agreement.

Following IP Completion Day, the Recast Brussels Regulation has ceased to apply to the UK as the UK is no longer considered an EU Member State. The courts of EU Member States may therefore choose to accept jurisdiction even if an agreement provides for the submission to the English courts. The question of whether an English court judgement may still be enforceable in EU Member States will be determined by the local laws of each EU Member State and as such the analysis may be less straightforward than the regime previously applicable pre-IP Completion Day.

This has been partially mitigated by UK's accession to the Hague Choice of Court Convention 2005 (the "**Hague Convention**") which came into force in the UK on 1 January 2021.

In relation to an agreement entered into after the Hague Convention was ratified by a participating state (which includes the EU) and where the jurisdiction clause in such an agreement is a two-way exclusive jurisdiction clause submitting to the court of such participating state, the Hague Convention generally requires (although there are some exceptions) all other participating states to:

- A. respect parties' choice of court in such participating state; and
- B. enforce judgements made by such court.

管辖权条款

1. 在过渡期完成日前和后

在过渡期完成日之前，英国法院的管辖权主要由欧盟第 1215/2012 号法规（the "**Recast Brussels Regulation**"《重铸布鲁塞尔法规》）决定。如果交易方协议将争议提交给特定欧盟成员国（包括英国）法院，则其他欧盟成员国法院通常应拒绝行使管辖权，并服从和执行该特定欧盟成员国法院对于该协议的判决。

在过渡期完成日之后，英国不再被视为欧盟成员国，《重铸布鲁塞尔法规》不再适用于英国。即使交易方协议将争议提交英国法院管辖，欧盟成员国法院仍可以选择接受管辖权。现在，英国法院的判决是否仍有可能在欧盟成员国执行由各成员国的当地法律决定，因此相比于过渡期完成日之前的分析较不直接。

于 2021 年 1 月 1 日在英国生效的《2005 年海牙法院选择公约》（“**海牙公约**”）部分缓解了这情况。

如果一份协议（一）在该缔约国批准《海牙公约》后签订并（二）有双向专属管辖权条款，《海牙公约》大致上要求(除了一些例外)所有缔约国（包括欧盟国家在内）：

- A. 尊重交易方对该缔约国法院的选择；以及
- B. 执行该缔约国法院做出的判决。



2. Types of dispute resolution clauses

Parties may now wish to consider the two-way exclusive jurisdiction clause anew when deciding which dispute resolution clause to use for their contracts. Simply put, a two-way exclusive jurisdiction clause is a jurisdiction clause which provides that all parties to an agreement submit to the courts of a certain jurisdiction.

Two other types of dispute resolution clauses currently more commonly used in financing transactions are the following:

- A. Asymmetrical jurisdiction clause – such a clause restricts one party to commencing proceedings only in the courts which they submitted to in the agreement, whilst allowing the other party to litigate in any jurisdiction.
- B. Arbitration clause – such a clause provides that parties will resolve any disputes by way of arbitration rather than through a court-driven procedure.

Developments in the market have also pointed to a suggestion of using an asymmetrical hybrid clause which allows one party to choose between the jurisdiction of the English courts and arbitration, while restricting the other party to only either the English courts or arbitration as provided for in the agreement. In this regard, careful drafting is required. Under English law, while such asymmetrical hybrid clauses are valid and enforceable, it is uncertain whether such clauses will be covered by the Hague Convention (and perhaps unlikely based on *obiter* comments at the Court of Appeal level in December 2020). Further, the issue of whether such a clause is within the Hague Convention may not necessarily be decided in each case under English law – it could be the law of (for example) the country where enforcement of a judgment is sought.

In the context of resolving disputes within the UK legal system, with the UK's official exit from the EU, parties now have to decide if they should adopt the two-way exclusive jurisdiction clause for use in agreements instead of the other options available.

2. 争议解决条款的种类

交易方在决定管辖权条款时可重新考虑是否使用双向专属管辖权条款。简单地说，在一个双向专属管辖权条款下，所有的交易方都同意将争议提交给某一特定管辖区域的法院管辖。

目前在融资交易较常用的其他两项争议解决条款如下：

- A. 非对称管辖权条款 – 此类条款限制一方仅可在协议中所选定的法院起诉，但允许另一方在任何司法管辖区提起诉讼。
- B. 仲裁条款 – 此类条款规定交易方将通过仲裁而非法院的司法程序来解决任何争议。

市场的发展也表明交易方能使用非对称混合条款。这类条款允许一方选择由英国法院管辖或由仲裁来解决争议，同时限制另一方根据协议的选择仅可在英国法院起诉或仅可进行仲裁。在这方面，仔细起草是必须的。根据英国法律，虽然这种非对称混合条款是有效且可执行的，但这类条款是否将被《海牙公约》涵盖还尚未可知（且基于 2020 年 12 月上诉庭的附带说明意见，可能性较低）。此外，对于这种条款是否被《海牙公约》涵盖这个问题，并不一定每次由英国法律作出决定。它也有可能受寻求执行判决的国家的法律管辖。

随着英国正式退出欧盟，在英国法律体系的背景下解决争议，各方现在必须决定是否在协议中采取双向专属管辖权条款。



Key considerations include weighing up the benefits of ease of enforcement of an English court judgement in the EU via the two-way exclusive jurisdiction clause, against the benefits of having flexibility as to where proceedings may be commenced under an asymmetrical jurisdiction clause, which has traditionally been the preferred option of financiers. With the current uncertainty on enforcement of English judgements in the EU, parties may also consider whether arbitration may be more effective as a dispute resolution mechanism in the appropriate transaction documents since it is unlikely that Brexit will affect recognition or enforcement of an arbitral award, which are governed by the New York Convention 1958 and the resulting national laws in each contracting state.

