

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

EU-UK Legal & Financial Bridges Post-Brexit



P.R.I.M.E. FINANCE
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Presentation by **Pedro Cardigos**
2018 P.R.I.M.E. Finance Annual Conference
22 & 23 January, Peace Palace, The Hague

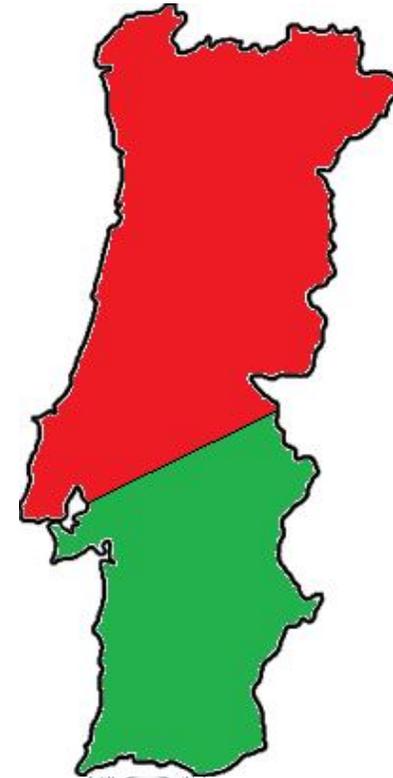
Portugal

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%.



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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.



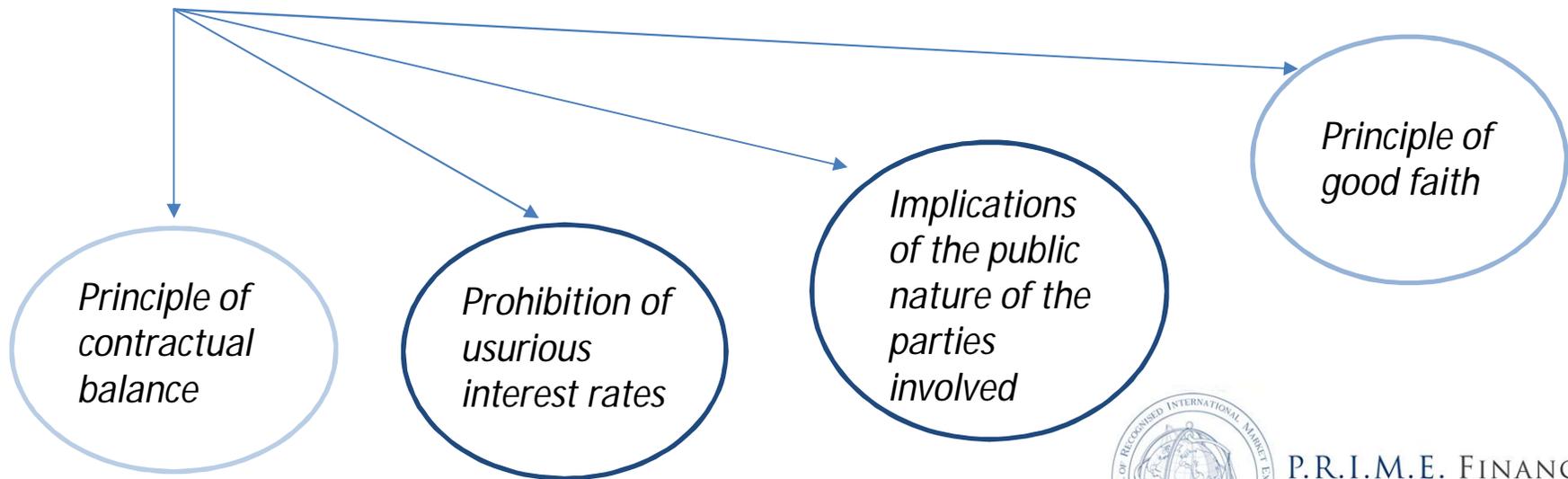
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ENFORCEMENT ISSUES BEFORE BREXIT

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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.”*

