Universiteit Leiden
The Netherlands

Recognition of foreign bank resolution actions

Guo, S.

Citation

Guo, S. (2020, November 17). *Recognition of foreign bank resolution actions*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/138380

Version:	Publisher's Version
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/138380

Note: To cite this publication please use the final published version (if applicable).

Cover Page

Universiteit Leiden

Leiden University
Repository

The handle http://hdl.handle.net/1887/138380 holds various files of this Leiden University dissertation.

Author: Guo, S.
Title: Recognition of foreign bank resolution actions
Issue date: 2020-11-17

E.M.
MEIJERS
INSTITUUT

INSTITUUT VOOR
RECHTSWETENSCHAPPELIJK
ONDERZOEK

Recognition of foreign bank resolution actions

S. GUO

Recognition of Foreign Bank Resolution Actions

Recognition of Foreign Bank Resolution Actions

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 17 november 2020
klokke 15.00 uur

door

Shuai Guo

geboren te Jiangsu, China

in 1991

Promotoren: prof. dr. M. Haentjens
prof. dr. R.D. Vriesendorp

Promotiecommissie: prof. dr. S.J. Schaafsma
prof. dr. J.L. Westbrook (The University of Texas at Austin, USA)
prof. dr. J. Shi (Renmin University, Beijing, China)
prof. dr. I. Tirado (Universidad Autónoma de Madrid, Spain)

This research project is funded by the China Scholarship Council (CSC) and the Leiden University Fund (LUF).

Lay-out: AlphaZet prepress, Bodegraven
Printwerk: Ipskamp Printing

© 2020 Shuai Guo

Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enig andere manier, zonder voorafgaande schriftelijke toestemming van de auteur.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission of the author.

Acknowledgements

I have received tremendous guidance and support from colleagues, friends and family members, who encouraged and helped me through this struggling yet fruitful journey. I am thankful to all of them, from whom I benefit a lot.

First of all, I give my heartfelt gratitude to my supervisors, Prof. Reinout Vriesendorp and Prof. Matthias Haentjens, who coached me with their broad knowledge and rich experience and led me to the academic world. Many thanks also go to Prof. Bob Wessels, who has always been supportive during my PhD times and provided me with a variety of research opportunities; to Prof. Qingjiang Kong, who first introduced me to the topic of bank resolution and encouraged me at the beginning to pursue an academic career; to Prof. Jay Westbrook who generously welcomed and guided me in Austin, where we had lively discussions about US law and acted as one of my doctorate committee members. I must thank also my other doctorate committee members, Prof. Jingxia Shi, Prof. Ignacio Tirado, and Prof. Sierd Schaafsma, who offered their precious time and efforts to read my manuscript and gave their insightful comments.

I am grateful to all the colleagues I met during various conferences and workshops, who provided me with valuable comments on my research. I have mentioned all their names in each chapter. I thank all my colleagues from the Private Law Institute, in particular, of the Company Law Department and Hazelhoff Centre for Financial Law, for creating a stimulating working environment. My appreciation also goes to my friends in the Netherlands, who have been a lot of help since I first arrived in Leiden, and living alone in a foreign country could not have been done be without them.

Last but not least, I thank my parents, who are always confident in me and supported me financially and emotionally when I lived in the Netherlands. I am truly indebted to them, and this dissertation could never have been accomplished without their love.

Table of Contents

Acknowledgements V

List of Abbreviations XV

Table of Cases XIX

Part I Introductory Chapters 1

1 Introduction 3
1.1 New bank resolution law and its international aspects 3
1.2 Research question 7
1.3 Terminology 9
1.4 Methodology 10
1.4.1 Positive law analysis: comparative law 11
1.4.2 Normative analysis: policy goals and legal doctrines 14
1.5 Outline 18

