

SECURITY RIGHTS AND THE EUROPEAN
INSOLVENCY REGULATION

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Security Rights and the European Insolvency Regulation

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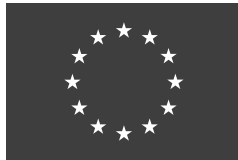
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PREFACE

This book arises out of a research project that was very generously funded by the European Commission under the Civil Justice Action programme – grant JUST/2013/JCIV/AG/4631. We thank the European Commission for their funding.

The events of 23 June 2016 may cast a long shadow but we hope that they do not dim unduly the prospects for further European scientific research and cooperation.

This book is very much a team effort led by Gerard McCormack at the University of Leeds in the UK and including Reinhard Bork at the University of Hamburg in Germany, Laura Carballo Piñeiro and Marta Carballo Fidalgo at the University of Santiago de Compostela in Galicia, Spain, Renato Mangano at the University of Palermo in Italy and last, but certainly not least, Tibor Tajti at the Central European University, Budapest, Hungary.

The book aims to analyse critically the provisions governing rights in rem (security rights) and transactional avoidance in the European Insolvency Regulation – now Regulation 2015/848 – and to address whether there is scope for reform of the law. Security rights are essentially rights over property intended to secure payment of a debt or other obligation. They are of fundamental importance to the granting of credit and are generally considered to increase the availability and lower the costs of credit with concomitant benefits for both debtors and the overall economy. But there are divergent views on the extent to which it should be possible to create and enforce security rights over assets.

The book also:

- assesses the extent of the protection given to security rights under the main EU legal traditions;
- evaluates the policy reasons behind protection;
- elaborates whether, and to what extent, this protection also applies in the context of insolvency proceedings affecting the debtor;
- assesses whether, and under what conditions, security rights created prior to the institution of insolvency proceedings can be set aside in those proceedings;

Moreover, it considers the need for further European harmonisation.

The first part of the book expounds common themes and ideas and suggests possible law reform measures. The project team as a whole has contributed to this part which considers the extent to which the relevant law in the EU countries

under review measures up against international benchmarks such as the World Bank Doing Business ‘getting credit’ and ‘resolving insolvency’ indicators and the UNCITRAL Legislative Guides on Secured Transactions and Insolvency. It asks whether there is any pressing need for reform at the national or EU level in light of these international benchmarks and whether reform is a realistic and achievable goal. Finally, it considers what form any reform measures might take. The focus is very much on the business debtor and it does not consider possible measures of consumer protection that may be appropriate in particular instances.

The first part of the book is followed by a second part containing chapters that address Germanic legal systems, the Common Law, Roman legal systems and Central and Eastern European legal systems. It should be noted that the book is based on reports submitted to the European Commission on 1 May 2016, although in some cases it has been possible to take into account developments after that date, such as changes to Italian law.

In the course of the project and in the writing of the book we have incurred many debts, not least to members of our International Advisory board and to those who spoke at the three international conferences that we organised as part of the project – London (May 2015), Erice (Trapani) in Italy (November 2015), and Santiago de Compostela (April 2016).

Those to whom we are indebted – in no particular order – include Lina Aleknaite-van der Molen (Kazimieras Simonavicius University, Vilnius, Lithuania); Paul Beaumont (University of Aberdeen, UK); Maya Boureghda Chebeane (JURISMED, Tunis); Catherine Bridge (European Bank for Reconstruction and Development); Michael Bridge (University College London); John Briggs (South Square Chambers, London); Richard Calnan (Norton Rose Fulbright LLP); Reinhard Dammann (Clifford Chance, Paris); Eric Dirix (Leuven); Ian Fletcher (University College London); Francisco Garcimartín Alférez (UAM, Spain), Anna Gardella (European Banking Authority); Robert van Galen (INSOL Europe); Louise Gullifer (University of Oxford); Santiago Hurtado Iglesias (Deloitte Abogados); Krzysztof Kaźmierczyk (Dentons, Poland); Andrew Keay (University of Leeds); Lisa Linklater (Exchange Chambers); Karolina Lyczkowska (DLA Piper, Spain); Jennifer Marshall (Allen & Overy LLP); Irit Mevorach (University of Nottingham); Karim Mouttaki (Mouttaki and Partners, Casablanca); Federico Mucciarelli (SOAS University of London, and University of Modena e Reggio Emilia); Paul Omar (Nottingham Trent University, UK); Jacinto José Pérez Benitez (High Court Pontevedra, Spain); Françoise Pérochon (Université de Montpellier, France); Juana Pulgar Esquerra (UCM, Spain); Magda Raczynska (University College London); Wolf-Georg Ringe (Copenhagen Business School, Denmark); Teresa Rodríguez de las Heras Ballell (UC3M, Spain); Felix Steffek (University of Cambridge); Andrew

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We would especially like to thank the overall project administrator, Alexandra Braithwaite, who is based at the University of Leeds, and her colleagues in the partner universities. We are also grateful for the tremendous support from our staff, especially Philipp Hartmann (University of Hamburg), who contributed significantly to the success of our project.

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Gerard McCormack and Reinhard Bork
Leeds and Hamburg, July 2016

CONTENTS

<i>Disclaimer</i>	v
<i>Preface</i>	vii
<i>Questionnaire</i>	xv
<i>Table of Cases</i>	xxi
<i>Table of Abbreviations</i>	xxxv
PART I. COMPARATIVE ANALYSIS	1
Introduction	3
Chapter 1. Security Rights under Article 5 of the Insolvency Regulation and Article 8 of the ‘Recast’	7
1. Introduction	7
2. The philosophy of the European Insolvency Regulation	8
3. Importance of security rights	12
4. Detailed analysis of Article 5 EIR – Article 8 of Recast	15
4.1. What counts as a ‘right in rem’ – referral to the lex situs	15
4.2. Encumbered assets	18
4.3. Location of encumbered assets – Article 2(g) and Article 2(9) of the Recast Regulation	21
4.4. Article 5 as a substantive rule restricting the effects of the insolvency proceedings	27
4.5. Conclusions on the interpretations of Article 5	34
5. Options for reform	36
5.1. Excluding security rights in rem from the scope of the Regulation	36
5.2. Regulating security rights in rem by means of a referral to the lex situs	37
5.3. Regulating security rights in rem by means of a double filter combining a referral to the lex fori concursus with a referral to the lex rei sitae	39
5.4. Regulating security rights in rem through a multilevel approach	40

Chapter 2. Transactional Avoidance and the Insolvency Regulation	45
1. Introduction	45
2. How the transactional avoidance provisions in the Regulation are to be interpreted and applied	47
2.1. Jurisdiction of the court that opens insolvency proceedings extends to ‘insolvency-related actions’ including transactional avoidance actions.	47
2.2. Applicable law in respect of transactional avoidance actions.	50
2.3. Applying Articles 4 and 13	51
3. Reform considerations	56
 Chapter 3. Security Rights, National Laws and Possible Reforms	 61
1. Background and policy	62
1.1. Divergences in the law, credit rankings and the World Bank Doing Business project	62
2. National laws on security rights – synthesising the national reports	67
2.1. Terminology, legal families and EBRD’s Core Principles and reform efforts in Central and Eastern Europe	67
2.1.1. Terminology	67
2.1.2. Usefulness of classifications based on legal families	67
2.1.3. EBRD Core Principles and reform efforts in Central and Eastern Europe	68
2.2. Basic features of credit and security laws	71
2.2.1. Use of all types of assets as collateral.	74
2.2.2. Recognition of global securities covering all assets of the debtor	75
2.2.3. Creation of security interests over assets not yet owned by the debtor or not yet in existence.	77
2.2.4. Relationship between the nature of the collateral and the applicable rules.	79
2.3. General formalities for the creation of security interests – convergence and divergence	80
2.3.1. Formalities for the creation of security interests over immovables	81
2.3.2. Formalities in respect of the creation of security interests over movables (including intangibles)	82
2.3.3. Non-possessory securities	83
2.3.4. Possible common principles on security rights	87
2.4. Enforcement of security interests	88
2.4.1. Enforcement of possessory pledges	89
2.4.2. Enforcement of mortgages on immovables.	91
2.4.3. Out-of-court repossession of movable collateral	92

2.5.	Comparisons between countries	94
2.5.1.	Possessory securities – comparison between countries.	95
2.5.2.	Non-possessory securities – comparison between countries	96
2.5.2.1.	Legal versus equitable security interests	96
2.5.2.2.	Recognition of latent (secret) security interests	96
2.5.2.3.	Idiosyncratic security devices	98
2.5.2.4.	Quasi securities	101
2.5.3.	Conclusions on the diversity of national laws	102
3.	The World Bank, international benchmarks and possible harmonisation measures	102
3.1.	UNCITRAL Secured Transactions Guide	106
3.2.	General principles of the UNCITRAL Guide.	107
3.3.	Creation and third party effectiveness of security rights under the Guide.	109
3.4.	Treatment of quasi-securities.	111
3.5.	Lessons for the European legislator.	112
3.6.	Rules on proprietary securities in Book IX of the DCFR	115
4.	Conclusions on convergence and reform	118

Chapter 4. Transactional Avoidance, National Laws and Possible

Reforms	121	
1.	Introduction	121
2.	National rules on transactional avoidance	122
2.1.	The scope of national avoidance rules.	122
2.1.1.	Standing to bring avoidance actions legal consequences	124
2.1.2.	Limitation periods	126
2.1.3.	Application of the avoidance rules to security and quasi-security type transactions?	127
2.2.	Rationale of the avoidance rules	129
2.2.1.	Enforcement of the <i>pari passu</i> principle	130
2.2.2.	Avoidance as a sanction for the debtor's intention to defraud other creditors	132
2.2.3.	Avoidance as a protection of creditors against any actions detrimental to the insolvency estate.	133
2.2.4.	Avoidance rules as a measure to assist in the successful restructuring of the debtor's business	133
2.3.	The conditions for the application of the rules and the length of the 'suspect period'	134
2.3.1.	Particularities of the Lithuanian avoidance regime	136
2.3.2.	Suspect periods	136

2.4.	General avoidance rules	138
2.4.1.	Fraudulent transactions/actio pauliana	138
2.4.2.	Undervalue transactions/not-for-profit acts	140
2.4.3.	Preferences	143
2.4.3.1.	Payments of immature claims	145
2.4.3.2.	Grant of security rights in rem for pre-existing claims	146
2.4.3.3.	Satisfaction of due monetary debts not by means of money or other regular means of payment	148
2.4.3.4.	Lawfully owed payments of mature monetary debts	149
2.4.3.5.	Avoidance of security rights created together with the secured claim.	150
2.4.3.6.	Security rights acquired through enforcement proceedings	150
2.5.	Distinctive avoidance rules in the legal systems	151
2.6.	Application of avoidance rules to transactions with a cross-border element.	152
2.7.	Operation of the rules in respect of transactions that favour parties who are connected to the debtor	153
2.8.	Defences that may be availed of by a counterparty to the transaction, i.e. the defendant in an avoidance action	156
2.9.	Conclusion on national transactional avoidance laws	158
3.	Broader international indicators.	160
3.1.	International norms on transactional avoidance – UNCITRAL Legislative Guide on Insolvency	166
3.2.	European harmonisation	167
PART II. NATIONAL REPORTS		171
(for a more detailed overview of the chapter contents please see 'Questionnaire' on pp. xv–xx)		
Chapter 5. Germanic Legal System – Germany and Austria		173
Chapter 6. Common Law System – England and the Republic of Ireland		313
Chapter 7. Roman Legal System – Spain, Italy and France		415
Chapter 8. Central and Eastern European Systems – Hungary, Poland and Lithuania		571
Index		693

QUESTIONNAIRE

A. Creation of Security Rights

Question 1: In general terms, to what extent is it possible in your legal system to create security rights (rights in rem) over assets?

