

**P.R.I.M.E. Finance**  
**Panel of Recognized International Market Experts in Finance**

EU-UK Legal & Financial Bridges Post-Brexit



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Presentation by [Pedro Cardigos](#)  
2018 P.R.I.M.E. Finance Annual Conference  
22 & 23 January, Peace Palace, The Hague

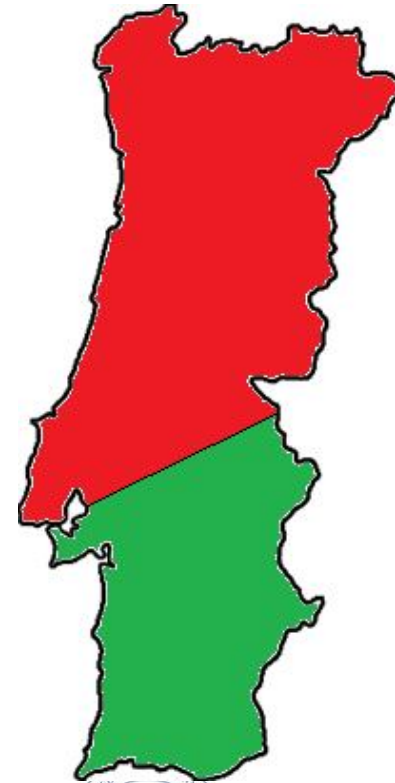
# Portugal

Where we left...

## Enforcement Stage in Portugal – Brussels I Regulation (44/2001)

Article 34 (1) *“A Judgment shall not be recognized [...] (1) if such recognition is **manifestly contrary to public policy** in the Member State in which recognition is sought.”*

Will the enforcement of payments with interest rates - on maturity ranging between 41,66% and 186,76% - **manifestly violate the principles of international public order of the Portuguese State?**



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## POST BREXIT CASE STUDY:

### *Santander Totta Portuguese v. Public Transport Companies*

#### Remembering the facts...

- All contractual elements were connected with Portugal (parties, agreement execution and performance)
- Choice of English law and English courts
- All transactions under ISDA documentation (1992 MA)

#### Remembering the Transactions...

- 9 IRSwaps (long term - 9 to 20 years) entered into between 2005 and 2007.
- highly leveraged, with accruing memory features (*snow balls*)
- 7 to be triggered if a low (or a high) interest rate level barrier was crossed (2 swaps had only high barriers, making them extremely unlikely to be triggered)
- Mostly referenced to Euribor - the low barriers were set at 1.5% or 2% and the high barriers at 6% or 8%.



# Portugal

## ENFORCEMENT ISSUES BEFORE BREXIT

**Choice of law and jurisdiction – Article 3 (3) (of the Rome Convention on the law applicable to contractual Obligations – later mostly replicated under Rome I Regulation)**

### *Possible interpretations*

- (i) It applies only when no “relevant” *international element exists* (i.e., a purely domestic case)
- (ii) It applies in the absence of an element connecting the situation to a legal system of another country (in a *conflict of laws* sense) – other than the choice of law itself.

***What are the consequences of this interpretation in terms of enforcement?***

*“Had Portuguese law applied to the swaps, 7 of the 9 swaps would have been modified or terminated” (J Blair) [under Article 437 of the CC, abnormal change of circumstances]. The Appeals Court further considered Article 437 “a provision of Portuguese law that cannot be derogated by contract”, a second aspect that had been raised by the first instance decision has an obstacle to apply to this case, Article 3 (3) of the Rome Regulation.*



