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(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



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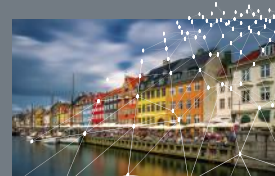
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Morning Technical Session

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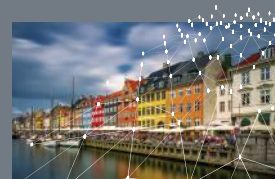
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Opening remarks of the Annual Congress

Congress Facilitator

Chris Laughton, Mercer & Hole, UK

Co-Chairs

Michala Roepstorff, Plesner, Denmark

Florian Bruder, DLA Piper, Germany

President of INSOL Europe

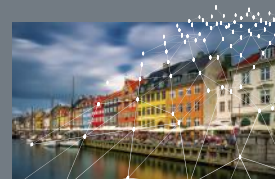
Alastair Beveridge, AlixPartners, UK



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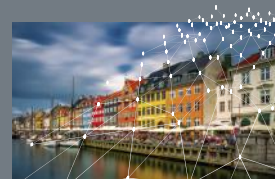
Polling



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Keynote Speaker: Prof. Vincent F. Hendricks

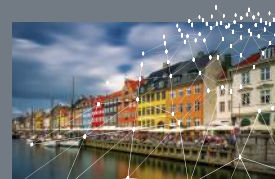
- Professor of Formal Philosophy at the University of Copenhagen, Denmark
- Director of the Center for Information and Bubble Studies (CIBS) sponsored by the Carlsberg Foundation
- Awarded in 2018 with the Elite Research Prize by the Danish Ministry of Science, Technology and Innovation and the Roskilde Festival Elite Research
- 2005-2015 Editor-in-Chief of Synthese: An International Journal for Epistemology, Methodology and Philosophy



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Directive on Preventive Restructuring Frameworks: Exploring new boundaries

Florian Bruder, DLA Piper, Germany

Natalia Stetsenko, International Monetary Fund (IMF)

Prof. Stephan Madaus, Martin-Luther-Universität Halle-
Wittenberg, Germany

Bob Rajan, Alvarez & Marsall, Europe



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Insolvency in the Brexit Era: Ever wonder how different your life would be?

Eduardo Peixoto Gomes, Abreu Advogados, Portugal

Robert Schiebe, Schiebe und Kollegen, Germany

Georges-Louis Harang, Hoche Avocats, France

Barry Cahir, Beauchamps, Ireland

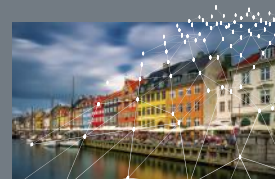
Elisabeth Baltay, Proskauer, UK



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**Insolvency in the
Brexit Era: ever
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different your life
would be?**

Eduardo Peixoto Gomes

Associated Partner



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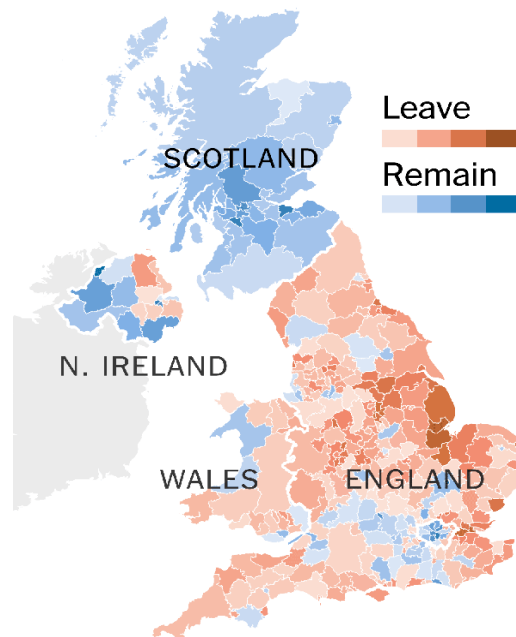
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- **Brexit won**

June 23rd 2016

With 51,9% of the votes being in favor of leaving the EU, the non-binding referendum became an historical moment.



Results by location

Remain	Leave	
48%	52%	Britain
47%	53%	England
60%	40%	London
62%	38%	Scotland
48%	53%	Wales
56%	44%	N. Ireland



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- **Theresa May becomes PM**

July 13th 2016

After Mr. Cameron announced his resignation, the home secretary Theresa May won the Conservative Party leadership contest by default, after all her challengers fell away.

The Brexit will be the main issue on her agenda.



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- **UK triggers article 50.º of Lisbon Treaty**
March 29th 2017

The time-frame allowed in Article 50.º is two years – this period has now been extended twice (by unanimous agreement from all EU countries).





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- **Beginning of formal negotiations between EU and UK regarding Brexit.**

26th June 2017

Deal?

No
deal?



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- **EU/UK divorce bill**

8th December 2017

EU/UK divorce bill is agreed, covering both EU and UK citizens' rights and the so called Northern Irish "backstop". The second phase of negotiations begins.