Germanic Legal System – Germany and Austria	176
Common Law System – England and the Republic of Ireland	318
Roman Legal System – Spain, Italy and France	422
Central and Eastern European Systems – Hungary, Poland and Lithuania	589

Question 2: Is it possible to create security rights over all assets of the debtor?

Germanic Legal System – Germany and Austria	185
Common Law System – England and the Republic of Ireland	326
Roman Legal System – Spain, Italy and France	454
Central and Eastern European Systems – Hungary, Poland and Lithuania	593

Question 3: Is it possible to create security rights over assets not yet owned by the debtor at the time of the creation of the security interest?

Germanic Legal System – Germany and Austria	189
Common Law System – England and the Republic of Ireland	333
Roman Legal System – Spain, Italy and France	460
Central and Eastern European Systems – Hungary, Poland and Lithuania	595

Question 4: Is it possible to create security rights over assets that are not yet in existence at the time of the execution of the security agreement?

Germanic Legal System – Germany and Austria	204
Common Law System – England and the Republic of Ireland	335
Roman Legal System – Spain, Italy and France	464
Central and Eastern European Systems – Hungary, Poland and Lithuania	595

Question 5: Is it possible to have a ‘global security agreement’, i.e. covering all assets of the debtor?

Germanic Legal System – Germany and Austria	210
Common Law System – England and the Republic of Ireland	335
Roman Legal System – Spain, Italy and France	468

Central and Eastern European Systems – Hungary, Poland and Lithuania	596
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Question 6: In general terms, what are the formalities in your legal system for the creation of a security interest over assets?

Germanic Legal System – Germany and Austria	212
Common Law System – England and the Republic of Ireland	335
Roman Legal System – Spain, Italy and France	472
Central and Eastern European Systems – Hungary, Poland and Lithuania	599

Question 7: Do the rules for the creation of security rights vary depending on the nature of the asset in question?

Germanic Legal System – Germany and Austria	213
Common Law System – England and the Republic of Ireland	335
Roman Legal System – Spain, Italy and France	477
Central and Eastern European Systems – Hungary, Poland and Lithuania	604

B. Enforcement of Security Rights

Question 8: To what extent is it possible for the secured party to enforce the security without having to use formal court procedures?

Germanic Legal System – Germany and Austria	217
Common Law System – England and the Republic of Ireland	337
Roman Legal System – Spain, Italy and France	480
Central and Eastern European Systems – Hungary, Poland and Lithuania	615

Question 9: Is the secured party affected by a ‘stay’ on the enforcement of security rights if the debtor enters insolvency proceedings?

Germanic Legal System – Germany and Austria	225
Common Law System – England and the Republic of Ireland	348
Roman Legal System – Spain, Italy and France	485
Central and Eastern European Systems – Hungary, Poland and Lithuania	626

Question 10: Can the secured party apply to have any stay lifted?

Germanic Legal System – Germany and Austria	237
Common Law System – England and the Republic of Ireland	352
Roman Legal System – Spain, Italy and France	500
Central and Eastern European Systems – Hungary, Poland and Lithuania	632

Question 11: Under what circumstances can the stay be lifted?

Germanic Legal System – Germany and Austria	237
Common Law System – England and the Republic of Ireland	352

Roman Legal System – Spain, Italy and France	504
Central and Eastern European Systems – Hungary, Poland and Lithuania	632
Question 12: In insolvency proceedings, can an insolvency practitioner (IP) ‘enforce’ the security, i.e. realise the secured assets, without the consent of the secured party?	
Germanic Legal System – Germany and Austria	239
Common Law System – England and the Republic of Ireland	355
Roman Legal System – Spain, Italy and France	505
Central and Eastern European Systems – Hungary, Poland and Lithuania	635
Question 13: Are there any conditions that must be satisfied before an IP may ‘enforce’ the security?	
Germanic Legal System – Germany and Austria	241
Common Law System – England and the Republic of Ireland	355
Roman Legal System – Spain, Italy and France	509
Central and Eastern European Systems – Hungary, Poland and Lithuania	637
Question 14: Do the rules or conditions differ depending on the nature of the insolvency proceedings in question?	
Germanic Legal System – Germany and Austria	245
Common Law System – England and the Republic of Ireland	357
Roman Legal System – Spain, Italy and France	512
Central and Eastern European Systems – Hungary, Poland and Lithuania	638
Question 15: Is a secured party liable to pay the general costs, i.e. costs apart from those incurred in connection with the realisation of security, of insolvency proceedings affecting the debtor?	
Germanic Legal System – Germany and Austria	246
Common Law System – England and the Republic of Ireland	358
Roman Legal System – Spain, Italy and France	515
Central and Eastern European Systems – Hungary, Poland and Lithuania	640
Question 16: Is the secured party liable to ‘set aside’ any portion of the amount realised from the enforcement of security for the benefit of (a) preferential or (b) unsecured creditors of the debtor?	
Germanic Legal System – Germany and Austria	248
Common Law System – England and the Republic of Ireland	360
Roman Legal System – Spain, Italy and France	516
Central and Eastern European Systems – Hungary, Poland and Lithuania	642

Question 17: Can the secured party be bound against its wishes by a restructuring plan that negatively affects either the secured debt or the enforcement of the security interest?

Germanic Legal System – Germany and Austria	248
Common Law System – England and the Republic of Ireland	363
Roman Legal System – Spain, Italy and France	519
Central and Eastern European Systems – Hungary, Poland and Lithuania	644

Question 18: Can an under-secured creditor claim from the insolvency estate in respect of any deficiency arising as a result of the enforcement of the security?

Germanic Legal System – Germany and Austria	251
Common Law System – England and the Republic of Ireland	368
Roman Legal System – Spain, Italy and France	525
Central and Eastern European Systems – Hungary, Poland and Lithuania	648

C. Registration of Security Rights

Question 19: To what extent must security rights over assets be publicised by registration or filing to ensure the effectiveness of the security interest over parties other than the debtor and in the event of insolvency proceedings?

Germanic Legal System – Germany and Austria	253
Common Law System – England and the Republic of Ireland	369
Roman Legal System – Spain, Italy and France	526
Central and Eastern European Systems – Hungary, Poland and Lithuania	649

Question 20: Can you describe briefly the nature of the filing or registration system and whether it is publicly accessible?

Germanic Legal System – Germany and Austria	257
Common Law System – England and the Republic of Ireland	371
Roman Legal System – Spain, Italy and France	529
Central and Eastern European Systems – Hungary, Poland and Lithuania	655

Question 21: To what extent does ‘possession’ or control of the secured assets serve as an alternative method to registration or filing in ensuring third party effectiveness of the security interest?

Germanic Legal System – Germany and Austria	261
Common Law System – England and the Republic of Ireland	375
Roman Legal System – Spain, Italy and France	534
Central and Eastern European Systems – Hungary, Poland and Lithuania	657

D. Plurality of Security Rights

Question 22: Is it possible to have more than one set of security rights (security interest) over the same asset?

Germanic Legal System – Germany and Austria	261
Common Law System – England and the Republic of Ireland	381
Roman Legal System – Spain, Italy and France	536
Central and Eastern European Systems – Hungary, Poland and Lithuania	659

Question 23: What are the rules for determining priority between competing security interests in the same property?

Germanic Legal System – Germany and Austria	265
Common Law System – England and the Republic of Ireland	381
Roman Legal System – Spain, Italy and France	537
Central and Eastern European Systems – Hungary, Poland and Lithuania	660

Question 24: Are there special rules privileging the position of an acquisition financier, i.e. a secured party whose advance of funds funded the acquisition of a particular asset and who may be in a priority competition with an earlier general creditor whose security interest extends to all assets of the debtor whenever acquired?

Germanic Legal System – Germany and Austria	268
Common Law System – England and the Republic of Ireland	390
Roman Legal System – Spain, Italy and France	542
Central and Eastern European Systems – Hungary, Poland and Lithuania	662

E. Quasi-Security Agreements

Question 25: Does your legal system have any rules equating the treatment, in whole or in part, of security interest and ‘quasi-security’ agreements, i.e. agreements that in legal terms do not involve the creation of security interests but have many of the same economic consequences? Examples of quasi-security include the factoring or sale of receivables and finance leases, hire-purchase agreements and retention of title clauses in sale of goods contracts.

Germanic Legal System – Germany and Austria	270
Common Law System – England and the Republic of Ireland	394
Roman Legal System – Spain, Italy and France	545
Central and Eastern European Systems – Hungary, Poland and Lithuania	664

F. Transactional Avoidance

Question 26: Are there rules in your legal system that operate once the debtor enters insolvency proceedings and that provide for the invalidation of transactions entered into by the debtor prior to the commencement of the insolvency proceedings?

Germanic Legal System – Germany and Austria	283
Common Law System – England and the Republic of Ireland	402
Roman Legal System – Spain, Italy and France	554
Central and Eastern European Systems – Hungary, Poland and Lithuania	670

Question 27: Do these transactional avoidance rules catch security and quasi-security type transactions?

Germanic Legal System – Germany and Austria	284
Common Law System – England and the Republic of Ireland	403
Roman Legal System – Spain, Italy and France	558
Central and Eastern European Systems – Hungary, Poland and Lithuania	672

Question 28: If so, describe briefly these rules highlighting in particular (a) the rationale for the rules; (b) the conditions for the application of the rules; (c) the length of the ‘suspect period’; (d) whether the rules apply to transactions with a cross-border element; (e) whether the rules operate more stringently in respect of transactions that favour parties who are connected to the debtor; and (f) any defences that may be availed of by a counterparty to the transaction, i.e. the defendant in an avoidance action.

Germanic Legal System – Germany and Austria	285
Common Law System – England and the Republic of Ireland	404
Roman Legal System – Spain, Italy and France	559
Central and Eastern European Systems – Hungary, Poland and Lithuania	674

TABLE OF CASES

References are to chapter (in bold) and paragraph number.