Conclusion

If financiers require a judgment that is enforceable in the EU, then the analysis as to which jurisdiction clause would be most appropriate will now require especially careful consideration and most certainly local law advice.

关键考虑因素包括权衡在双向专属管辖权条款下在欧盟执行英国法院判决的便利性的好处，以及根据融资方一项倾向于的非对称管辖权条款下可灵活选择诉讼程序启动地的好处。鉴于目前在欧盟执行英国判决的不确定性，交易方在适当的交易协议里也可以考虑仲裁是否会是更有效的纠纷解决机制。仲裁裁决受 1958 年《纽约公约》以及各缔约国由此产生的国内法管辖，因此仲裁裁决的承认和执行将不受英国脱欧的影响。

结论

若融资方要求在欧盟执行判决，那么哪一种管辖条款最合适需要特别仔细的考虑，并且需求当地法律咨询。

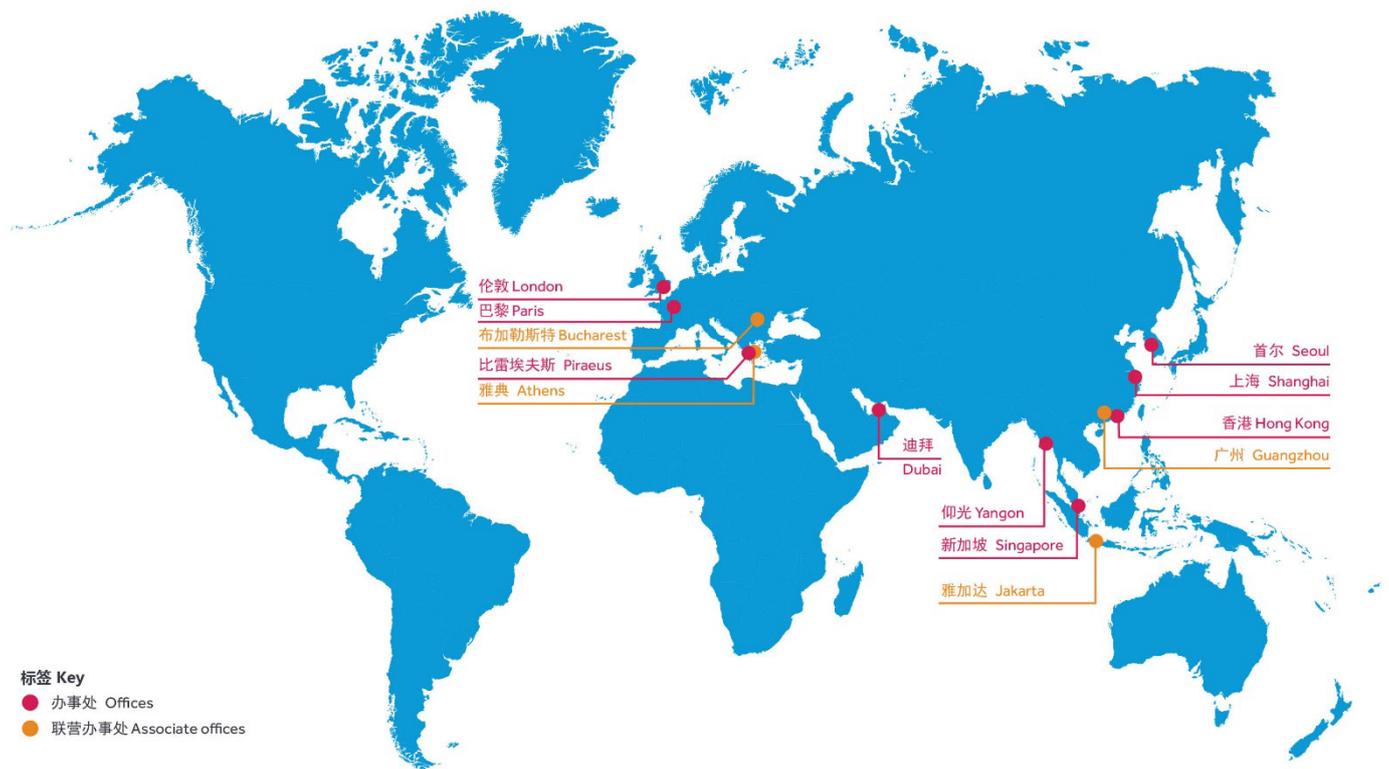
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