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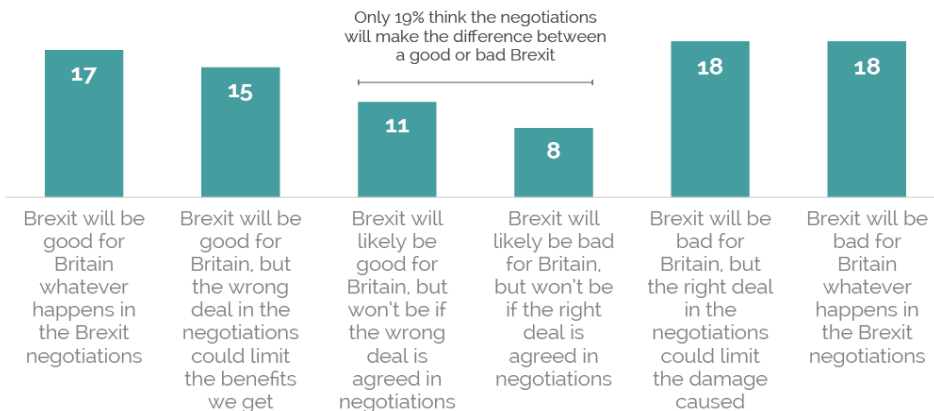
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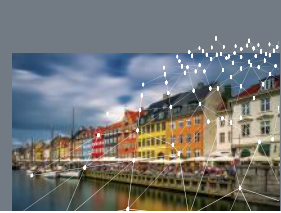
Most Britons don't believe Brexit negotiations can make the difference between a good or bad Brexit

Which of the following best reflects your view? % ("don't know" and "none of these" responses not shown)



- **Progress at the negotiations declared - 2018**

The transition period for Brexit is agreed, beginning 29th March 2019 ending 31st December 2020.



- **Resignations on May's cabinet**
6th July 2018

After the EU Exit bill was approved turning Brexit irreversible, the Government proposed a free trade zone for agricultural goods and products.

Following, David Davis and Boris Johnson resign.

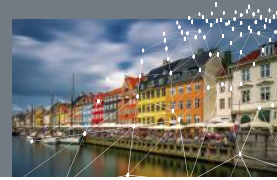




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- **Boris Johnson becomes PM**

October 13th 2018

Boris Johnson has become the UK's new prime minister, promising to defy "the doubters, the doomsters and the gloomsters" by completing Brexit with a deal by 31 October.



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- **European Council**

25th November 2018

After approval of the draft of the exit deal and additional resignations on May's cabinet, the European Council approves the exit deal and the declarations regarding future relations between EU and UK.



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- **Exit deal rejections**

15th January - 29th March 2019

Exit deal is rejected by a record number of 230 votes; In 12th March a new rejection occurs by 391 votes; a postpone of exit deal is approved by the British Parliament.

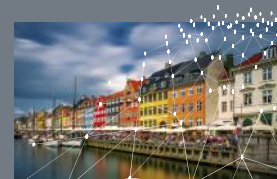




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- **First and Second Postpone – 21th March**

The term for Brexit is extended by the European Council, until 22th May if the deal is approved, or 12th April in case of rejection. At 29th March, a third rejection occurs.

Boris Johnson announced Parliament would be suspended until mid-October – 28th August

At the present time, **31st October 2019** is the deadline. **Boris Johnson** rejects a new postpone...



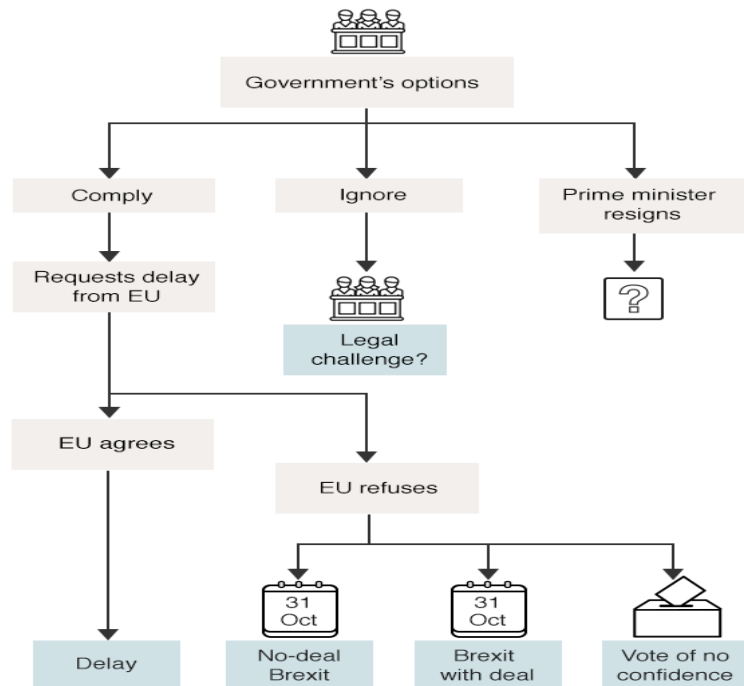
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Law against no deal passed



- **A law designed to stop a no-deal Brexit on 31 October was passed.**

6th September 2019

If a deal is not agreed between the UK and EU by 19 October, and MPs don't vote in favor of leaving with no deal, then the prime minister will be legally obliged to ask the EU for a Brexit delay.



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- **The Supreme Court has ruled that the suspension of Parliament was unlawful and void.**

24th September 2019

Where does this leave the wider Brexit process and how could it play out over the coming weeks?

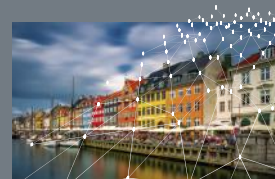




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Cross border insolvency proceedings with UK impacts in the Post-Brexit Era:

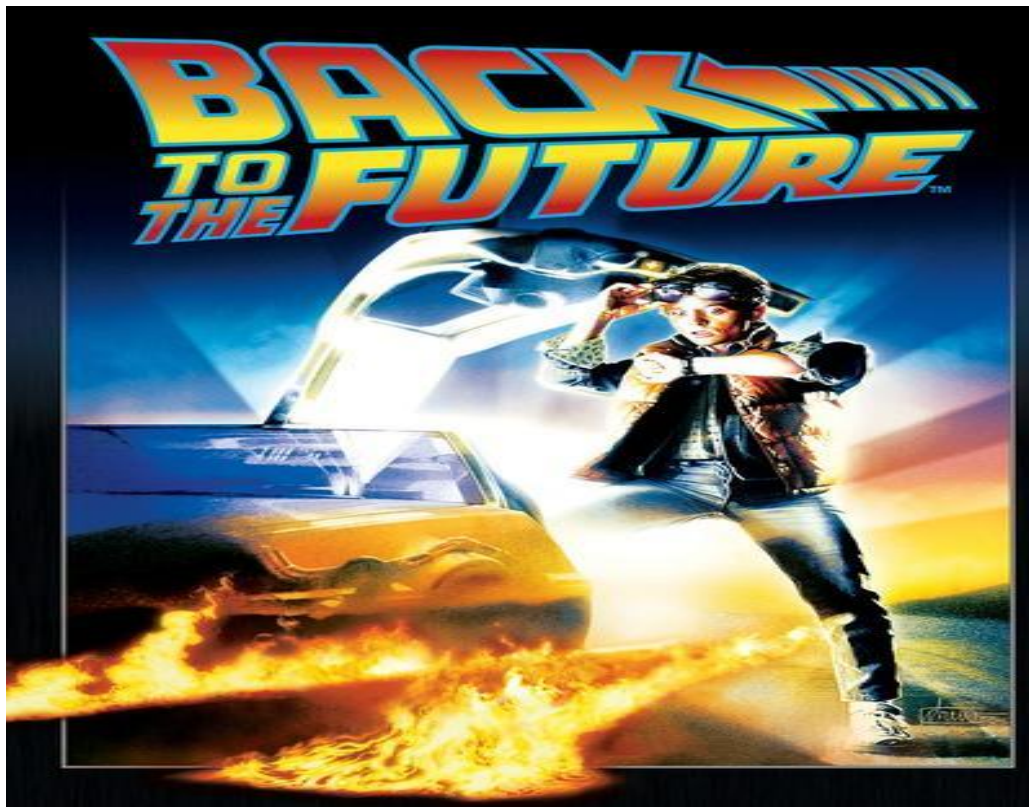
Main changes?



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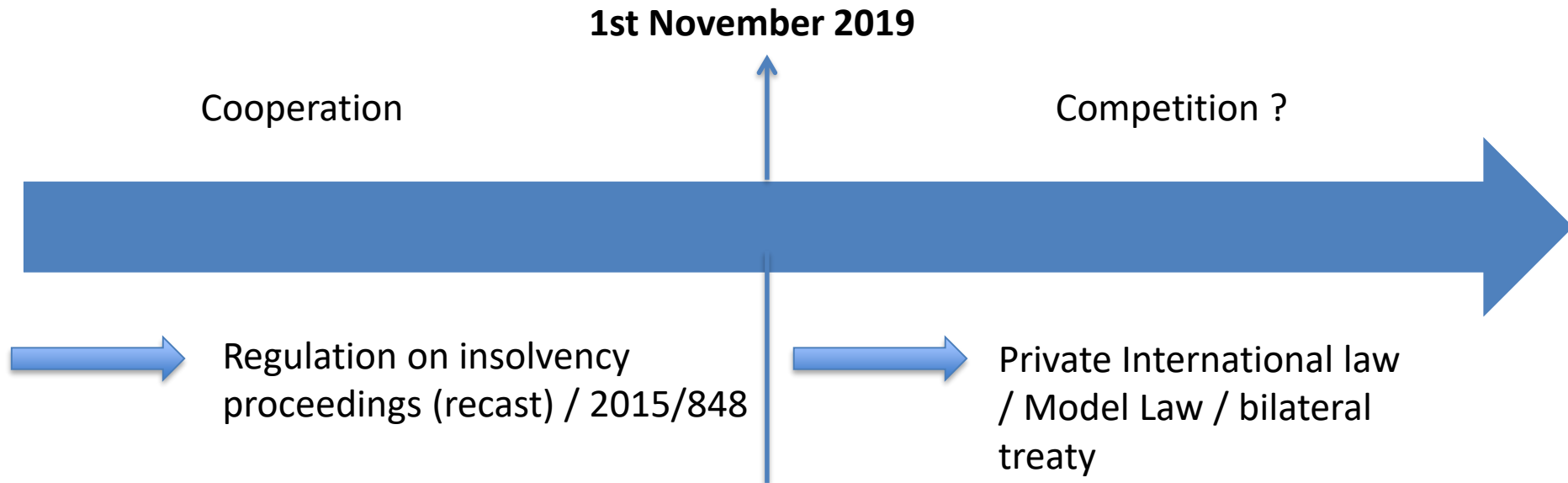
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Between UK insolvency practitioners and EU insolvency practitioners

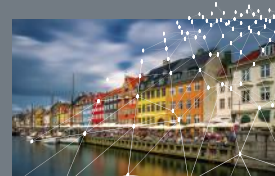




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Between UK insolvency practitioners and EU insolvency practitioners

1st November 2019

Legal security / regulated proceedings

Uncertainty / legal insecurity

LOST

QUID?

- International jurisdiction - EU Member state with COMI (art. 3)
- Automatic recognition (art. 20)
- Hierarchy btw principal & secondary proceedings (art. 34)
- Cooperation btw IP / Courts (art. 56 and followings)
- Information of the creditors (art. 53 and followings)

Chaos ? Parallel proceedings ?

Open door to forum shopping?

Chances of success of rescue plan jeopardized ?



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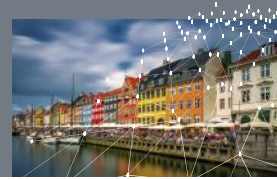
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**Break-out-sessions
(see separate files)**



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Delegate Lunch

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Afternoon Technical Session

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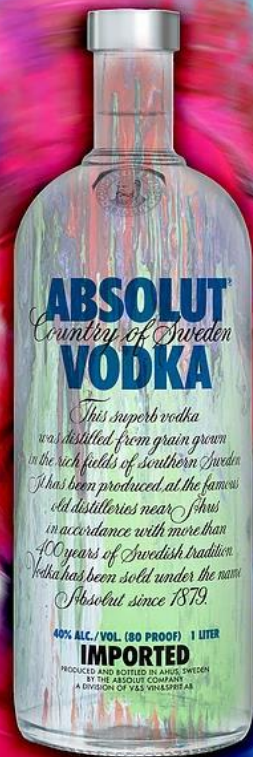
Directive on Preventive Restructuring Frameworks: Relative or absolute cram-down?