ECJ/CJEU CASES (ARRANGED BY CASE NAME)

Case C-116/11, <i>Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.</i> , ECLI:EU:C:2012:739	2 131
Case C-339/07, <i>Christopher Seagon v Deko Marty Belgium NV</i> , ECLI:EU:C:2009:83	2 115, 120, 121, 126
Case C-527/10, <i>ERSTE Bank Hungary Nyrt v Magyar Állam and Others</i> , ECLI:EU:C:2012:417	1 80
Case C-341/04, <i>Eurofood IFSC Ltd</i> , ECLI:EU:C:2006:281	1 23, 2 155
Case C-213/10, <i>F-Tex SIA v Lietuvos-Anglijos UAB “Jadecloud-Vilma”</i> , ECLI:EU:C:2012:215	2 127
Case C-292/08 <i>German Graphics Graphische Maschinen GmbH v Alice van der Schee</i> , ECLI:EU:C:2009:544	1 69
Case C-295/13, <i>H v HK</i> , ECLI:EU:C:2014:2410	2 124, 130
Case C-133/78, <i>Henri Gourdain v Franz Nadler</i> , ECLI:EU:C:1979:49	2 120, 122, 123
Case C-396/09, <i>Interedil Srl (in liquidation) v Fallimento Interedil Srl and Intesa Gestione Crediti SpA</i> , ECLI:EU:C:2011:671	1 23, 2 155
Case C-594/14, <i>Kornhaas v Dithmar</i> , ECLI:EU:C:2015:806	2 132
Case C-557/13, <i>Lutz v Bäuerle</i> , ECLI:EU:C:2015:227	1 , 39, 2 133, 138, 139, 140, 145, 147, 4 386, 5 359
Case C-191/10, <i>Mediasucre</i> , ECLI:EU:C:2011:838	1 23
Case C-304/14 <i>Nike European Operations Netherlands BV v Sportland Oy, in liquidation</i> , ECLI:EU:C:2015:690	2 141, 142, 144, 149
Case C-649/13, <i>Nortel Networks</i> , ECLI:EU:C:2015:384	1 54, 55
Case C-328/12, <i>Ralph Schmid v Lilly Hertel</i> , ECLI:EU:C:2014:6	2 121
Case C-1/04, <i>Susanne Staubitz-Schreiber</i> , ECLI:EU:C:2006:39	1 22

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Case C-133/78, <i>Henri Gourdain v Franz Nadler</i> , ECLI:EU:C:1979:49	2 120, 122, 123
Case C-1/04, <i>Susanne Staubitz-Schreiber</i> , ECLI:EU:C:2006:39	1 22
Case C-341/04, <i>Eurofood IFSC Ltd</i> , ECLI:EU:C:2006:281	1 23, 2 155
Case C-339/07, <i>Christopher Seagon v Deko Marty Belgium NV</i> , ECLI:EU:C:2009:83	2 115, 120, 121, 126
Case C-292/08 <i>German Graphics Graphische Maschinen GmbH v Alice van der Schee</i> , ECLI:EU:C:2009:544	1 69
Case C-396/09, <i>Interedil Srl (in liquidation) v Fallimento Interedil Srl and Intesa Gestione Crediti SpA</i> , ECLI:EU:C:2011:671	1 23, 2 155

Case C-191/10, <i>Mediasucre</i> , ECLI:EU:C:2011:838	1 23
Case C-213/10, <i>F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"</i> , ECLI:EU:C:2012:215	2 127
Case C-527/10, <i>ERSTE Bank Hungary Nyrt v Magyar Állam and Others</i> , ECLI:EU:C:2012:417	1 80
Case C-116/11, <i>Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.</i> , ECLI:EU:C:2012:739	2 131
Case C-328/12, <i>Ralph Schmid v Lilly Hertel</i> , ECLI:EU:C:2014:6	2 121
Case C-295/13, <i>H v HK</i> , ECLI:EU:C:2014:2410	2 124, 130
Case C-557/13, <i>Lutz v Bäuerle</i> , ECLI:EU:C:2015:227	1, 39, 2 133, 138, 139, 140, 145, 147, 4 386, 5 359
Case C-649/13, <i>Nortel Networks</i> ECLI:EU:C:2015:384	1 54, 55
Case C-304/14 <i>Nike European Operations Netherlands BV v Sportland Oy, in liquidation</i> , ECLI:EU:C:2015:690	2 141, 142, 144, 149
Case C-594/14, <i>Kornhaas v Dithmar</i> , ECLI:EU:C:2015:806	2 132

EFTA COURT CASES

Case E-28/13, <i>LBI v Merrill Lynch Int. Ltd.</i>	2 145, 146
--	------------

NATIONAL CASES

AUSTRALIA

<i>Hewett v Court</i> (1983) 149 CLR 639	6 44
<i>Horsburgh v Deputy Commissioner of Taxation</i> (1984) 54 ALR 397	6 61

AUSTRIA

OGH, 09.04.1924 – Ob II 202/24, SZ 6/148	5 225
OGH, 11.01.1938 – 2 Ob 1151/37, SZ 20/04	5 98
OGH, 07.11.1951 – 3 Ob 574/51, SZ 24/303	5 181
OGH, 23.06.1954 – 3 Ob 349, 350/54, SZ 27/180	5 224
OGH, 19.01.1960 – 2 Ob 525/59, [1960] JBl 383	5 287
OGH, 09.04.1968 – 8 Ob 80/68, SZ 41/37	5 98
OGH, 23.10.1968 – 3 Ob 12/68, SZ 41/140	5 32, 159
OGH, 12.02.1969 – 5 Ob19/69, [1969] EvBl 280	5 328
OGH, 30.04.1969 – 5 Ob 17/69, SZ 42/65	5 109
OGH, 07.02.1972 – 6 Ob 131/71, SZ 45/12	5 431
OGH, 22.02.1972 – 8 Ob 17/72, SZ 45/18	5 98
OGH, 21.02.1973 – 1 Ob 13/73, OGH SZ 46/24	5 184
OGH, 21.01.1975 – 5 Ob 322/74, SZ 48/2	5 163
OGH, 15.11.1976 – 4 Ob 525/76, SZ 49/138	5 351
OGH, 07.09.1978 – 6 Ob 662/78, SZ 51/121	5 108, 160
OGH, 02.05.1979 – 1 Ob 583/79	5 422

OGH, 14.12.1979 – 1 Ob 646/79, [1980] JBl 435.....	5 96
OGH, 04.05.1982 – 5 Ob 586/82, SZ 55/65	5 441
OGH, 05.12.1983 – 6 Ob 770/82.....	5 428
OGH, 16.01.1984 – 5 Ob 609/81, SZ 57/8	5 61
OGH, 08.05.1984 – 4 Ob 559/83, SZ 57/87	5 430
OGH, 22.11.1984 – 8 Ob 607/84, SZ 57/186	5 353
OGH, 19.12.1984 – 3 Ob 113/84, [1985] JBl 541.....	5 96
OGH, 09.01.1985 – 3 Ob 116/85, SZ 58/1	5 159
OGH, 18.06.1986 – 3 Ob 43/86, [1987] 14 ÖBA 51	5 149
OGH, 10.07.1986 – 6 Ob 595/86.....	5 441
OGH, 02.09.1987 – 3 Ob 87/87, [1998] JBl 463.....	5 58
OGH, 25.02.1988 – 7 Ob 723/87, SZ 61/47	5 132
OGH, 02.03.1988 – 3 Ob 130/87, SZ 61/51	5 100, 105
OGH, 22.03.1988 – 6 Ob 575/86, SZ 61/70	5 354
OGH, 26.04.1988 – Ob 514/88, SZ 61/101.....	5 426
OGH, 17.05.1988 – 8 Ob 608/87,SZ 61, 122	5 429
OGH, 21.06.1988 – 5 Ob 566/88, SZ 61/142	5 358
OGH, 24.01.1989 – 4 Ob 623/88.....	5 354
OGH, 01.03.1989 – 1 Ob 697/32, SZ 62/32	5 32, 135, 160
OGH, 30.03.1989 – 8 Ob 48/88, SZ 62/55	5 350
OGH, 21.12.1989 – 6Ob 737/87, SZ 62/219.....	5 116
OGH, 25.11.1992 – 3 Ob 31, 1012/92, [1993] ÖBA 401/665.....	5 215, 224, 225
OGH, 03.02.1994 – 6 Ob 641/93, SZ 67/20	5 411
OGH, 17.02.1994 – 2 Ob 504/94, OGH SZ 67/29.....	5 356
OGH, 27.04.1994 – 3 Ob 45/94, SZ 67/78	5 96
OGH, 13.10.1994 – 8 Ob 619/92, [1995] ÖBA 475/217	5 356
OGH, 23.11.1994 – 7 Ob 39/94, SZ 67/213	5 92, 149
OGH, 09.02.1995 – 8 Ob 27/94, SZ 68/29	5 408
OGH, 22.11.1995 – Ob 521/95, SZ 68/221.....	5 411
OGH, 12.12.1995 – 10 Ob 512/95.....	5 433
OGH, 14.08.1996 – 6 Ob 665/95.....	5 428
OGH, 17.10.1996 – Ob 2114/96g, SZ 69/232.....	5 219, 241
OGH, 25.09.1997 – 2 Ob 210/97i, SZ 70/188.....	5 352
OGH, 29.10.1997 – 5 Ob 2155/96i, [1998] JBl 105	5 108
OGH, 29.09.1998 – 1 Ob 406/97f, SZ 71/154	5 108, 134, 163
OGH, 15.10.1998 – 8 Ob 125/98k, [1999] ÖBA 805 /568	5 185, 187
OGH, 22.10.1998 – 8 Ob 271/98f, [1999] ÖBA 806/649	5 356
OGH, 20.05.1999 – Az.: 2 Ob 114/99z, [2000] ÖBA 841/77	5 356
OGH, 30.03.2000 – 8 Ob 28/00a.....	5 411
OGH, 30.08.2000 – 6 Ob 174/00g, SZ 73/132	5 108, 134
OGH, 11.06.2001 – 8 Ob 313/00p, SZ 74/105	5 221
OGH, 26.06.2001 – 1 Ob 290/00d, SZ 74/112	5 108, 356
OGH, 11.07.2001 – 3 Ob 57/01f, SZ 74/128	5 94
OGH, 23.08.2001 – 6 Ob157/01h	5 431
OGH, 15.02.2002 – 5 Ob 295/01w, SZ 2002/2.....	5 187
OGH, 21.02.2002 – 8 Ob 194/01i, OGH SZ 2002/25.....	5 135
OGH, 14.09.2004 – 10 Ob 321/02g, [2005] ÖBA 1268/284	5 133
OGH, 26.07.2006 – 3 Ob 48/05p, [2007] 1405/234.....	5 354
OGH, 18.12.2006 – 8 Ob 113/06k, SZ 2006/185	5 257
OGH, 12.04.2007 – 2 Ob 177/06b, SZ 2007/55	5 411
OGH, 17.12.2007 – 8 Ob 108/07a.....	5 219