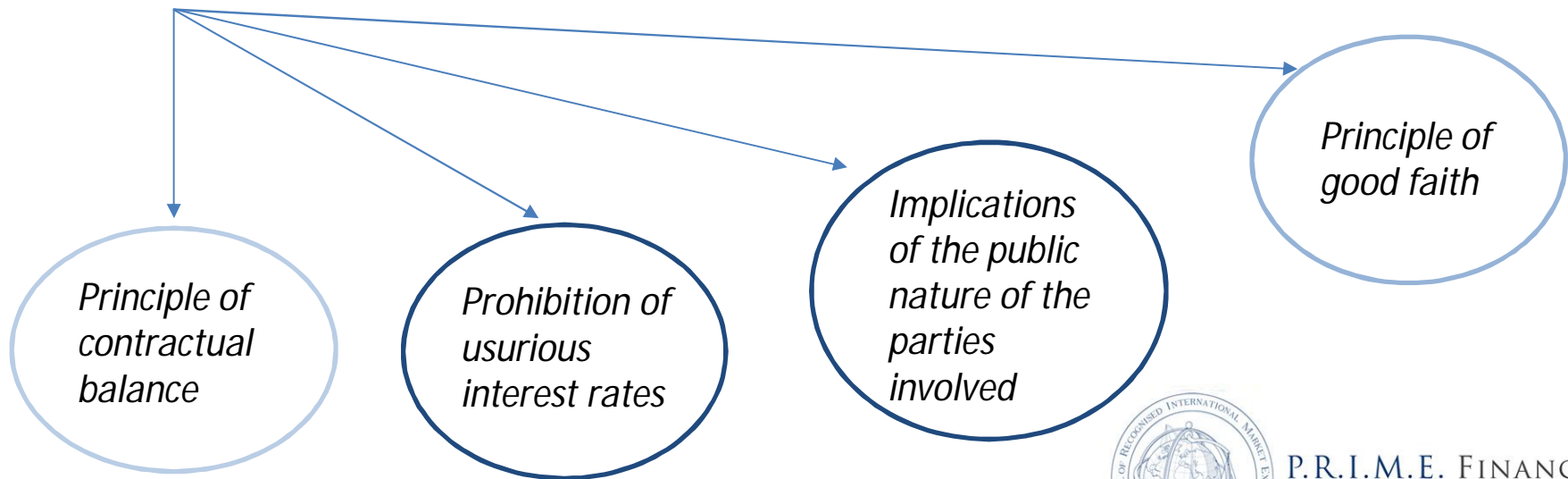
# Portugal

## ENFORCEMENT ISSUES BEFORE BREXIT

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Article 34 (1): “A Judgment shall not be recognized [...] (1) if such recognition is **manifestly contrary to public policy** in the Member State in which recognition is sought.”

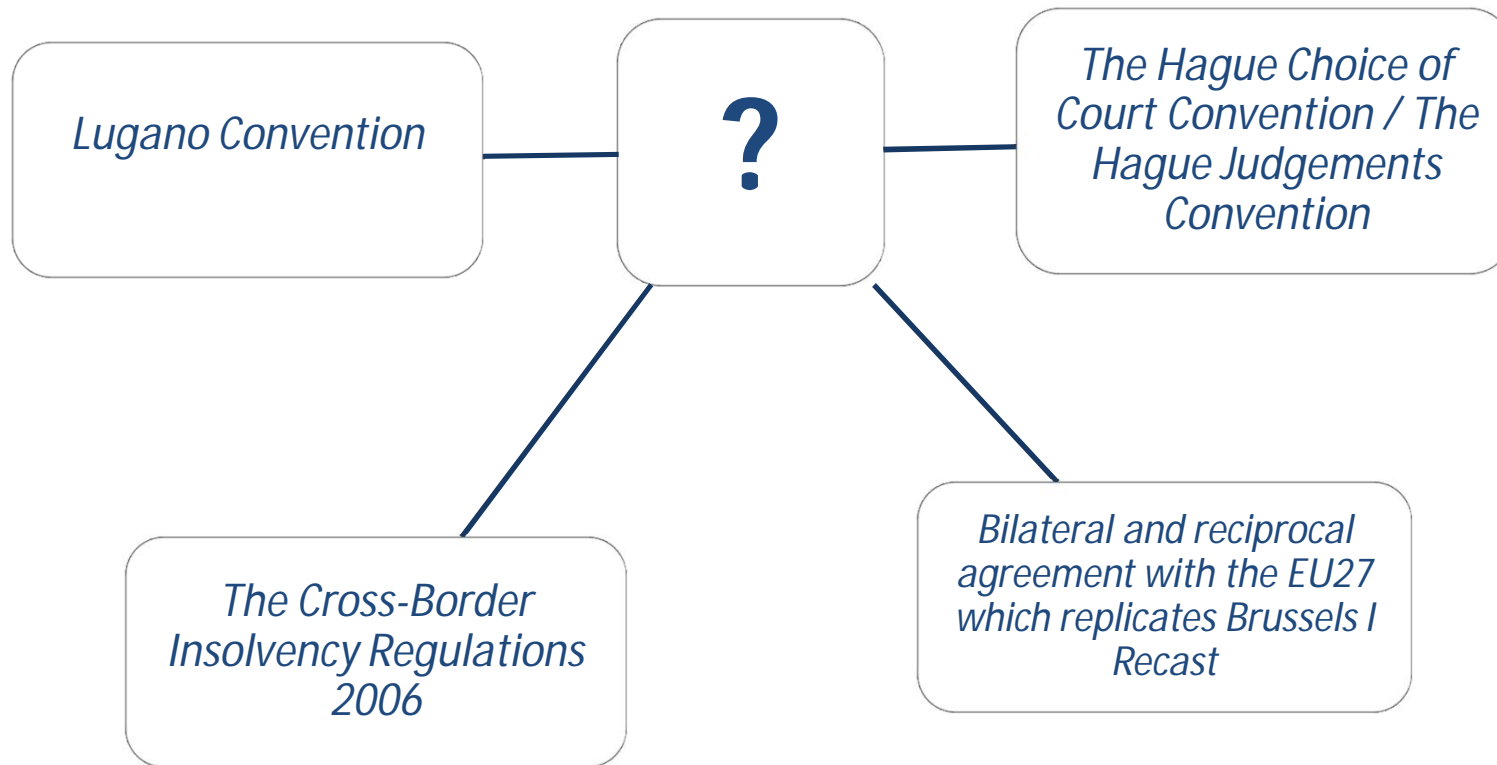
**Would the enforcement of payments with interest rates ranging between 41,66 % and 186,76% on maturity manifestly violate the principles of the international public order of the Portuguese State?**