Prof. Reinhard Dammann

Clifford Chance / Sciences Po Law School, France

Prof. Christoph Paulus, Humboldt-Universität zu Berlin, Germany

Prof. Francisco Garcimartin, University Autonoma of Madrid /
Linklaters, Spain



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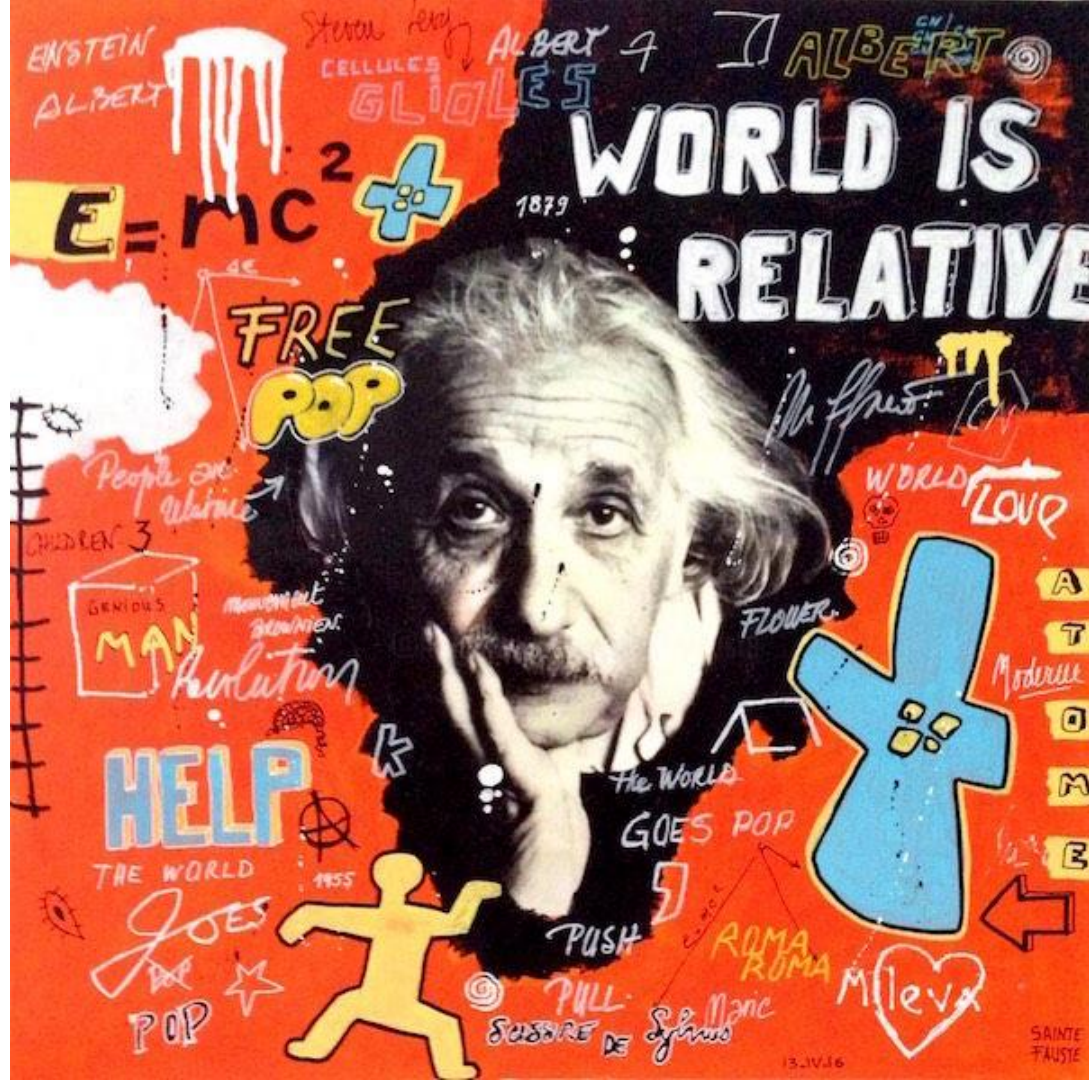
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ABSOLUT ABSTRACT





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Non-performing loans: The European Challenge

Alberto Núñez-Lagos, Uría Menéndez-Proença de Carvalho,
Spain and Portugal

Francisco Patricio, Abreu Advogados, Portugal

Steffen Koch, hww hermann wienberg wilhelm, Germany

Anne Froehling, European Central Bank



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Current Situation

- ✓ High stock of NPL as a legacy of the past crisis.
- ✓ The US did reach pre crisis NPL situation 4 years after the peak of the crisis and Europe 10 years after the peak of the crisis still has not.

(Andrea Enria, Chair of the Supervisory Board of the ECB in interview, 15 August 2019)

- ✓ *Indem* European Commission Progress Reports on the Reduction of Non-performing loans in Europe



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Expectations for the Future

- ✓ Whereas (2) of Directive on preventive restructuring frameworks, “Directive PRF”: Directive PRF will only permit the restructuring of viable businesses. No “Extent and Pretend” policy.
- ✓ Whereas (3) of “Directive PRF”: Directive PRF will accelerate the liquidation of non viable businesses.
- ✓ German official statement on “Directive PRF”: The Directive PRF allows a large number of options to be exercised at national discretion, leaving Member States room forms of implementation which do not provide adequate safeguards against abuse and economically inefficient restructuring attempts. This may lead to the delaying of necessary insolvency proceedings, which in turn may lead to lower rates of return.