OGH, 25.03.2009 – 3 Ob 232/08a, SZ 2009/36	5 426
OGH, 18.02.2010 – 8 Ob 105/09, [2010] Ecolex 677	5 25
OGH, 24.03.2010 – Ob 239/09g, SZ 2010/24.	5 421
OGH, 19.01.2011 – 3 Ob99/10w, SZ 2011/2	5 409
OGH, 18.01.2012 – Ob 168/11v, [2012] JBl 316	5 426
OGH, 14.03.2012 – 3 Ob 33/12t, [2013] ÖBA 1895 /146.	5 441
Öster. Patentamt, 10.08.1957 – B 58/57, [1957] PBl 162.	5 282
Öster. Patentamt, 03.04.1975 – B 67, 68/74, [1976] PBl 8.	5 282

CHINA

<i>ABN Amro Bank NV v Chiyu Banking Corp Ltd</i> [2000] 2 HKLRD 175, CFI	6 214
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FRANCE

Cour de cassation, Chambre civile, 29.06.1983	7 150
Cour de cassation, Chambre civile, 08.12.1999	7 174
Cour de cassation, Chambre civile, 24.09.2003	7 176
Cour de cassation, Chambre civile, 09.03.2005	7 174
Cour de cassation, Chambre civile, 24.09.2009	7 94
Cour de cassation, Chambre civile, 23.02.2012	7 150
Cour de cassation, Chambre commerciale, 07.07.1987	7 532
Cour de cassation, Chambre commerciale, 03.10.1989	7 83
Cour de cassation, Chambre commerciale, 28.11.1989	7 83
Cour de cassation, Chambre commerciale, 16.02.1993	7 534, 551
Cour de cassation, Chambre commerciale, 04.10.1995	7 535
Cour de cassation, Chambre commerciale, 09.01.1996	7 535
Cour de cassation, Chambre commerciale, 09.10.1996	7 532
Cour de cassation, Chambre commerciale, 28.05.1996	7 542
Cour de cassation, Chambre commerciale, 20.01.1998	7 548
Cour de cassation, Chambre commerciale, 09.06.1998	7 376
Cour de cassation, Chambre commerciale, 01.02.2000	7 546
Cour de cassation, Chambre commerciale, 19.03.2002	7 546
Cour de cassation, Chambre commerciale, 26.02.2006	7 83
Cour de cassation, Chambre commerciale, 19.12.2006	7 504
Cour de cassation, Chambre commerciale, 30.09.2008	7 149
Cour de cassation, Chambre commerciale, 10.11.2009	7 532
Cour de cassation, Chambre commerciale, 12.01.2010	7 288
Cour de cassation, Chambre commerciale, 26.05.2010	7 83, 504
Cour de cassation, Chambre commerciale, 21.09.2010	7 546
Cour de cassation, Chambre commerciale, 15.06.2011	7 288
Cour de cassation, Chambre commerciale, 16.03.2012	7 546
Cour de cassation, Chambre commerciale, 11.09.2012	7 83
Cour de cassation, Chambre commerciale, 02.10.2012	7 550
Cour de cassation, Chambre commerciale, 19.02.2013	7 54
Cour de cassation, Chambre commerciale, 23.04.2013	7 376
Cour de cassation, Chambre commerciale, 15.10.2013	7 338

Cour de cassation, Chambre commerciale, 26.11.2013	7 92
Cour de cassation, Chambre commerciale, 07.11.2016	7 278

GERMANY

BGH, 09.11.1955 – IV ZR 196/54, BGHZ 19, 12.	5 28
BGH, 22.02.1956 – IV ZR 164/55, BGHZ 20, 88.	5 71
BGH, 03.03.1956 – IV ZR 334/55, BGHZ 20, 159.	5 340
BGH, 16.12.1957 – VII ZR 49/57, BGHZ 26, 185.	3 304
BGH, 30.04.1959 – VII ZR 19/58, BGHZ 30, 149.	5 28
BGH, 14.12.1959 – II ZR 187/57, BGHZ 258, 268	5 393
BGH, 10.12.1959 – VII ZR 210/59, BGHZ 31, 337	5 201
BGH, 23.11.1959 – VII ZR 48/58, [1960] WM 171.	5 167
BGH, 15.11.1960 – V ZR 35/59, BGHZ 33, 389	5 380
BGH, 21.12.1960 – VIII ZR 89/59, BGHZ 34, 122	5 71
BGH, 10.04.1961 – VIII ZR 68/60, BGHZ 35, 85	5 75
BGH, 01.04.1963 – VIII ZR 211/61, [1963] WM 504.	5 68
BGH, 15.04.1964 – VIII ZR 232/62, BGHZ 41, 298	5 391
BGH, 22.09.1965 – VIII ZR 265/63, [1965] NJW 2197.	5 121
BGH, 25.02.1966 – V ZR 126/64, BGHZ 45, 186	5 90
BGH, 18.12.1967 – V ZB 6/67, BGHZ 49, 197	5 90
BGH, 03.05.1972 – VIII ZR 170/71, BGHZ 58, 364	5 342
BGH, 25.09.1972 – VIII ZR 216/71, BGHZ 59, 230	5 379, 381
BGH, 23.02.1977 – VIII ZR 124/75, BGHZ 68, 118	5 342
BGH, 19.09.1977 – VIII ZR 169/76, BGHZ 69, 254	5 346
BGH, 20.12.1978 – VIII ZR 288/77, [1979] WM 300.	5 64
BGH, 31.01.1979 – VIII ZR 93/78, BGHZ 73, 253	5 142
BGH, 14.10.1981 – VIII ZR 149/80, BGHZ 82, 50	5 346
BGH, 30.04.1982 – V ZR 104/81, BGHZ 83, 395	5 90
BGH, 27.02.1985 – VIII ZR 328/83, BGHZ 94, 44	5 342
BGH, 20.03.1986 – IX ZR 88/85, [1986] NJW 1985	5 142
BGH, 09.07.1986 – VIII ZR 232/85, BGHZ 98, 160	5 341
BGH, 03.12.1987 – IX ZR 228/86, [1998] WM 346	5 68, 142
BGH, 12.10.1989 – IX ZR 184/88, BGHZ 109, 47.	5 348
BGH, 12.07.1990 – IX ZR 245/89, BGHZ 112, 136.	5 390
BGH, 31.10.1990 – IV ZR 24/90, BGHZ 112, 387.	5 50
BGH, 29.11.1990 – IX ZR 29/90, BGHZ 113, 98.	5 390
BGH, 12.02.1992 – XII ZR 7/91, BGHZ 117, 200	5 325
BGH, 12.11.1992 – IX ZR 237/91, [1993] NJW-RR 235.	5 369
BGH, 24.06.1993 – IX ZR 96/92, [1993] NJW 1379	5 390
BGH, 30.09.1993 – IX ZR 227/92, BGHZ 123, 320.	5 397
BGH, 11.05.1995 – IX ZR 170/94, [1995] NJW 2348	5 142
BGH, 09.09.1997 – IX ZR 14/97, BGHZ 136, 309.	5 381
BGH, 27.11.1997 – GSZ 1/97, BGHZ 137, 212	5 28, 256, 398
BGH, 04.12.1997 – IX ZR 47/97, NJW 1998, 1561	5 379
BGH, 12.03.1998 – IX ZR 74–95, [1998] NJW 2047.	5 28
BGH, 08.12.1998 – Xi ZR 302/97, [1999] NJW 940	5 28
BGH, 12.10.1999 – XI ZR 24/99, [2000] NJW 276	5 121
BGH, 15.05.2003 – IX ZR 218/02, [2003] NJW-RR, 1490	5 28

BGH, 27.05.2003 – IX ZR 169/02, BGHZ 155, 75.....	5 387
BGH, 11.04.2002 – IX ZR 211/0, [2002] NJW 2568	5 381
BGH, 01.04.2004 – IX ZR 305/00, [2004] NZI 376.....	5 390
BGH, 11.03.2004 – IX ZR 160/02, BGH NJW-RR 2004, 1130.....	5 379
BGH, 10.02.2005 – IX ZR 211/02, BGHZ 162, 143.....	5 383
BGH, 03.03.2005 – IX ZR 441/00, BGHZ 162, 276.....	5 391
BGH, 26.04.2005 – XI ZR 289/04, [2005] NJW-RR 1408.....	5 171
BGH, 24.05.2005 – IX ZR 123/04, BGHZ 163, 143.....	5 370
BGH, 23.03.2006 – IX ZR 116/03, BGHZ 167, 11.....	5 381
BGH, 11.05.2006 – IX ZR 247/03, BGHZ 167, 363.....	5 124
BGH, 01.06.2006 – IX ZR 159/04, [2006] NZI 524.....	5 391
BGH, 08.03.2007 – IX ZR 127/05, [2007] NZI 337.....	5 380
BGH, 19.04.2007 – IX ZR 79/05, [2007] NZI 403.....	5 389
BGH, 10.05.2007 – IX ZR 146/05, NZI 2007, 456.....	5 397
BGH, 21.06.2007 – IX ZR 231/04, [2007] NJW-RR 1419.....	5 369
BGH, 16.11.2007 – IX ZR 194/04, BGHZ 174, 228.....	5 369
BGH, 29.11.2007 – IX ZR 30/07, BGHZ 174, 297.....	5 121, 380
BGH, 20.12.2007 – IX ZR 93/06, [2008] NZI 231.....	5 386, 387
BGH, 20.12.2007 – IX ZR 105/07.....	5 345
BGH, 08.05.2008 – IX ZR 116/07, [2009] MittBayNot 61	5 399
BGH, 05.06.2008 – IX ZR 17/07, [2008] NJW 2008, 2506.....	5 390
BGH, 19.02.2009 – IX ZR 62/08, BGHZ 180, 63.....	5 373
BGH, 05.03.2009 – IX ZR 85/07, BGHZ 180, 98.....	5 385
BGH, 07.05.2009 – IX ZR 71/08, [2009] NJW 2065	5 391
BGH, 10.12.2009 – IX ZR 1/09, [2010] NZI 138.....	5 345
BGH, 18.03.2010 – IX ZR 57/09, [2010] NZI 439.....	5 379, 386, 390
BGH, 08.12.2011 – IX ZR 156/09, [2012] NZI 142.....	5 386
BGH, 17.03.2011 – IX ZR 63/10, BGHZ 198, 1.....	5 380
BGH, 10.11.2011 – IX ZR 142/10, BGHZ 191, 277.....	5 124
BGH, 20.09.2012 – IX ZR 208/11, [2013] NZI 42.....	5 121, 124
BGH, 20.12.2012 – IX ZR 21/12, [2013] NZI 258.....	5 391
BGH, 21.02.2013 – IX ZR 69/12, [2013] NZI 42.....	5 124
BGH, 25.04.2013 – IX ZR 62/12, [2013] NZI 586.....	5 124
BGH, 08.05.2014 – IX ZR 128/12, [2014] NJW 2358	5 341
BGH, 10.07.2014 – IX ZR 192/13, [2014] NJW 2579	5 399
BAG, 18.07.2013 – 6 AZR 47/12, [2014] NZI 167.....	5 349
OLG Frankfurt a.M., 09.12.1958 – 5 U 74/58, [1959] MDR 578.....	5 340
OLG Köln, 18.02.1987 – 13 U 170/86, NJW-RR 1988, 239	5 127
OLG Köln, 29.09.2004 – 2 U 1/04, 2 U 01/04, [2005] NZI 112	5 370
OLG Brandenburg, 14.03.2012 – 4 U 60/10.....	5 179
LG Wiesbaden, 06.04.1987 – 1 S 413/86, [1987] NJW-RR 1270	5 167
LG Traunstein, 27.08.1999 – 4 T 2966/99, [1999] NZI 461	5 267
AG Hamburg, 20.02.2006 – 67g IN 513/05, [2006] ZInsO 218	5 348