2 Cross-border Bank Resolution: Definitions and Scenarios 19
2.1 The concept of bank resolution 19
2.1.1 Corporate insolvency and bank insolvency 19
2.1.2 Bank resolution: a new administrative regime 23
2.1.3 Resolution within insolvency 27
2.1.4 Resolution toolbox 29
2.2 Recognition of foreign resolution actions: different scenarios 35
2.2.1 Scenarios 35
2.2.2 Single point of entry v multiple points of entry 37
2.2.3 Active recognition v passive recognition 39

Part II Comparative Studies in the Selected Jurisdictions 41

3 The EU 43
3.1 Introduction 43
3.2 Regulation, supervision and resolution in the EU banking sector 44
3.2.1 Regulation and supervision 44
3.2.2 Resolution 47
3.3 Recognition of foreign resolution actions in the EU 54
3.3.1 Legal grounds for recognition 54

3.3.2 Public policy exception 66
3.4 Concluding remarks 68

4 The US 71
4.1 Introduction 71
4.2 Regulation, supervision and resolution in the US banking sector 72
4.2.1 Regulation and supervision 72
4.2.2 Resolution 76
4.3 Recognition of foreign resolution actions in the US 82
4.3.1 Legal grounds for recognition 82
4.3.2 Public policy exception 95
4.4 Concluding remarks 98

5 China 99
5.1 Introduction 99
5.2 Regulation, supervision and resolution in the Chinese banking sector 100
5.2.1 Regulation and supervision 100
5.2.2 Resolution 103
5.3 Recognition of foreign resolution actions in China 106
5.3.1 Legal grounds for recognition 106
5.3.2 Public policy exception 115
5.4 Concluding remarks 117

Part III Analysis from the Perspectives of Private International Law, Financial Law and Insolvency Law 119

6 Grounds for Recognition 121
6.1 Introduction 121
6.2 Theoretical Framework 122
6.2.1 Recognition of foreign judgments 122
6.2.2 Recognition of foreign insolvency proceedings 130
6.2.3 Recognition of foreign resolution actions 137
6.3 Grounds for recognition in the selected jurisdictions 141
6.3.1 Prerequisites for recognition 141
6.3.2 Procedures for recognition 145
6.4 Comparison and evaluation 146
6.4.1 Should reciprocity be a pre-condition for recognition? 146
6.4.2 How should jurisdiction be determined? 148
6.4.3 What are the conditions for and effects of recognition of a foreign resolution proceeding? 154
6.4.4 What are the conditions for and effects of recognition of a foreign resolution measure? 159
6.5 Concluding remarks 169

7 Financial Stability and Resolution Objectives 171
7.1 Introduction 171
7.2 Theoretical framework 172
7.2.1 Financial stability as an overarching objective of international financial regulation 172
7.2.2 Financial stability and resolution objectives 183
7.3 Financial stability in the selected jurisdictions 188
7.3.1 Resolution objectives in domestic resolution 188
7.3.2 Foreign interest consideration in cross-border cases 195
7.4 Comparison and evaluation 197
7.4.1 Why should financial stability be invoked as a reason not to recognise foreign resolution actions? 197
7.4.2 How should local financial stability (and local critical functions) be interpreted? 200
7.4.3 How should national fiscal policies be evaluated? 204
7.5 Concluding remarks 209

8 Creditors' Position 211
8.1 Introduction 211
8.2 Theoretical framework 212
8.2.1 Creditors in recognition of foreign corporate insolvency proceedings 212
8.2.2 Creditors in recognition of foreign resolution measures 226
8.3 Creditors' positions in the selected jurisdictions 232
8.3.1 Equal treatment of creditors 232
8.3.2 Host creditors' interest in the recognition proceedings 236
8.4 Comparison and evaluation 237
8.4.1 How should circumstances be interpreted as discriminatory? 237
8.4.2 Should the difference in laws be as a reason to refuse to recognise or support foreign resolution measures? 240
8.4.3 Should governing law provisions be the reason to refuse to recognise or support foreign resolution actions? 253
8.5 Concluding remarks 255

Part IV Conclusions 257

9 A Future Framework for Recognition of Foreign Resolution Actions 259
9.1 FSB standards and implementation in national law instruments 259
9.2 Choice of international instruments 262
9.2.1 International agreements 262