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Expectations for the Future

- ✓ Whereas (3) of “Directive PRF”: Directive PRF will ensure that action is taken before enterprises default on the loans, thereby helping to reduce the risk of loans becoming non-performing.
- ✓ German official statement on “Directive PRF”: The Directive PRF does not make a significant contribution to measures necessary for sustainable reduction in futures avoidance of non-performing loans. Farther-reaching elements would be required to that end, such as ensuring that secured creditors have effective access to the value of the collateral security in liquidation procedures.

Who do you think will be right?



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The O.W. Bunker collapse – A case on third-party effects on assignments under a trans-national credit facility

Michala Roepstorff, Plesner, Denmark

Prof. Ulrik Rammeskov Bang-Pedersen,

University of Copenhagen, Denmark

Patrick Ehret, Schultze & Braun, Germany

Herman Veerbeek, ING, The Netherlands



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Timeline: From stock darling to collapse





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Security Challenge

- Borrowing Base Facility Agreement
- Securities (a.i. receivables) and guarantees
- English law:
 - Borrowing Base Facility
 - Security Agreement
 - Sales/ purchase agreements
 - English venue
- Danish assignor (the challenge case only concerned the DK OW entities)
- Danish venue (agreed upon only in respect of the challenge case)

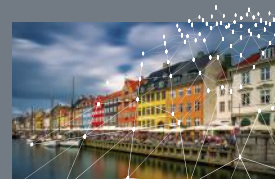
Key questions: Which law applicable? The bankruptcy estate a third party in respect of Rome I Art. 14 (Rome 1980 Art. 12)?



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The law applicable to third-party effects of assignments of claims is...?

Patrick Ehret

Partner @ Schultze & Braun



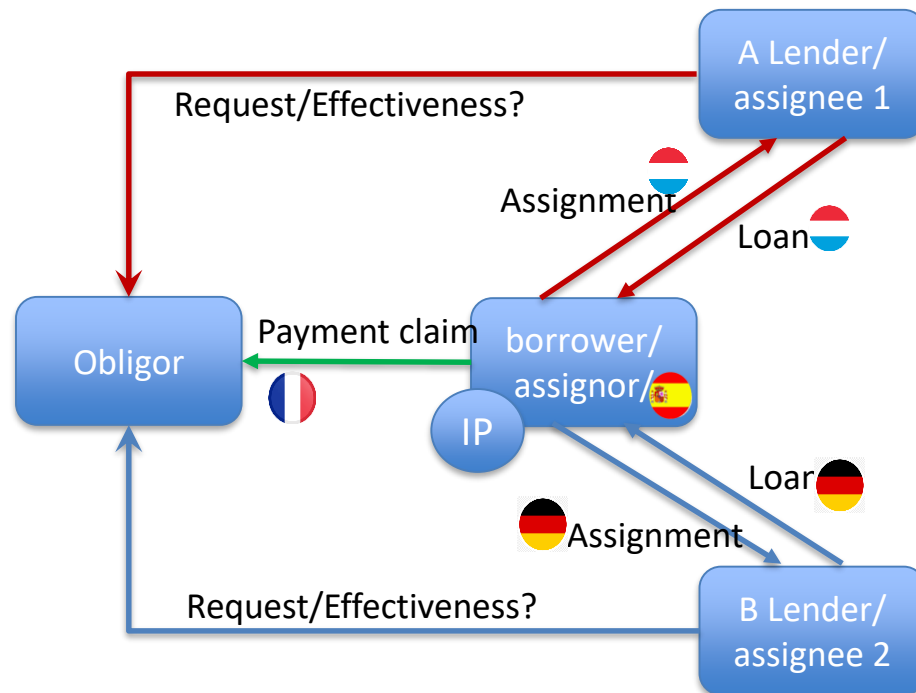
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- Borrower receives a loan from 2 banks,
- assigns the same claim against obligor as security,
- Both lenders request payment from obligor:
- (which) assignment effective towards obligor?
- Higher Regional Court of Saarbrücken → reference to ECJ:
- **Art. 14 Rome I applicable?**
If not, what law governs effectiveness of assignment towards third parties?





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Reference Questions to ECJ

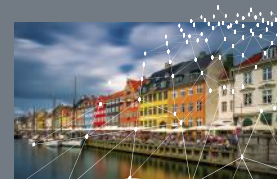
- Is Art. 14 Rome I Regulation applicable to the third-party effects of multiple assignments of the same claim by the same assignor?
- If the first question is to be answered in the affirmative: Which law is applicable to such third-party effects?
- If the first question is to be answered in the negative: Is Art. 14 Rome I Regulation to be applied *per analogiam*?
- If the third question is to be answered in the affirmative: Which law is applicable to such third-party effects?



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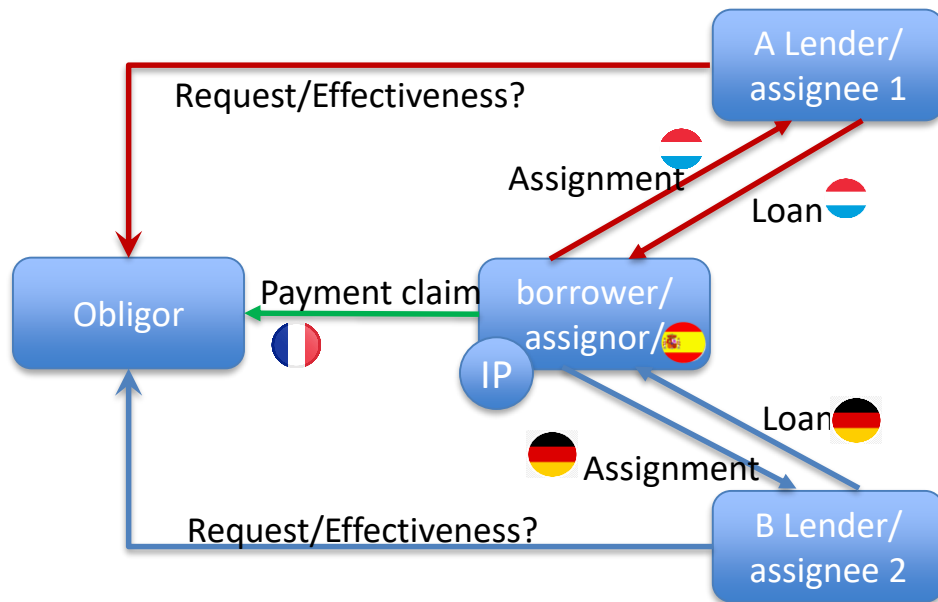
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Art. 14 Rome I