HUNGARY

Kúria BH 2011.227	8 364
Kúria BH 2013.131	8 190, 257, 325

IRELAND

<i>Clare Textiles Ltd, Re</i> [1993] 2 IR 213	6 164
<i>Corran Construction Co v Bank of Ireland Finance Ltd</i> [1976–7] ILRM 175	6 291
<i>Coveney v HS Perse Ltd</i> [1910] 1 IR 194	6 210
<i>Cox v Dublin City Distillery Co</i> [1906] IR 446	6 210
<i>Creation Printing Co Ltd, Re</i> [1981] IR 353	6 292
<i>Friends First Finance Ltd v Cronin</i> [2013] IEHC 59	6 91
<i>Gallium Ltd, Re</i> (2009) 8 IESC	6 121
<i>Irish Life & Permanent plc v Duff</i> [2013] IEHC 43	6 92
<i>Irish Life and Permanent plc v Dunne</i> [2015] IESC 46	6 92
<i>JD Brian Ltd, Re</i> [2015] IESC 62	6 66, 147
<i>JD Brian and the Companies Acts</i> [2011] IEHC 113	6 66
<i>Kill Inn Motel Ltd, Re</i> [1978–1987] 3 ITR 706	6 293

ITALY

Corte di Cassazione 14.5.2001 No 202, (2001) I FI 2511	7 102
Corte di Cassazione 14.1.2004 No 335, [2005] F 294	7 388
Corte di Cassazione 12.2.1951 No 370, [1950] MGI 95	7 157
Corte di Cassazione 3.2.1987 No 950, (1987) II DF 692	7 523
Corte di Cassazione 13.5.1971 No 1378, (1971) I FI 1191	7 250
Corte di Cassazione Sez. Un. 3.4.1989 No 1611, [1989] MGC 431	7 508
Corte di Cassazione 24.2.1998 No 1999, [1998] F 604	7 513
Corte di Cassazione 22.6.1972 No 2056, (1973–9) II BBTC 236	7 209
Corte di Cassazione Sez. Un. No 2285, [2006] MGC 2	7 97
Corte di Cassazione 2.2.2006 No 2285, (2007) I GC 700	7 507
Corte di Cassazione 10.10.1967 No 2387, (1967) I GC 1947	7 109
Corte di Cassazione 8.4.1999 No 3415, [2001] N 473	7 511
Corte di Cassazione 3.4.1991 No 3478, [1991] F 799	7 517
Corte di Cassazione 27.4.1999 No 4208, (2000) II DF 1203, [2000] F 1317	7 210, 247
Corte di Cassazione 5.03.2004 No 4520, [2005] F 547	7 211
Corte di Cassazione 19.3.2004 No 5561, [2004] GDir 18	7 247
Corte di Cassazione 9.3.2011 No 5583, [2011] N 259	7 519
Corte di Cassazione 16.3.2005 No 5713, [2005] F 713	7 554
Corte di Cassazione 10.3.2011 No 5740, (2011) I GC 1449	7 508
Corte di Cassazione 22.3.2007 No 6969, [2007] MGC 635	7 508
Corte di Cassazione Sez. Un. 28.3.2006 No 7028, (2006) I FI 1718	7 554
Corte di Cassazione 24.6.1995 No 7158, (1995) I GC 2633	7 100, 245
Corte di Cassazione No 7257, [2010] RN 1566	7 194
Corte di Cassazione 27.8.1996 No 7859, [1997] CG	7 208
Corte di Cassazione 29.9.1993 No 9760, (1994) I FI 1840	7 162
Corte di Cassazione 23.10.1998 No 10526, (1999) I GC 2115	7 247
Corte di Cassazione 12.5.2010 No 11500, [2010] F 1271	7 382
Corte di Cassazione 23.10.1999 No 11924, [2000] GI 1599	7 508
Corte di Cassazione 28.5.2008 No 13998, (2009) I GC 176	7 263
Corte di Cassazione 20.6.2008 No 16953, [2008] MGC 1006	7 508
Corte di Cassazione 26.8.2005 No 17396, [2005] MGI	7 110
Corte di Cassazione 5.9.2006 No 19059, [2006] MFI	7 229, 230

Corte di Cassazione 12.10.2011 No 20956, [2011] C 1144.	7 516
Corte di Cassazione 18.12.2006 No 27044, [2007] F 391	7 303
Corte d'appello Milano 7.4.1978, (1978) I FP	7 213
Corte d'appello Milano 28.9.1998, [1999] C 555	7 97
Corte d'appello Torino 5.9.2007, [2008] F 186.	7 303
Tribunale di Bologna 3.12.1996, (1998) II BBTC 177.	7 508

MALAYSIA

<i>United Malayan Banking Corp v Aluminex</i> [1993] 3 MLJ 587	6 225
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NEW ZEALAND

<i>Dempsey v The Traders Finance Corporation Ltd</i> [1933] NZLR 1258	6 216
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POLAND

Sąd Najwyższy BH 120/2006	8 94
Sąd Najwyższy II CK 409/2003	8 53
Sąd Najwyższy III CZP 26/13	8 383
Sąd Najwyższy III CZP 104/2005	8 357
Sąd Najwyższy I PK 23/14	8 390
Sądy Apelacyjne Gdansk V ACa 859/14.	8 385
Sądy Apelacyjne Gdansk V Aca 330/13	8 390

SPAIN

Tribunal Supremo 19.04.1975	7 144
Tribunal Supremo 05.07.1990	7 144
Tribunal Supremo 01.04.1996 (RJ 1996/2877).	7 136
Tribunal Supremo 19.04.1997 (RJ 1997/3429).	7 135
Tribunal Supremo 07.10.1997 (RJ 1997/7101).	7 135
Tribunal Supremo 14.12.2000 (RJ 2000/10442).	7 492
Tribunal Supremo 07.04.2001 (RJ 2001/2387).	7 492
Tribunal Supremo 26.09.2002 (RJ 2002/7873).	7 169
Tribunal Supremo 15.07.2003 (RJ 2003/4462).	7 529
Tribunal Supremo 25.02.2005 (RJ 2005/1405).	7 529
Tribunal Supremo 10.03.2005 (RJ 2005/1405).	7 529
Tribunal Supremo 02.02.2006 (RJ 2006/494).	7 529

UNITED KINGDOM

<i>Abbey National v Cann</i> [1991] 1 AC 56	6 222, 226
<i>Agnew v Commissioner of Inland Revenue</i> [2001] 2 AC 710	6 5, 6, 22, 49, 53
<i>Agriplant Services Ltd, Re</i> [1997] BCC 842	6 269
<i>Alpstream AG v PK Airfinance</i> [2015] EWCA Civ 1318	6 98
<i>Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd</i> [1976] 1 WLR 676	6 238
<i>Arbuthnot Leading v Havelet Leasing (No 2)</i> [1990] BCC 636	6 288
<i>Armada Shipping, Re</i> [2011] EWHC 21	1 94
<i>Armour v Thyssen Edelstahlwerke AG</i> [1991] 2 AC 339	6 238
<i>Armstrong DLW GmbH v Winnington Networks Ltd</i> [2012] EWHC 10, [2013] Ch 156	6 36
<i>ARV Aviation Ltd, Re</i> (1988) 4 BCC 708, [1989] BCLC 664	6 133
<i>Atlantic Computer Systems plc, Re (No 1)</i> [1992] Ch 505	6 125, 127, 143
<i>Automatic Bottle Makers, Re</i> [1926] Ch 412	6 210
<i>Baillies Ltd, Re</i> [2012] BCC 554	2 129
<i>Bank of Baroda v Panessar</i> [1987] Ch 335	6 93
<i>Bank of Credit & Commerce International SA, Re (No 8)</i> [1998] AC 214	6, 29, 34, 109
<i>Barclay Mercantile Business Finance Ltd v Sibec Development Ltd</i> [1992] 1 WLR 1253	6 128
<i>Barclays Bank Ltd v Quistclose Investments Ltd</i> [1970] AC 567	6 250, 312
<i>Beacon Leisure Ltd, Re</i> [1991] BCC 213	6 269
<i>Bell v Long</i> [2008] EWHC 1273 (Ch), [2008] BPIR 1211	6 98
<i>Belmont Park Investments Pty Ltd v BNY Corporate Trustee</i> [2011] UKSC 38, [2012] 1 AC 383	6 219
<i>Bexhill Ltd v Razzaq</i> [2012] EWCA Civ 1376	6 241, 242
<i>Bieber v Teathers Ltd</i> [2012] EWHC 190 (Ch), [2012] 2 BCLC 585	6 250
<i>Black Ant Co Ltd, Re</i> [2014] EWHC 1161 (Ch)	6 212
<i>Black Ant Co Ltd, Re</i> [2016] EWCA Civ 30	6 212
<i>Bluebrook Ltd, Re</i> [2009] EWHC 2114	6 163
<i>Bloom v Pensions Regulator</i> [2011] BCC 277	6 140
<i>Bloom v Pensions Regulator</i> [2012] BCC 83	6 141
<i>Bloom v Pensions Regulator</i> [2014] AC 209	6 141
<i>BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group</i> [2013] EWHC 1146	6 160
<i>Benjamin Cope & Co, Re</i> [1914] 1 Ch 800	6 210
<i>Bond Worth Ltd, Re</i> [1980] Ch 228	6 28
<i>Borden v Scottish Timber Products Ltd</i> [1981] Ch 25	6 238
<i>Bowles v Rogers</i> (1800) 31 ER 957	6 44
<i>Bradford Advance Co Ltd v Ayers</i> [1924] WN 152	6 173
<i>Brightlife Ltd, Re</i> [1987] Ch 200	6 5, 22, 64, 65
<i>Bristol Airport plc v Powdrill</i> [1990] C 744	6 43, 118, 125, 126
<i>British Aviation Insurance Co Ltd</i> [2005] EWHC 1621	6 162
<i>Brumark Investments Ltd, Re</i> [2001] AC 710	1 42, 6 6, 53
<i>Burgess v Auger</i> [1998] 2 BCLC 478	6 97
<i>Cambridge Gas Transport Corporation v Official Committee of</i> <i>Unsecured Creditors (of Navigator Holdings Plc)</i> [2007] 1 AC 508	1 24
<i>Camdex International Ltd v Bank of Zambia</i> [1998] QB 22	6 244