9.2.2 Model law (soft law) 266
9.2.3 Customary international law 268
9.3 Concluding remarks 272

10 Conclusions 273

Bibliography 283

Summary 303

Samenvatting (Summary in Dutch) 309

Curriculum vitae 317

List of Abbreviations

ABC	Agricultural Bank of China
AIG	American International Group
ALI	American Law Institute
AT1 Capital	Additional Tier 1 Capital
BCBS	Basel Committee on Banking Supervision
BCCI	Bank of Credit and Commerce International
BHCA	Banking Holding Company Act
BIS	Bank for International Settlements
BOC	Bank of China
BOE	Bank of England
BRI	Belt and Road Initiative
BRRD	Bank Recovery and Resolution Directive
Capital Guidance	Supervisory Guidance on Capital Instruments Innovation for Commercial Banks
Capital Rules	Measures for the Management of Capitals of Commercial Banks
CBIRC	China Banking and Insurance Regulatory Commission
CBIRRR	Commercial Bank Insolvency Risk Resolution Regulation
CBL	Commercial Bank Law
CBRC	China Banking Regulatory Commission
CCB	China Construction Bank
CCP	Central Counterparty
CET1 Capital	Common Equity Tier 1 Capital
CIL	Customary International Law
CIWUD	Directive on Reorganisation and Winding-up of Credit Institutions
CJEU	Court of Justice of the European Union
CMG	Crisis Management Group
CPL	Civil Procedural Law
CoAg	Cooperation Agreement
COMI	Centre of Main Interest
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
CSRC	China Securities Regulatory Commission
DIF	Deposit Insurance Fund
DIFMI	Deposit Insurance Fund Management Institution
DIR	Deposit Insurance Regulation

Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act
DSG	Deposit Guarantee Scheme
DSG Directive	Directive on Deposit Guarantee Schemes
EBA	European Banking Authority
EBL	Enterprise Bankruptcy Law
ECB	European Central Bank
EFTA	European Free Trade Association
EIR	European Insolvency Regulation
ESDS	European System of Financial Supervision
EIOPA	European Insurance and Occupational Pension Authority
ESCB	European System of Central Banks
ESM	European Stability Mechanism
ESMA	European Securities Markets Authority
ESRB	European Systemic Risk Board
EU	European Union
FBO	Foreign Banking Organization
FCRG	Financial Crisis Response Group
FDIA	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FDICIA	Federal Deposit Insurance Corporation Improvement Act
Fed	Federal Reserve System
FFBR	Foreign Funded Banks Regulation
FFBRIR	Implementing Rules for the Foreign Funded Banks Regulation
FMI	Financial Market Infrastructure
FRA	Federal Reserve Act
FRB	Federal Reserve Board
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSB Principles	Principles for Cross-border Effectiveness of Resolution Actions
FSDC	Financial Stability and Development Committee
FSF	Financial Stability Forum
FSI	Financial Stability Institute
FSOC	Financial Stability Oversight Council
GFC	Global Financial Crisis
G-SIB	Global Systemically Important Bank
G-SII	Global Systemically Important Institution
HCCH	Hague Conference on Private International Law
IBA	International Banking Act
IBRD	International Bank for Reconstruction and Development
ICBC	Industrial and Commercial Bank of China

ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
IDA	International Development Association
IFC	International Finance Corporation
IHC	Intermediate Holding Company
IMF	International Monetary Fund
IP	Insolvency Practitioner
IPU	Intermediate EU Parent Undertaking
ISDA	International Swaps and Derivatives Association
JMC	Joint Ministerial Committee
JV Bank	Joint Venture Bank
KAAM	Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution for Financial Institutions in the Banking Sector
Key Attributes/KAs	Key Attributes of Effective Resolution Regimes for Financial Institutions
LAL	Law on Application of Law for Foreign Related Civil Relationships
MIGA	Multilateral Investment Guarantee Agency
MLCBI	Model Law on Cross-border Insolvency
MLCBI Guide	Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency
MLJ	Model Law on Recognition and Enforcement of Insolvency-Related Judgments
MPE	Multiple Points of Entry
MOF	Ministry of Finance
MOU	Memorandum of Understanding
NAFMII	National Association of Financial Market Institutional Investors
NBA	National Bank Act
NCA	National Currency Act
NCWO	No Creditor Worse Off Than In Liquidation
NPC	National People's Congress
NRA	National Resolution Authority
OBOR	One Belt One Road
OCC	Office of the Comptroller of the Currency
OFR	Office of Financial Research
OLA	Orderly Liquidation Authority
OTC	Office of Thrift Supervision
PBOC	People's Bank of China
PBOCL	People's Bank of China Law
QFC	Qualified Financial Contract
QFII	Qualified Foreign Institutional Investor
RRP	Recovery and Resolution Plan

RSBIL	Law on Regulation and Supervision over the Banking Industry
RWA	Risk-weighted Asset
SIFI	Systemically Important Financial Institution
SIFI Guiding Opinions	Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions
SLHC	Savings and Loan Holding Company
SLHCA	Savings and Loan Holding Company Act
SPC	Supreme People's Court
SPE	Single Point of Entry
SPV	Special Purpose Vehicle
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRMR	Single Resolution Mechanism Regulation
SSM	Single Supervisory Mechanism
T1 Capital	Tier 1 Capital
T2 Capital	Tier 2 Capital
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TLAC	Total Loss-absorbing Capacity
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States
WB	World Bank
WFO Bank	Wholly Foreign-owned Bank

Table of Cases

Austria

Austrian Constitutional Court, decision of 3 July 2015, AT:VFGH:2015:G239.2014.

China

(2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.
(2005) Sui Zhong Fa Min San Chu Zi No.146 Civil Ruling.
(2012) E Wu Han Zhong Min Shang Wai Chu Zi No.00016 Civil Ruling.
(2012) Pu Min Er (Shang) Chu Zi No. 1119 Civil Judgment.
(2014) Min Si Zhong Zi No 20 Civil Ruling.
(2016) Su 01 Xie Wai Ren No.3.

CJEU

Judgment of 2 May 2006, Eurofood IFSC Ltd, C-341/04 EU:C:2006:281.

Judgment of 20 October 2011, Interedil Srl v. Fallimento Interedil Srl et al., C-396/ 09, EU:C:2011:671.

Judgement of 27 November 2012, Thomas Pringle v Government of Ireland and others, C-370/12 EU:C:2012:765.

Judgment of 24 October 2013, LBI hf v Kepler Capital Markets SA and Frédéric Giraux, C-85/12 EU:C:2013:697.

Judgment of 11 June 2015, Comité d'entreprise de Nortel Networks SA and Others v Cosme Rogeau liquidator of Nortel Networks SA and Cosme Rogeau liquidator of Nortel Networks SA v Alan Robert Bloom and Others, C-649/13 EU:C:2015:384.

Judgement of 16 July 2015, Diageo Brands BV v Simiramida-04 EOOD, C-681/13 EU:C:2015:471.

Judgment of 19 July 2016, Tadej Kotnik and Others v Državni zbor Republike Slovenije, C-526/14 EU:C:2016:570.

EFTA

Judgment of EFTA Court, EFTA Surveillance Authority v Iceland, E-16/11, 28 January 2013.

Germany

Bayern LB v Hypo Alpe Adria (HETA), Regional Court Munich I, Judgment of 8 May 2015, 32 O 26502/12.

Bayern LB v Hypo Alpe Adria (HETA), Higher Court of Munich, Judgment of 25 June 2018, 17 U 2168/15.

Hong Kong

Chiyu Banking Corp. Ltd. v. Chan Tin Kwun, [1996] S H.K.L.R. 395, 399 (H.C.).

The Netherlands

ECLI:NL:HR: 2013: BZ5668.
ECLI:NL:HR:2019: 54.

Singapore

In the Matter of Zetta Jet Pet. Ltd. and Zetta Jet USA, Inc [2019] SGHC 53.