- Art. 14 I: law governing loan determines law governing assignment
- Art. 14 I: silent on third party effect, no proprietary element in Rome I
- Art. 14 I: governs only relationship between assignor and assignee
- Negotiation @ EUCOM failed













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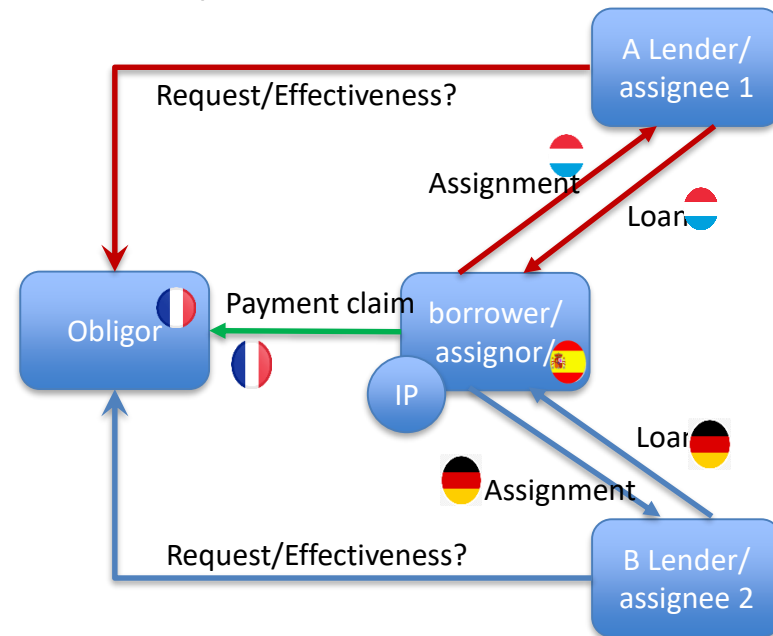
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Purpose: legal certainty

- If Art. 14 I applies to third party effects:
 - Law governing assignment →  or  (first effective)
 - Law governing assigned claim → 
- If Art. 14 I does not apply → gap
 - Law governing claim → 
 - Law at seat of obligor → 
 - Law at seat / residence of assignor →  (COM (2018/96))
 - Law governing assignment →  or  (first effective)
 - Law at seat/ residence of assignee





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What next?

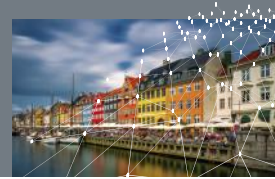
- Waiting for ECJ vs. Waiting for EU Commission?
- EU Commission: COM (2018) 96, Proposal:
 - general rule, the law of the country where the assignor has its habitual residence will govern the third-party effects of assignments of claims.
 - exceptions for claims for cash at bank / claims from financial instruments
 - choice of law possibility for securitisations aimed at expanding the securitisation market
 - Council stopped legislative process: to rethink the technical mechanics



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UNConvention on the Assignment of Receivables in International Trade (New York, 2001)

Article 22. Law applicable to competing rights

With the exception of matters that are settled elsewhere in this Convention and subject to articles 23 and 24, the law of the State in which the **assignor is located governs the priority of the right of an assignee in the assigned receivable** over the right of a competing claimant.

Article 30. Law applicable to priority

1. The law of the State **in which the assignor is located governs the priority of the right of an assignee in the assigned receivable** over the right of a competing claimant.

Article 29. Law applicable to the rights and obligations of the assignee and the debtor

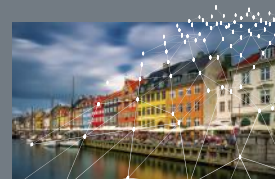
The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.



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The pros for the law of the Assignor

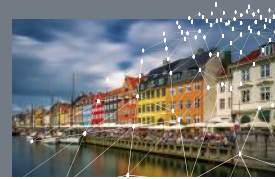
Professor Dr. Ulrik Rammeskov Bang-
Pedersen



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Application the law of the assignor is the best solution as:

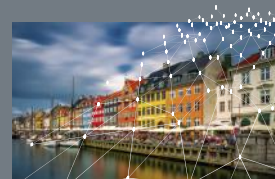
- 1) It gives predictability for third parties and creditors
- 2) It makes bulk assignments possible regardless of whether the assigned receivables are governed by different contractual laws
- 3) It makes it possible to pledge future receivables (before a receivable has come to existence there is no contractual law governing it)
- 4) Typically the law of the assignor also applies in insolvency proceedings regarding the assignor. Applying the same law ensures the optimal interplay between law of assignment and law of insolvency including avoidance law
- 5) It upholds the policy of the State of the assignor regarding the interests of third parties and creditors
- 6) It avoids that the assignor through a choice contractual law with its debtors use an assignee friendly law to the detriment of the assignors' creditors
- 7) It prohibits a "race to the bottom" between States regarding perfection requirements
- 8) It achieves the highest degree of global harmonization, as the law of the assignor is the solution used in the UNCITRAL convention and in the USA (UCC art. 9)