<i>Capitol Films Ltd</i> [2011] BPIR 334	6 133
<i>Castlemahon Poultry Products Ltd, Re</i>	6 48
<i>Caterpillar (NI) Ltd v John Holt & Co</i> [2013] EWCA Civ 1232	6 238
<i>Chapman v Wilson</i> [2010] EWHC 1746 (Ch)	6 47
<i>Charge Card Services Ltd, Re</i> [1987] Ch 150	6 34
<i>Cheah v Equiticorp Finance Group Ltd</i> [1992] 1 AC 472	6 218
<i>China and South Sea Bank Ltd v Tan1</i> [1990] 1 AC 536	6 98
<i>Chow Yoong Hong v Choong Fah Rubber Manufactory</i> [1962] AC 209	6 232
<i>Clayton's Case</i> (1816) 1 Mer 572	6 211, 277
<i>Clough Mill Ltd v Martin</i> [1985] 1 WLR 111	6 238
<i>Compaq Computer Ltd v Abercorn Group Ltd</i> [1991] BCC 484	6 238
<i>Connolly Bros Ltd Re (No 2)</i> [1912] 2 Ch 25	6 222, 223
<i>Courts plc, Re</i> [2009] 1 WLR 1499	6 150
<i>Cosslett (Contractors) Ltd, Re</i> [1998] Ch 495	1 42, 6 29, 32, 53, 188
<i>Cukurova Finance International Ltd v HM Treasury</i> [2008] EWHC 2567, [2009] EuLR 317	6 106, 109
<i>Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd</i> [2009] UKPC 19, [2009] 3 All ER 849	6 109, 111, 193
<i>Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd</i> [2013] UKPC 2	6 111, 194
<i>Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd</i> [2013] UKPC 20	6 111
<i>Curtain Dream plc, Re</i> [1990] BCLC 925	6 248
<i>David Allester Ltd, Re</i> [1922] 2 Ch 211	6 39
<i>Davies v Rees</i> (1886) 17 QBD 408	6 173
<i>Den Norske Bank ASA v Acemex Management Co Ltd</i> [2003] EWHC 326 (Comm), [2003] 2 All ER (Comm) 318	6 98
<i>Devaynes v Noble</i> (1816) 1 Mer 572	6 211
<i>Donald v Suckling</i> (1866) LR 1 QB 585	6 87
<i>Durham Bros v Robertson</i> [1898] 1 QB 765	6 233
<i>Edwards v Flightline Ltd</i> [2003] 1 WLR 1200	6 30
<i>English and Scottish Mercantile Investment Co Ltd v Brunton</i> [1892] 2 QB 700	6 214
<i>Environment Agency v Clark</i> [2001] Ch 57	6 118
<i>Fairway Magazines Ltd, Re</i> [1992] BCC 924	6 269
<i>Feetum v Levy</i> [2005] EWCA Civ 1601, [2006] Ch 585	6 102
<i>Finnerty v Clark</i> [2011] EWCA Civ 858 [2011] BCC 702	6 117
<i>Forthright Finance Ltd v Carlyle Finance Ltd</i> [1997] 4 All ER 90	6 235
<i>Fortress Value Recovery Fund v Blue Skye Special Opportunities Fund</i> [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973	6 285
<i>4 Eng Ltd v Harper</i> [2009] EWHC 2633 (Ch), [2010] BCC 746	6 287
<i>Four Maids Ltd v Dudley Marshall (Properties) Ltd</i> [1957] Ch 317	6 89
<i>G and T Earle Ltd v Hemsworth Rural District Council</i> (1928) 44 TLR 605	6 210, 215
<i>Gaskell v Gosling</i> [1896] 1 QB 669, AC 575	6 94
<i>George Inglefield Ltd, Re</i> [1933] Ch 1	6 233, 249
<i>Gray v G-T-P Group Ltd</i> [2011] BCC 869	6 198
<i>Gray v Smith</i> [2013] EWHC 4136 (Comm)	6 210
<i>Griffiths v Yorkshire Bank plc</i> [1994] 1 WLR 1427	6 210
<i>Gomba Holdings (UK) Ltd v Homan</i> [1986] 3 All ER 94	6 95

<i>Gore v Mischon de Reya</i> [2015] EWHC 164 (Ch)	6 250
<i>Halliday v Holgate</i> (1868) LR 3 Ex 299	6 36, 188
<i>Hamlet International plc, Re</i> [1999] 2 BCLC 506.	6 189
<i>Harrold v Plenty</i> [1901] 2 Ch 314	6 36
<i>Hashimi v IRC</i> [2002] EWHC Civ 981, [2002] BPIR 974	6 283
<i>Hawk Insurance Co Ltd</i> [2001] 2 BCLC 480.	6 161
<i>Hendry v Chartsearch Ltd</i> [1998] CLC 1382	6 245
<i>HIH Casualty and General Insurance Ltd, Re</i> [2008] 1 WLR 852	1 24
<i>Hill v Spread Trustee Co Ltd</i> [2007] 1 WLR 2404	6 284
<i>Hilton v Tucker</i> (1888) 39 Ch D 669	6 37
<i>H & K Medway Ltd, Re</i> [1997] 1 WLR 1422	6 210
<i>Holroyd v Marshall</i> (1862) 10 HL Cas 191	6 6, 69, 70
<i>Hopkinson v Rolt</i> (1861) 9 HL Cas 514, 11 ER 829	6 212
<i>Hubbard ex parte Hardwick, Re</i> (1886) 17 QBD 690.	6 84
<i>Hydrosolve Ltd, Re</i> [2008] BCC 175	6 149
<i>International Sections Ltd</i> [2009] EWHC 137 (Ch), [2009] BCC 574.	6 151
<i>IRC v Wimbledon Football Club Ltd</i> [2005] 1 BCLC 66	6 159
<i>Irish Bank Resolution Corporation Ltd v DTZ Debenham</i> [2013] EWHC 596 (Comm), [2013] All ER (D) 155	6 145
<i>Jones v Marshall</i> (1890) 24 QBD 269.	6 84
<i>Jones v Morgan</i> [2001] Lloyd's Rep Bank 323	6 109
<i>Lehman Brothers International (Europe), Re</i> [2012] EWHC 2997 (Ch)	1 42, 6 33, 188, 190, 194, 200–202
<i>Lehman Brothers International (Europe), Re</i> [2014] EWHC 704 (Ch)	6 146
<i>Lehman Brothers International (Europe) Re</i> [2015] EWCA Civ 485	6 219
<i>Leyland Daf Ltd; Buchler v Talbot, Re</i> [2004] 2 AC 298	6 28, 142 146
<i>Lloyds & Scottish Finance v Cyril Lord Carpet Sales Ltd</i> [1992] BCLC 609	6 239
<i>Lloyds TSB Bank plc v Clarke (Liquidator of Socimer International</i> <i>Bank Ltd)</i> [2002] UKPC 27, [2002] 2 All ER (Comm) 992	6 241
<i>Lundy Granite Co, Re</i> (1871) LR 6 Ch App 462	6 143
<i>Lunn v Thornton</i> (1845) 1 CB 379	6 26
<i>Mackay v Kaupthing Singer</i> [2013] EWHC 2533 (Ch)	6 127
<i>Mackreth v Symmons</i> (1808) 15 Ves 329.	6 44
<i>Manchester & Milford Rly Co, Re</i> (1880) 14 Ch D 645	6 94
<i>Manchester, Sheffield and Lincolnshire Railway Co v North Wagon</i> <i>Railway Co</i> (1880) 13 App Cas 554.	6 171
<i>Matthew v TM Sutton Ltd</i> [1994] 4 All ER 793	6 36, 84
<i>Maxwell Communications Corp plc, Re (No 2)</i> [1994] 1 All ER 737	6 219, 220
<i>MC Bacon Ltd (No 2), Re</i> [1991] Ch 127	6 144, 271
<i>MC Bacon Ltd, Re</i> [1990] BCC 78.	6 55, 269, 274
<i>McMullen & Sons v Cerrone</i> [1994] BCC 25	6 118
<i>Meesan Investments Ltd (Royal Trust Bank v Buchler) Re</i> (1988) 4 BCC 788, [1989] BCL 130.	6 127
<i>MF Global UK Ltd, Re</i> [2013] 1 WLR 903	6 114
<i>MyTravel plc, Re</i> [2004] EWCA Civ 173, [2005] 2 BCLC 123	6 163
<i>National Westminster Bank Ltd v Halesowen Presswork and</i> <i>Assemblies Ltd</i> [1972] AC 785.	6 220
<i>National Westminster Bank plc v Spectrum Plus Ltd</i> [2005] 2 AC 680	1 42, 6 22, 50, 53

<i>Newman Shopfitters (Cleveland) Ltd, Re</i> [1991] BCLC 407	6 134
<i>Nortel GmbH, Re</i> [2013] UKSC 52, [2013] 3 WLR 504	6 146
<i>North Western Bank Ltd v Poynter, Son and Macdonalds</i> [1895] AC 56	6 39
<i>O'Connell v Rollings</i> [2014] EWCA Civ 639	6 133
<i>Official Assignee of Madras v Mercantile Bank of India Ltd</i> [1935] AC 53	6 37
<i>Olympia and York Canary Wharf Ltd, Re</i> [1993] BCC 15	6 118
<i>Olympic Airlines SA, Re</i> [2015] UKSC 27	1 23
<i>Palk v Mortgage Services</i> [1993] Ch 330	3 279, 6 104
<i>Palmer v Carey</i> [1926] AC 703	6 30
<i>Pal SC Realisations 2007 Ltd2, Re</i> [2011] BCCC 933	6 152
<i>Panama, New Zealand and Australian Royal Mail C, Re</i> (1870) 5 Ch App 318	6 52, 71
<i>Pan Oceanic Maritime Inc, Re</i> [2010] EWHC 1734	1 94
<i>Paramount Airways Ltd, Re</i> [1990] BCC 130	6 2
<i>Paramount Airways Ltd, Re</i> [1993] Ch 223	6 261, 279, 285
<i>Parke & Sons Ltd v Hong Kong and Shanghai Banking Corp</i> [1990] ILRM 341	6 291
<i>Paul and Frank Ltd v Discount Bank (Overseas) Ltd</i> [1967] Ch 348	6 70
<i>Peachdart Ltd, Re</i> [1984] Ch 131	6 238
<i>Permacell Finesse Ltd, Re</i> [2008] BCC 208	6 152
<i>Pfeiffer Weinkellerei-Weineinkauf GmbH Co v Arbuthnot Factors Ltd</i> [1988] 1 WLR 150	6 238
<i>Plevin v Paragon v Personal Finance</i> [2014] UKSC 61	6 254
<i>Portbase Clothing Ltd, Re</i> [1993] Ch 388	6 210
<i>Primacom Holdings GmbH v Credit Agricole</i> [2011] EWHC 3746	6 160
<i>QMD Hotels Ltd Administrators</i> [2010] CSOH 168	6 151
<i>Raja v Austin Gray</i> [2002] EWCA Civ 1965, [2003] BPIR 725	6 97, 98
<i>Railtrack plc, Re</i> [2002] 2 BCLC 755	6 118
<i>Rodenstock GmbH</i> [2011] EWHC 1104, [2011] WLR (D) 150	6 160
<i>Rose v Watson</i> (1864) 10 HL Cas 672	6 44
<i>Rubin v Eurofinance SA</i> [2012] UKSC 46	6 261
<i>Sabre International Products Ltd, Re</i> [1991] BCLC 470	6 126
<i>Saltri III Ltd v MD Mezzanine SA</i> [2012] EWHC 3025(Comm), [2013] 1 All ER (Comm) 661	6 98
<i>Scott v Southern Pacific Mortgages Ltd</i> [2014] UKSC 52	6 226
<i>Sewell v Burdick</i> (1884) 10 App Cas 74	6 36
<i>Shoe Lace Ltd, Re</i> [1993] BCC 609	6 277
<i>Siebe Gorman v Barclays Bank</i> [1979] 2 Lloyd's Rep 142	6 5, 22, 214, 312
<i>Silven Properties Ltd v Royal Bank of Scotland</i> [2004] 1 WLR 997	6 96, 98
<i>Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend Borough Council</i> [2002] 1 AC 336	6 53
<i>Smith v Whiteman</i> [1909] 2 KB 437	6 173
<i>Standard Chartered Bank v Walker</i> [1982] 1 WLR 1410	6 97
<i>Standard Rotary Machine Co, Re</i> (1906) 95 LT 829	6 214
<i>Stucley, Re</i> [1906] 1 Ch 67	6 44
<i>Super Aguri F1 Ltd, Re</i> [2011] BCC 452	6 117
<i>Swiss Bank Corporation v Lloyds Bank Ltd</i> [1982] AC 584	6 28
<i>Tailby v Official Receiver</i> (1888) 13 App Cas 523	6 26, 69, 70, 246
<i>Tappenden v Artus</i> [1964] 2 QB 185	6 41
<i>Telewest (No 2), Re</i> [2005] BCC 36	6 162