United Kingdom

Adams v National Bank of Greece S.A. [1960] 3 W.L.R. 8; [1961] A.C. 255 (HL).
Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399 (CA).
Bank of Credit and Commerce International S.A. (No.10), In re [1997] Ch. 213.
Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26; [2007] 1 AC 508 (PC, IoM).
Clarke v Fennoscandia Ltd [2007] UKHL 56.
Collins & Aikman Europe SA, Re [2006] EWCH 1343 (Ch); [2006] B.C.C.
Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA, Goldman Sachs International v Novo Banco SA [2016] EWCA Civ 1092, [2016] 2 CLC 690.
Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA [2015] EWHC 2371 (Comm), [2015] 2 CLC 475.
Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683.
HIH Casualty & General Insurance Ltd, Re [2008] UKHL 21.
Holman v Johnson (1775) 1 Cowper 341, 98 E.R. 1120.
McCartney, Re [1921] 1 Ch. 522.
National Bank of Greece and Athens S.A. v Metliss [1957] 3 W.L.R. 1056; [1958] A.C. 509 (HL).
Nouvion v Freeman (1889) 15 App. Cas. 1.
OJSC International Bank of Azerbaijan, Re [2018] EWCA Civ 2802, [2018] 12 WLK 286 [29], on appeal from [2018] EWHC 59 (Ch).
Rubin v Eurofinance SA [2012] UKSC 46 [30]; [2013] 1 A.C. 235 (SC), on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971.
Schibsby v Westenholz [1870] L.R. 6 Q.B. 155.
Secretary of State for Trade and Industry v Frid [2004] 2 A.C. 506 (HL).
Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36; [2015] A.C. 1675.
Stein v Blake [1996] A.C. 243 (HL).
Trendtex Trading Corp v Central Bank of Nigeria [1977] QB 529, [2977] 2 WLR 356, [1977] 1 ALL ER 881.
Videology Limited, Re [2018] EWHC 2186 (Ch).
Westfal-Larsen AS v Ikerigi Naviera SA [1983] 1 All E.R. 382.

United States

ABC Learning Ctrs., In re, 728 F.3d 301 (3d Cir. 2013).
Agrokor, In re, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).
Allstate Insurance Co. v. Hughes, 174 B.R. 884 (S.D.N.Y. 1994).
Arcapita Bank B.S.C. (c), In re, 575 B.R. 229 (Bankr. S.D.N.Y. 2007).
Aria Inc v Credit Agricole Corporate and Investment Bank [2014] EWHC 872.
Artimm S.r.L., In re, 335 B.R. 149 (Bankr.C.D.Cal. 2005).
Ashapura Minechem Ltd., In re, 480 B.R. 129 (S.D. N.Y. 2012).
Assoc. of St. Croix Condo. Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir.1982).
Atlas Shipping A/S, In re, 404 B.R. 726 (Bankr. S.D.N.Y. 2009).
Avanti Commc'n Grp. PLC, In re, 582 B.R. 603 (Bankr.S.D.N.Y. 2018).
AWAL Banking, In re, 455 B.R. 73 (Bankr.S.D.N.Y. 2011).
Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd., In re, 375 B.R. 122 (Bankr.S.D.N.Y. 2007).
Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd., In re, 389 B.R. 325 (S.D.N.Y. 2008).
Betcorp. Ltd., In re, 400 B.R. 266, 290 (Bankr.D.Nev. 2009).
Board of Directors of Hopewell International Insurance Ltd., In re, 238 B.R. 25 (Bankr.S.D.N.Y. 1999).
Board of Directors of Hopewell International Insurance Ltd., In re, 375 B.R. 699 (S.D.N.Y. 2002).
Board of Directors of Multicanal S.A., In re, 314 B.R. 486, 505 (Bankr.S.D.N.Y. 2004).
Board of Directors of Multicanal S.A., In re, 331 B.R. 537 (S.D.N.Y. 2005).
British American Ins Co Ltd, In re, 425 B.R. 884 (Bankr.S.D.Fla. 2010).
British American Insurance Co. Ltd, In re, 488 B.R. 205 (Bankr. S.D. Fla. 2013).
British American Isle of Venice (BVI), Ltd., In re, 441 B.R. 713 (Bankr.S.D.Fla. 2010).
Brown, In re, 354 B.R. 591 (D.R.I. 2006).
Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527 (1883).
Commodore International, Ltd, 242 B.R. 243 (Bankr. S.D.N.Y. 1999).
Cowans v Ticonderoga Pulp and Paper Co., 219 App. Div. 120, 219 N.Y. Supp. 284, aff'd, 246 N.Y. 603, 159 N.E. 669 (1927).
Cozumel Caribe S.A. de C.V., In re, 482 B.R. 96, 114-115 (Bankr. S.D.N.Y. 2012).
Creative Finance Ltd., In re, 543 B.R. 498 (Bankr. S.D. N.Y. 2016).
Elpida Memory Inc., In re, 2012 WL 6090194, 4 (Bankr. D. Del. 2012).
ENNIA Caribe Holding N.V., In re, 594 B.R. 631 (Bankr.S.D.N.Y. 2018).
Ephedra Products Liability Litigation, In re, 349 B.R. 333 (S.D.N.Y. 2006).
Erie Railroad v Tompkins, 304 U.S. 64 (1938).
Fairfield Sentry, In re, 400 B.R. 60 (Bankr.S.D.N.Y. 2010).
Fairfield Sentry, In re, 714 F.3d 127 (2d Cir. 2013).
Fairfield Sentry, In re, 768 F.3d 239 (2nd Cir. 2014).
Hilton v Guyot, 159 U.S. 113 (1895).
Gold & Honey, Ltd., In re, 410 B.R. 357 (Bankr.E.D.N.Y. 2009).