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Closing the Rome I gap: defining the best connecting factor for third party effects of assignments of receivables

Herman Veerbeek

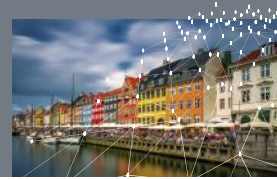
Legal Product Head Receivables Finance ING



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Preliminary remarks

- 1) There is **no gap** in Rome I (recital 38; Art. 14 (1); await EUCoJ ruling on BGL BNP (Case C-548/18))
- 2) Key issue in **OW Bunker** ruling (2018, DK) is not that (i) it infringes EU law or (ii) that the C&M High Court applied the wrong solution for the Rome I gap; the ruling shows (i) the need for the EU to first harmonize various national concepts of whether a court appointed liquidator (trustee) or bankrupt estate is a 'legal entity' distinct from the assignor and (ii) the provincial perspective of DK private international law
- 3) The EU has **no power** to determine (implicitly) that a trustee or estate is a 'species apart' (and thus a third party) (TFEU Art. 345) => MSs prerogative
- 4) The **EC Prop Reg** shows *chutzpah* of the EU organs as it is an attack on the parties' freedom to choose applicable law (creating a mandatory conflict rule) and on legal certainty. EC Prop Reg is '*conceptually mistaken*' and '*misconceived*', ' (City of London Law Society', May 2018). It is inconsistent with its own purpose (Explanatory Memorandum) '*to help to increase cross-border transactions in claims by providing legal certainty*'.



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Law applicable to the assignment or alternatively the law applicable to the assigned receivable is best solution as:

- 1) It fits best in Rome I (recital 38; Art. 14 (1) or (2))
- 2) It is the less complex solution (no triple testing)
- 3) It provides the best legal certainty
- 4) It avoids unnecessary legal structuring efforts (DD, LO) and economic loss (pricing, lower credit), certainly if originators located in various jurisdictions
- 5) It does not eat one another's bread (no harm done when opting this solution)
- 6) Geography (rule 3) as connecting factor is retarded (in a tech driven global village allowing originators to migrate) and is not appropriate for receivables (as these have no *locus*)



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Highlight of key arguments

Law of the Assignor:

- 1) Predictability also for third parties
- 2) Bulk assignments are easier
- 3) Pledge of future receivables possible
- 4) Law of the assignor also applies in insolvency proceedings; optimal interplay
- 5) Upholds the policy of the State of the assignor
- 6) Avoids abuse of an assignee friendly law to the detriment of the creditors
- 7) Prohibits a “race to the bottom”
- 8) Highest degree of global harmonization (UNCITRAL and USA)

Law applicable to the assignment or alternatively the law applicable to the assigned receivable:

- 1) Fits best in Rome I
- 2) Less complex solution
- 3) Best legal certainty
- 4) Avoids unnecessary legal structuring efforts and economic loss
- 5) Does not eat one another's bread
- 6) Geography as connecting factor is retarded and not appropriate for receivables



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Recognition of (insolvency-related) decisions – When Brussels Regulation, European Insolvency Regulation & UNCITRAL Model-Law cross paths

Prof. Rodrigo Rodriguez, Universität Luzern, Switzerland

Simeon Gilchrist, Edwin Coe, UK

Prof. Michael Veder, Radboud University / RESOR, The Netherlands



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Recognition: mapping the european and global landscape:



«civil and commercial»	«insolvency-related»	«insolvency decree»
Brussels I «recast»	EuInsReg (revised)	EuInsReg (revised)
<i>Lugano 1988 (UK only?)</i> <i>Lugano 1997</i> <i>bilat. Agreement</i>	Nat. law. bilat. agreement	Nat. law. bilat. agreement
<i>Hague Choice of court</i> <i>2005</i> <i>Hague Judgments</i> <i>2019</i>	<i>UNCITRAL 2018 ML on</i> <i>insolvency related</i> <i>decisions</i>	UNCITRAL ML on cross- border insolvency



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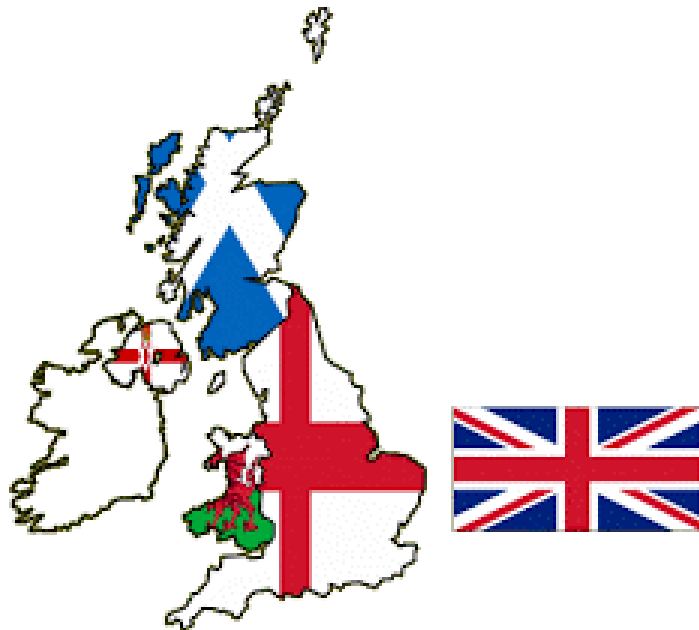




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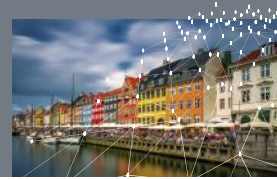