<i>Thorniley v Revenue and Customs Commissioners</i> [2008] EWHC 124 (Ch), [2008] 1 WLR 1516	6 152
<i>Torkington v Magee</i> [1902] 2 KB 427	6 243
<i>Toshoku Finance (UK) plc, Re</i> [2002] 1 WLR 671	6 144
<i>Transbus International Ltd, Re</i> [2004] 2 All ER 911	6 155
<i>Transfield ER Cape Ltd, Re</i> [2010] EWHC 2851	1 94
<i>Trident Fashions</i> [2004] 2 BCLC 35	6 158
<i>Twinsectra Ltd v Yardley</i> [2002] 2 AC 164	6 250, 251
<i>US v Nolan</i> [2015] UKSC 63	6 106
<i>TXU Europe Group plc, Re</i> [2003] EWHC 3105 (Ch)	6 30
<i>Weddell v JA Pearce & Major</i> [1988] Ch 26	6 245
<i>Welsh Development Agency v Export Finance Co Ltd</i> [1992] BCLC 148	6 248
<i>Whale v Viaystems Ltd</i> [2002] EWCA Civ 480	6 227
<i>William Brandt's Sons & Co v Dunlop Rubber Co Ltd</i> [1905] AC 454	6 245
<i>Wills v Corfe Joinery Ltd</i> [1997] BCC 511	6 269
<i>Wilson v Kelland</i> [1910] 2 Ch 306	6 210, 215, 222, 224
<i>Woodroffes (Musical Instruments) Ltd, Re</i> [1986] Ch 366	6 63, 210
<i>Yeovil Glove Co Ltd, Re</i> [1965] Ch 148	6 277
<i>Yorkshire Woolcombers Association Ltd, Re</i> [1903] 2 Ch 284	6 52
<i>Your Response Ltd v Database Business Media</i> [2014] EWCA Civ 281	6 42, 190

UNITED STATES

<i>Board of Directors of Multicanal SA, Re</i> (2004) 314 BR 4	1 24
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TABLE OF ABBREVIATIONS

Abbreviation	Full text	Translation
AC	Law Reports, Appeal Cases (Third Series) (England)	–
AG	Advocate General (of the Court of Justice of the European Union)	–
AG	Amtsgericht (Germany)	lowest-instance court
AG	Aktiengesellschaft (Germany/ Austria)	(public) company limited by shares
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)	Civil Code
al.	et alii/et aliae/et alia	and others
ALR	Australian Law Review	–
All ER	All England Law Reports	–
a.M.	andere Meinung	disagreement, differing opinion
Anh.	Anhang	attachment, index, annex
AO	Ausgleichsordnung (Austria)	Act on the Composition with Creditors
App Cas	Law Reports Appeal Cases (Second Series) (England)	–
App.	Corte di appello (Italy)	Appeal Court
Art.	Article (of a statute)	–
Art. D.	Article d'un décret codifié (France)	Article of a Decree
Art. L.	Article d'une loi codifiée (France)	Article of a Law
Art. R.	Partie réglementaire d'un code (France)	Section of a Law Act
Az.	Aktenzeichen (Germany)	Reference Number
BAG	Bundesarbeitsgericht (Germany)	Federal Labour Court
BBTC	Banca, borsa e titoli di credito (journal, Italy)	Bank, stock exchange and credit instruments
BCC	British Company Law Cases	–

Abbreviation	Full text	Translation
BCCI	Bank of Credit and Commerce International	–
BCLC	Butterworths Company Law Cases (England)	–
Beschl.	Beschluss (Germany)	order
BGB	Bürgerliches Gesetzbuch (Germany)	Civil Code
BGH	Bundesgerichtshof (Germany)	Federal Supreme Court
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)	official journal of decisions of the Federal Supreme Court
BH	Bírósági Határozatok (Hungary)	case law report of the Supreme Court
BOE	Boletín Oficial del Estado (Spain)	Official Bulletin
BPIR	Bankruptcy and Personal Insolvency Reports	–
BR	Bankruptcy Reporter (journal)	–
BV	Besloten Vennootschap met beperkte aansprakelijkheid (Netherlands)	limited company
C	I contratti (journal, Italy)	Contracts (journal, Italy)
CA	Companies Act (England)	–
Cass. civ.	Corte Suprema di Cassazione civile (Italy)	Supreme Court (Civil)
Cass. civ.	Cour de cassation – Chambre civile (France)	Supreme Court – Civil Division
Cass. comm.	Cour de cassation – Chambre commerciale, financière et économique (France)	Supreme Court – Division for Business and Financial Litigation
CB	Common Bench Reports (England)	–
CC	Code civil (French)	Civil Code
CC	Código civil (Spain)	Civil Code
CCCat	Codi civil de Catalunya (Spain)	Civil Code of Catalonia
CCMA	Code of Conduct on Mortgage Arrears (England)	–

Abbreviation	Full text	Translation
CCo	Código de comercio (Spain)	Commercial Code
CComm.	Code de commerce (France)	Commercial Code
CEE	Central and Eastern Europe Legal Systems	–
CEO	Chief Executive Officer	–
CEU	Central European University	–
cf.	conferre	compare
CG	Corriere Giuridico (journal, Italy)	Law Journal
ch	chapter	–
Ch	Chancery Division	–
Ch App	Law Reports, Chancery Appeal Cases (England)	
Ch D	Law Reports, Chancery Division (England)	–
CL	Colección Legislativa de España (Spain)	Legislative Collection
CLC	CCH Commercial Law Cases	
CLR	Commonwealth Law Review (Australia)	–
CM	Common Bench Reports	–
Cmdn 8558	Command Papers Cork Review Committee Report on Insolvency Law and Practice 1982	–
CMon and Fin	Code monétaire et financier (France)	Monetary and Financial Code
COM	Commission	–
Comm	Commission	–
Comm	Commercial Division	–
COM (2014)	Commission Recommendation from the European Commission 2014	–
COM (2012)	Commission Recommendation from the European Commission 2012	–
COM (1999)	Financial Services Action Plan	–
COMI	Centre of Main Interests	–
CRD	Capital Requirements Directive	–
CRO	Companies Registration Office	–

Abbreviation	Full text	Translation
CRR	Capital Requirements Regulation	–
CSOH	Court of Session Outer House (Scotland)	–
CTMs	Common Trade Marks	–
CVA	Company Voluntary Agreement	–
CFR	Common Frame of Reference	–
DB	database	–
DCFR	Draft academic European Common Frame of Reference	–
DF	Il diritto fallimentare e delle società commerciali (periodical, Italy)	The law of insolvency and of business companies
DGRN	Dirección General de los Registros y del Notariado (Spain)	General Directorate of Registries and Notaries
Dir	Directive	–
dir. priv.	Diritto privato (Italy)	Civil Law
d.l.	Decreto legge (Italy)	Law Decree
d.lgs.	Decreto legislativo (Italy)	Legislative Decree
d.m.	Decreto ministeriale (Italy)	Ministerial Decree
d.P.R.	Decreto del Presidente della Repubblica (Italy)	Presidential Decree
EBRD	European Bank for Reconstruction and Development	–
EC	European Commission	–
EC	European Community (prior name for the European Union)	–
ECGI	European Corporate Governance Institute	–
ECJ	European Court of Justice	–
ECR	European Court Reports	–
ed.	edited	–
ed.	edition	–
ed(s).	editor(s)	–
e.g.	<i>exempli gratia</i>	for example
EFTA	European Free Trade Association	–
ECLI	European Case Law Identifier	–

Abbreviation	Full text	Translation
EIR	(EU) Regulation 2015/848 of 20 May 2015 on Insolvency Proceedings	–
ENAC Civile	Ente Nazionale per l'Aviazione (Italy)	National Body for Civil Aviation
Entsch.	Entscheidung (Austria)	decision
EO	Erwerbsersatzordnung (Switzerland)	Regulation for Income Compensation
EPC	European Patent Convention	–
ER	English Reports	–
et al.	et alii	and others
etc.	et cetera	and so on
et seq.	et sequentia	and that which follows
EU	European Union	–
EULIS	European Land Information Service	–
EuLR	European Law Reports	–
EvBl	Evidenzblatt der Rechtsmittel-Entscheidungen (journal, Austria)	Journal on Appeal Cases
EWCA (Civ)	Court of Appeal of England and Wales, Civil Division	–
EWHC (Ch)	High Court of England and Wales, Chancery Division	–
Ex	Law Reports, Exchequer Division (England)	–
F	Il Fallimento (journal, Italy)	Bankruptcy
ff.	and the following	–
Fl	Il Foro Italiano (journal, Italy)	–
fn.	footnote	–
FOGASA	Fondode Garantía Salarial (Spain)	wage guarantee fund
FP	Il Foro Padano (journal, Italy)	–
GBG	Grundbuchgesetz (Austria)	Land Registry Act
GI	Giurisprudenza italiana (journal, Italy)	Italian Law (Journal)
GBO	Grundbuchordnung (Germany)	Land Register Regulation