International Banking Corp., In re, 439 B.R. 614 (Bankr.S.D.N.Y 2010).
Ionica PLC, In re, 241 B.R. 829 (Bankr. S.D.N.Y. 1999).
Iridium Operating LLC, In re, 285 B.R. 822 (S.D.N.Y. 2002).
Irish Bank Resolution Corporation Ltd., In re, 538 B.R. 692 (D. Del. 2015).
Johnson v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926).
Kemsley, In re, 489 B.R. 436 (Bankr.S.D.N.Y. 2013).
Lee, In re, 472 B.R. 156 (Bankr.D.Mass. 2012).
Lida, In re, 377 B.R. 243 (9th Cir. BAP 2007).
Loy, In re, 432 B.R. 551 (E.D. Va. 2010).
Manley Toys Limited, In re, 580 B.R. 632 (Bankr.D.N.J. 2018).
Metcalfe & Mansfield Alternative Investments, In re, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).
Millennium Global Emerging Credit Master Fund Ltd., In re, 458 B.R. 63 (Bankr.S.D.N.Y. 2011).
Millennium Global Emerging Credit Master Fund Ltd., In re, 474 B.R. 88 (S.D.N.Y. 2012).
Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014).
OAS S.A., In re, 533 B.R. 83 (Bankr.S.D.N.Y. 2015).
Oi Brasil Holdings Coöperatief U.A., In re, 578 B.R. 169 (Bankr.S.D.N.Y. 2017).
Paine v Schenectady Ins. Co., 11 R.I. 411, 412 (R.I. Sup. Ct. 1876).
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).
Petroforte Brasileiro de Petroleo Ltda., In re, 542 B.R. 899 (Bankr. S.D. Fla. 2015).
Platinum Partners Value Arbitrage Fund L.P., In re, 583 B.R. 308 (Bankr. S.D.N.Y. 2018).
Qimonda AG, In re, 433 B.R. 547 (E.D.Va. 2010).
Qimonda AG, In re, 462 B.R. 165 (Bankr.E.D.Va. 2011).
Qui Financing LLC v Dellar, 2013 WL 5568732 (S.D.N.Y.2013).
Ran, In re, 607 F.3d 1017 (5th Cir. 2010).
Rede Energia S.A., In re, 515 B.R. 69 (Bankr.S.D.N.Y. 2014).
Sivec SRL, In re, 2011 WL 3651250 (Bankr.E.D.Okla. 2011).
SPhinX Ltd., In re, 351 B.R. 103 (Bankr.S.D.N.Y. 2006).
SPhinX, Ltd., In re, 371 B.R. 10 (Bankr.S.D.N.Y. 2007).
SunEdision, Inc., In re, 577 B.R. 120 (Bankr.S.D.N.Y. 2017).
Toft, In re, 453 B.R. 186 (Bankr.S.D.N.Y. 2011).
Tradex Swiss AG, In re, 384 B.R. 34 (Bankr.D. Mass. 2008).
Tri-Cont'l Exch. Ltd., In re, 349 B.R. 627 (Bankr.E.D.Cal. 2006).
Vitro, SAB de CV, In re, 473 B.R. 117, 132 (Bankr.N.D.Tex. 2012).
Vitro, SAB de CV, In re, 701 F.3d 1031 (5th Cir. 2012).
Zhejiang Topoint Photovoltaic Co., Ltd., In re, case 14-24549 (Bankr.D.N.J. Aug 12, 2014).