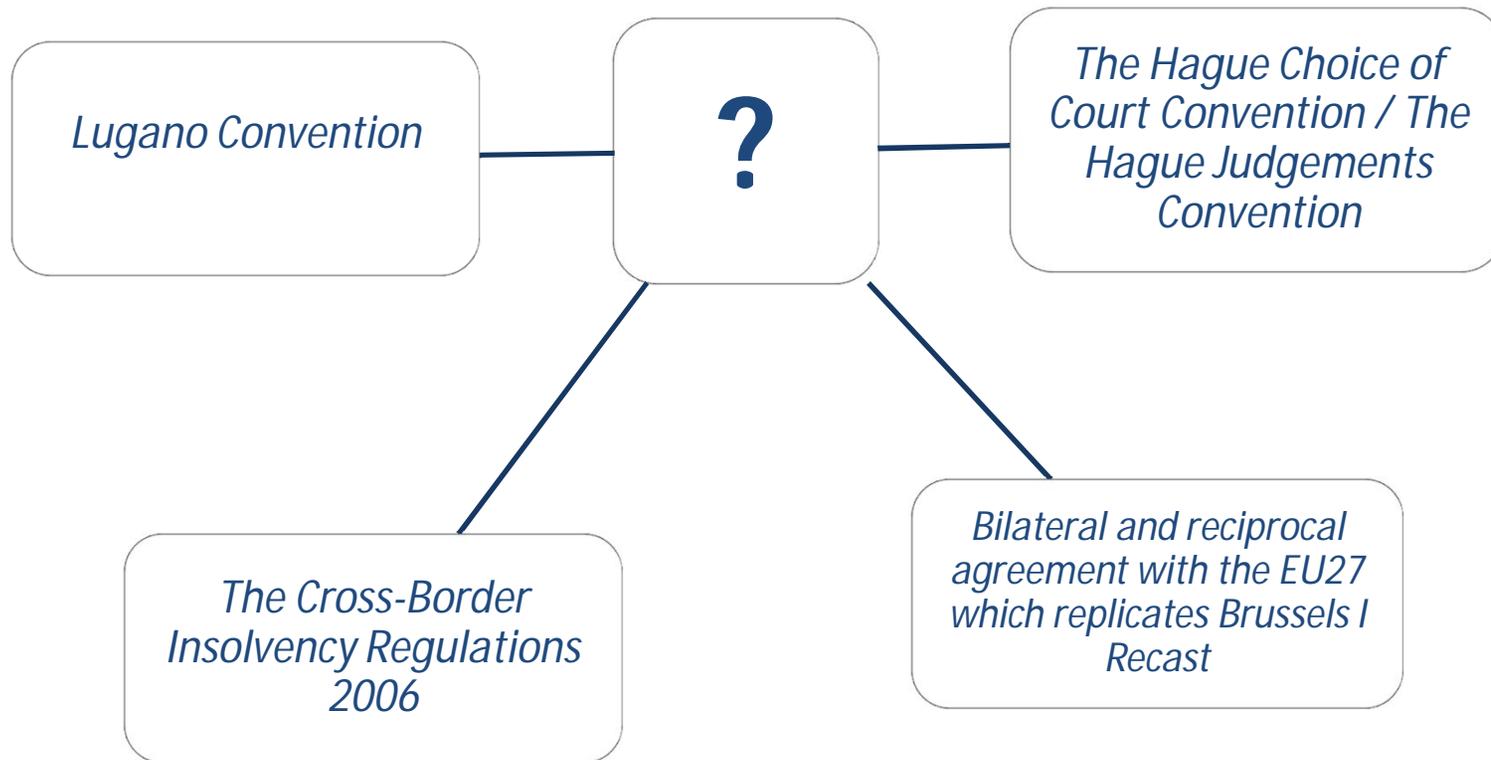
Would the enforcement of payments with interest rates ranging between 41,66 % and 186,76% on maturity manifestly violate the principles of the international public order of the Portuguese State?



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

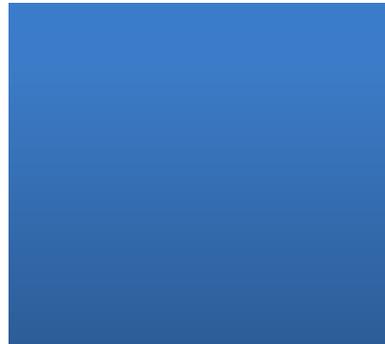


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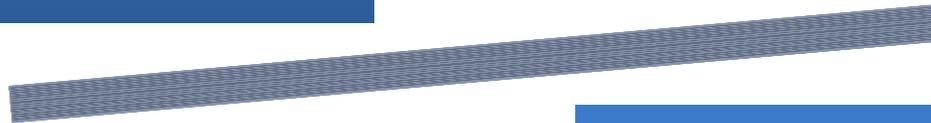
ABSTRACT DECISION v ACTUAL ENFORCEMENT