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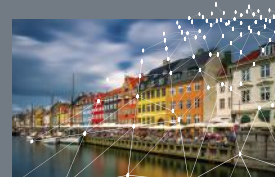
- Insolvency Regulation (2015/848): rules about jurisdiction, applicable law and recognition of insolvency proceedings in cross-border insolvencies
- Brussels Ia Regulation (1215/2012): rules which determine which EU country's courts hear cases in civil and commercial matters (jurisdiction); and rules which enable judgments to be recognised and enforced across borders
- Rome I Regulation (593/2008) and Rome II Regulation (864/2007): rules which determine the law which is applicable to cross-border contractual and non-contractual disputes
- Brussels IIa Regulation (2201/2003): rules about which EU country's courts should decide matrimonial and parental responsibility matters; the recognition and enforcement of judgments; administrative cooperation; and cooperation in child abduction cases
- Service of Documents Regulation (1393/2007) and Taking of Evidence Regulation (1206/2001): rules to facilitate the service of legal documents in civil and family judicial proceedings involving parties in more than one EU country and rules about cooperation between the courts of EU countries in taking of evidence in civil and commercial judicial proceedings



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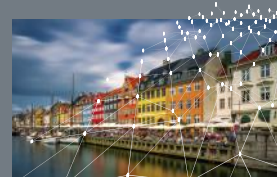
- Civil Protection Measures Regulation (606/2013): rules ensuring the cross-border recognition and enforcement of civil protection measures
- Small Claims Procedure Regulation (861/2007), European Enforcement Order Regulation (805/2004) and European Order for Payment Procedure Regulation (1896/2006): rules which establish streamlined procedures for determining small claims and enforcing uncontested judgments and debts
- Cross-border Mediation Directive (2008/52): rules aimed at promoting the amicable settlement of cross-border disputes through mediation and Legal Aid Directive (2002/8): rules to cover the grant of legal aid in cross-border disputes
- Maintenance Regulation (4/2009): rules about which EU country's courts should make decisions in maintenance matters; recognition and enforcement of child, spousal and other forms of family maintenance decisions; and administrative cooperation and assistance



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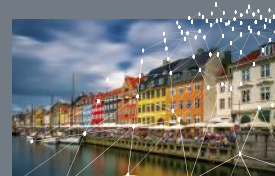
- Lugano Convention 2007: this deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; it applies between EU countries and Switzerland, Norway and Iceland (European Free Trade Association Member States)
- 2005 Hague Convention on Choice of Court Agreements: provides rules to ensure the effectiveness of exclusive choice of court agreements between parties to international commercial transactions
- 2007 Hague Maintenance Convention: provides rules for the recognition and enforcement of child support and other forms of family maintenance and for administrative cooperation between contracting states
- EU/Denmark 2005 Agreement: this extends the Brussels Ia rules to Denmark



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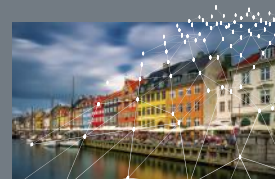
- Insolvency Regulation (2015/848): rules about jurisdiction, applicable law and recognition of insolvency proceedings in cross-border insolvencies
- Brussels Ia Regulation (1215/2012): rules which determine which EU country's courts hear cases in civil and commercial matters; jurisdiction; enforceable judgments to be recognised and enforced in other EU countries
- Rome I Regulation (593/2007): rules which determine the law which is applicable to contractual disputes
- Brussels IIa Regulation (2201/2003): rules which determine which EU country's courts should decide matrimonial and parental responsibility cases; recognition and enforcement of judgments; administrative matters; child abduction cases
- Service of Documents Regulation (1206/2001): rules about the service of legal documents in civil and family judicial proceedings involving more than one EU country; rules about cooperation between the courts of different EU countries in taking of evidence in civil and commercial judicial proceedings



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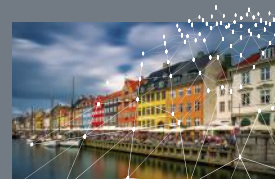
- Civil Protection Measures Regulation (606/2013): rules ensuring the cross-border recognition and enforcement of civil protection measures
- Small Claims Procedure Regulation (861/2009) and Enforcement Order Regulation (805/2007): rules for determining small claims and enforcing uncontested judgments
- Cross-border Mediation Directive (2002/8): aimed at promoting the amicable settlement of cross-border disputes through mediation and Legal Aid
- Maintenance Regulation (2007/19): ensures that a country's courts should make decisions in maintenance matters; recognition and enforcement of child, spousal and other family maintenance orders and administrative cooperation and assistance



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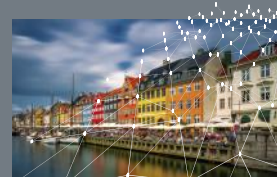
- Lugano Convention: this deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; it applies between EU countries and non-EU countries that are members of the European Free Trade Association (EFTA).
- 2005 Hague Convention on Choice of Court Agreements: provides rules to ensure the effectiveness of choice of court agreements between parties to international trade.
- 2007 Hague Maintenance Convention: provides for the recognition and enforcement of court judgments and other formalized maintenance and for administrative cooperation between contracting states.
- EU/Denmark 2005 Agreement: this extends the Brussels Ia rules to Denmark



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- UNCITRAL model law: Greece; Poland; Romania; and Slovenia.
- Accession to Lugano ?
- CPR Part 74 : Enforcement of Foreign Judgments :
 - Foreign Judgments (Reciprocal Enforcement) Act 1933 for Austria; Belgium; France; Germany; Italy; The Netherlands; and Norway); or
 - Administration of Justice Act 1920 for Cyprus and Malta .
 - Fresh proceedings on the judgment for “non-treaty countries”
- Application plus witness statement on paper to the High Court setting out :
 - Competent court judgment ; definite sum; not tax or penalty.



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Closing remarks of the day

Chris Laughton
Mercer & Hole, UK



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Speed Networking Session



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