# Portugal

## ENFORCEMENT ISSUES AFTER BREXIT

Enforcement Stage Post Brexit...



# Portugal

*Judgement rendered on issues of the exclusive competence of local courts*

*Judgement incompatible with fundamental principles of procedural fairness*

*Lack of incapacity of one party to enter into the agreement under the law of the requested State*

**If an agreement is reached, there is likely to be potentially new grounds for enforcement refusal, magnifying the distance between EU Code Law principles and English law.**

*Inconsistency with a judgement rendered in the requested State*

*Judgement obtained by fraud*

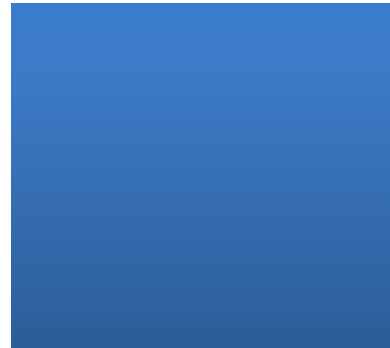
*Judgement involving infringements of security or sovereignty of the requested State*



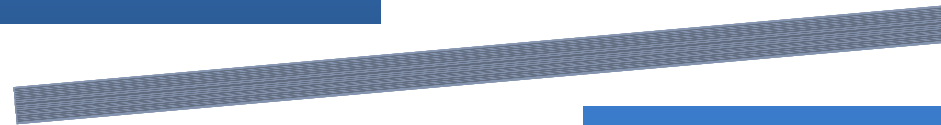
# Portugal ABSTRACT DECISION v ACTUAL ENFORCEMENT

- ❑ Austria 26 January 2005 Supreme Court (*Mushrooms case*)

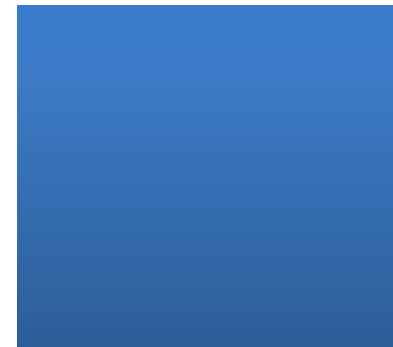
- ❑ Supreme Court of Justice, proceedings (non-compete provision - Spanish Law Firm) no. 103/13.1YRLSB.S1, 14 March 2017



*The **further** a decision from [UK] courts will be from the local law solutions ...*