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

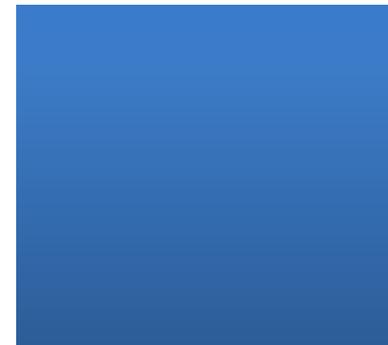
- ❑ Supreme Court of Justice, proceedings (non-compete provision - Spanish Law Firm) no. 103/13.1YRLSB.S1, 14 March 2017



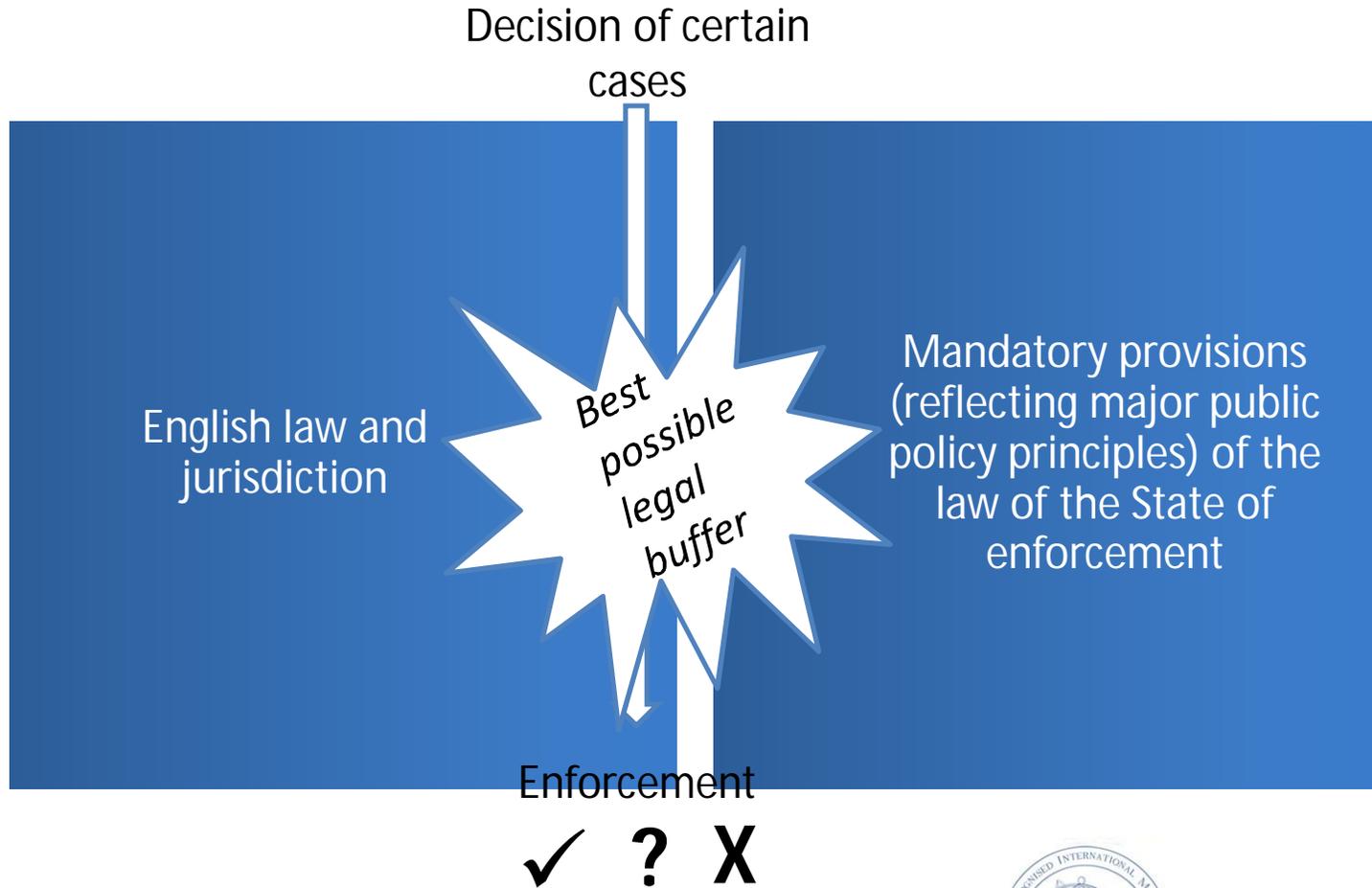
*The **further** a decision from [UK] courts will be from the local law solutions ...*



*... 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?**