Abbreviation	Full text	Translation
GBV	Verordnung zur Durchführung der Grundbuchordnung (Germany)	Regulation on the Implementation of the Land Registry Code
GC	Giustizia civile (Italy)	Civil Law
GComm	Giurisprudenza commerciale (Italy)	Commercial Law
GDir	Guida al diritto (journal, Italy)	Guide to Law
Geo.	Geschäftsordnung für Gerichte I. und II. Instanz (Germany)	By-Laws for I. and II. level of jurisdiction
GmbH	Gesellschaft mit beschränkter Haftung	limited liability company
GmbHG	Gesetz betreffend die Gesellschaft mit beschränkter Haftung (Germany)	Limited Liability Companies Act
GmbHHR	Die GmbH-Rundschau (journal, Germany)	The GmbH Review
GSZ	Großer Senat des Bundesgerichtshofs (Germany)	Grand Panel of the Federal Supreme Court
GUG	Grundbuchumstellungsgesetz (Austria)	Act concerning changes or transfers of Land Registers
HGB	Handelsgesetzbuch (Germany)	Commercial Code
HKLRD	Hong Kong Law Reports & Digest	-
HL Cas	Clark & Finnelly's House of Lords Reports New Series (England)	-
HR Rep	House Report	-
HUF	Hungary Forint	Hungarian currency
IBAN	international bank account number	-
ibid.	ibidem	in the same place
ICAO	International Civil Aviation Organisation	-
i.e	id est	that is to say
IEHC	High Court of Ireland	-
IESC	Supreme Court of Ireland	-
IILR	International Insolvency Law Review (journal)	-
ILRM	Irish Law Reports Monthly	-
inc	incorporated	-
InDret	InDret Revista para el Análisis del Derecho (journal, Spain)	InDret Journal of Legal Analysis

Abbreviation	Full text	Translation
IR	Irish Reports	–
in <i>Re</i>	in the matter of	–
InsO	Insolvenzordnung (Germany)	Insolvency Regulation
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals*	–
IP	insolvency practitioner	–
IO	Insolvenzordnung (Austria)	Insolvency Act
ITR	Ridgeway, Lapp & Schoales Irish Term Reports	–
J	Justice of Her Majesty's High Court (England)	–
JBl	Juristische Blätter (journal, Austria)	Law Papers
KB	Law Reports, King's Bench (England)	–
KO	Konkursordnung (Austria)	Former Insolvency Regulation
L.	Legislativo (Spain)	Law
L.	Legge (Italy)	Law
La. Civ.	Louisiana Civil Code	–
Law Com	The Law Commission (England)	–
LBF	Lehman Brothers Finance AG	–
LBIE	Lehman Brothers International (Europe)	–
LC	Ley Concursal (Spain)	Insolvency Act
LEC	Ley de Enjuiciamiento Civil (Spain)	Procedure Law
LEH	Ley de Enjuiciamiento Civil (Spain)	Civil Procedure Act
L.Fall.	Legge Fallimentare (Italy)	Insolvency Law
LH	Ley Hipotecaria (Spain)	Mortgage Law
LHMPSD	Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento (Spain)	Law on Chattel Mortgage and Non Possessory Pledge
LJ	Lord Justice of Appeal (England)	–
Lloyd's Rep Bank	Lloyd's Law Reports Banking (England)	–
Lloyd's Rep	Lloyd's Law Report (England)	–

* The European branch has a database of relevant European case law available on LexisLibrary.

Abbreviation	Full text	Translation
LLP	limited liability partnership	–
LMV	Ley del Mercado de Valores (Spain)	Law on Securities Markets
LNA	Ley de Navegación Aérea (Spain)	Aviation Law
LNM	Ley de Navegación Marítima (Spain)	Law on Shipping
LR	Law Reports (1 st Series) (England)	–
L. Rev.	Law Review	–
Ltd	limited	–
LuftFzgG	Gesetz über Rechte an Luftfahrzeugen (Germany)	Act on Rights in Aircrafts
LVPBM	Ley de Venta a Plazos de Bienes Muebles (Spain)	Law on Hire Purchase Agreements
MAO	Mortgaging of Aircraft Order 1972 (England)	–
MCA	Master Custody Agreement	–
MCC	Maxwell Communication Corp plc	–
MDR	Monatszeitschrift für deutsches Recht (journal, Germany)	Monthly Journal for German Law
MER	Merivale's Chancery Reports (England)	–
MFI	Massimario del Foro Italiano (journal, Italy)	Law Report arranged by the journal 'Foro Italiano'
MFJ	Maxwell Finance Jersey	–
MGC	Massimario di Giustizia Civile (journal, Italy)	Law Report arranged by the journal 'Giustizia Civile'
MGl	Massimario di Giurisprudenza del Lavoro (journal, Italy)	Law Report on Labour Law
MittRhNotK	Mitteilungen der Rheinischen Notarkammer (journal, Germany)	Rhenish Notaries' Chamber Notifications
MLJ	Malayan Law Journal	–
N	Notariato (journal, Italy)	Public Notaries
NGOs	non-governmental organisations	–
NJW	Neue Juristische Wochenschrift (Germany)	New Jurists' Weekly Journal

Abbreviation	Full text	Translation
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report (Germany)	New Jurists' Weekly Journal Case Law Report
No.	number	–
NO	Notariatsordnung (Austria)	Notarial Code
Nr.	Nummer (Germany)	number
NR	National Report	–
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht (Germany)	New Insolvency and Restructuring Law Journal
NZLR	New Zealand Law Reports	–
ÖBA	Zeitschrift für das gesamte Bank- und Börsenwesen (Austria)	Journal of Banking and Financial Research
OECD	Organisation for Economic Cooperation and Development	–
OGH	Oberster Gerichtshof (Austria)	Highest Court
OJ	Official Journal of the European Communities	–
ÖJZ	Österreichische Juristenzeitung (Austria)	Lawyers Journal
OLG	Oberlandesgericht (Germany)	Upper State Court*
OMC	Open Method of Coordination	–
Öster.	Österreichische	Austrian (referring to a decision)
OR	European Insolvency Regulation (Old Regulation)	–
OVPBM	Ordenanza de la Ley Venta a Agreements Plazos de Bienes Muebles (Spain)	Ordinance on the Law on Hire Purchase
Oy	Osakeyhtiö (Finland)	incorporated company
p.	page	–
para(s).	paragraph(s)	–
PatG	Patentgesetz (Austria)	Patent Act
PAYE	pay as you earn	–
PBl	Österreichisches Patenblatt (Austria)	Patent Law Papers

* Instance above Landgericht but below the Federal Supreme Court with mostly appellate but some original jurisdiction.

Abbreviation	Full text	Translation
P & CR	Planning and Compensation Reports (journal, England)	–
plc	public limited company (England)	–
PMSI	Purchase Money Security Interests	–
PRA	Pubblico Registro Automobilica (Italy)	Public Automobile Register
PRIMA	place of the relevant intermediary approach	–
PPSAs	Personal Property Security Acts	–
QB	Law Reports, Queen's Bench Division (England)	–
QBD	Law Reports, Queen's Bench Division (England)	–
RAN	Registro Aeronautico Nazionale (Italy)	National Aeronautical Register
RD	Real Decreto (Spain)	Royal Decree
r.d.	Regio decreto (Italy)	Royal Decree
RDGRN	Resolución de la Dirección General de los Registros y del Notariado (Spain)	Resolution of the General Directorate of Registries and Notaries
r.d.l.	Regio decreto legge (Italy)	Royal Decree
RdTW	Recht der Transportwirtschaft (journal, Germany)	Transport Business Law
Reg.	Regulation	–
RH	Reglamento Hipotecario (Spain)	Mortgage Regulation
RJ	Repertorio de Jurisprudencia (Spain)	Collection of Court Decisions
RN	Reglamento Notarial (Spain)	Notarial Code
RN	Rivista del Notariato (journal, Italy)	Journal on Notaries
ROT	retention of title	–
RRM	Reglamento del Registro Mercantil (Spain)	Regulation of the Business Registry
s.	section	–
SA	Société Anonyme (France)	(public) company limited by shares
Sch.	schedule	–

Abbreviation	Full text	Translation
SchiffRegO	Schiffsregisterordnung (Germany)	Ship Register Regulation
SchiffRG	Schiffsregistergesetz (Germany)	Maritime Register Act
SchiffRG	Schiffsregistergesetz (Austria)	Act on Rights over Registered Ships and Ships under Construction
Sez. Un.	Sezioni Unite (Italy)	United Chambers of the Italian Supreme Court of Cassation
SIP 16	Statement of Insolvency Practice 16	–
SJD	Scientiae Juridicae Doctor	Doctor of Laws
S.p.A.	Società per Azioni (Italy)	corporation
SREIR	Security Rights & European Insolvency Regulation	–
STS	Sentencia del Tribunal Supremo (Spain)	Supreme Court Decision
SSTS	Sentencia del Tribunal Supremo (Spain)	Supreme Court Decision
SWD	Commission Staff Working Document	–
SZ	Amtliche Sammlung Zivilrecht (Austria)	Official Journal of Civil Law Decisions
TLR	Times Law Reports (England)	–
TS	Tribunal Supremo de España (Spain)	Supreme Court
UAM	Universidad Autónoma de Madrid (Spain)	–
UCC	Uniform Commercial Code	–
UCM	Universidad Complutense de Madrid (Spain)	–
UC3M	Universidad Carlos III de Madrid (Spain)	–
UGB	Unternehmensgesetzbuch (Austria)	Companies Act
UHG	Urkundenhinterlegungsgesetz (Austria)	Act on the Deposit of Documents
UIBM	Ufficio Italiano Brevetti e Marchi (Italy)	Office of Patents and Trademark
UK	United Kingdom	–

Abbreviation	Full text	Translation
UKPC	United Kingdom Privy Council	–
UKSC	United Kingdom Supreme Court	–
UNCITRAL	United Nations Commission on International Trade Law	–
UrhG	Urheberrechtsgesetz (Germany)	Copyright Act
Urt.	Urteil (Germany)	judgment
US	United States (of America)	–
USAID	United States Agency for International Development	–
v	vom	of (referring to a date)
v	versus	against, in contrast to
VAT	Value Added Tax	–
V(-)C	Vice Chancellor High Court (England)	–
Ves	Vesey Junior's Chancery Reports (England)	–
Vol.	Volume	–
WM	Zeitschrift für Wirtschafts- und Bankrecht (journal, Germany)	Business and Banking Law
WN	Weekly Notes of Cases (England)	–
WLR	Weekly Law Reports (England)	–
WW	World War	–
ZB	Registerzeichen Beschwerden BGH (Germany)	Register
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (Germany)	Journal for Insolvency Law
ZIP	Zeitschrift für Wirtschaftsrecht (Germany)	Journal for Business Law
ZPO	Zivilprozessordnung (Germany)	Code of Civil Procedure
ZVG	Gesetz über die Zwangsversteigerung und Zwangsverwaltung im Wege der Zwangsvollstreckung	Act on Forced Auctions