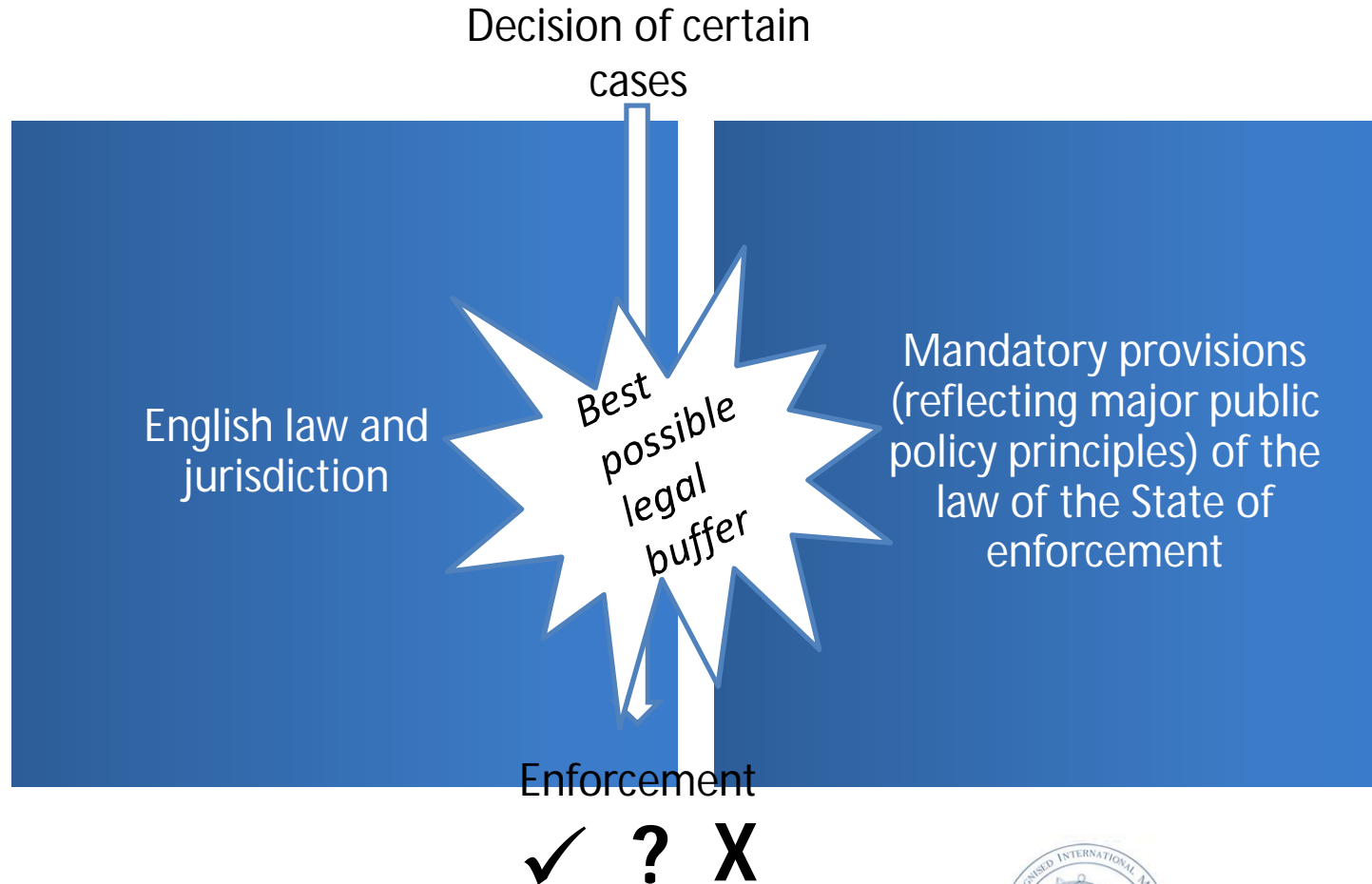


*... the **larger** the **gap** between the decision of the case and its enforcement chances of success locally*





# Portugal ABSTRACT DECISION v ACTUAL ENFORCEMENT



# Portugal

**CAN THE POST BREXIT ENFORCEMENT FRAMEWORK AFFECT...**

- a. ... the way English courts decide to interpret the choice of law by the parties?**
- b. ... the legal criteria of English courts in light of potential new enforcement issues?**



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