Part I

Introductory Chapters

1 Introduction

1.1 New bank resolution law and its international aspects

After the global financial crisis (GFC) in 2007/2008, world leaders from G20 countries reached a consensus on the importance of 'strengthening transparency and accountability, enhancing sound regulation, promoting integrity in financial market and reinforcing international cooperation'.[1] They called for the development of 'resolution tools and frameworks for the effective resolution of financial groups to help mitigate the disruption of financial institution failures and reduce moral hazard in future', *inter alia,* 'crisis management groups for the major cross-border firms'.[2] Much research has been done on causes of the financial crisis, the issue of 'too-big-to-fail', as well as on new mechanisms to address the problem of ailing financial institutions.[3]

Against this background, resolution emerged as the new response to the GFC.[4] The intent is to prevent systemic failure and to avoid sacrificing taxpayers' money to bail out banks. International organisations such as the Basel Committee on Banking Supervision (BCBS), the International

[1] G20, 'Declaration on Strengthening the Financial System – London Summit' (2 April 2009) 1.

[2] G20, 'Leaders' Statement – The Pittsburgh Summit' (24-25 September 2009) 9.

[3] See, e.g., Andrew Ross Sorkin, *Too big to fail: the inside story of how Wall Street and Washington fought to save the financial system--and themselves* (Penguin 2010); David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (John Wiley & Sons 2010); Todd A Gormley, Simon Johnson and Changyong Rhee, *Ending "Too Big To Fail" Government Promises vs. Investor Perceptions* (National Bureau of Economic Research 2011); Viral V Acharya, *The Social Value of the Financial Sector Too Big to Fail or Just Too Big?* (Thorsten Beck and Douglas D Evanoff eds, World Scientific Publishing 2013); Andreas Dombret, *Too Big to Fail III Should We Break Up the Banks?* (Patrick S. Kenadjian ed, De Gruyter 2015).

[4] See, e.g., Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010); Patrick S Kenadjian (ed), *The Bank Recovery and Resolution Directive Europe's Solution for "Too Big To Fail"?* (De Gruyter 2013); Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution A Conference Book* (Eleven International Publishing 2014); Sven Schelo, *Bank Recovery and Resolution* (Kluwer Law International 2015); Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Jens-Hinrich Binder and Dalvinder Singh (eds), *Bank Resolution: The European Regime* (OUP 2016); Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016); Simon Gleeson and Randall D Guynn, *Bank Resolution and Crisis Management: Law and Practice* (OUP 2016).

Monetary Fund (IMF) and the Financial Stability Board (FSB) subsequently published several proposals on effective bank resolution and cross-border cooperation. In March 2010, the BCBS published the *Report and Recommendations of the Cross-border Bank Resolution Group*, proposing ten recommendations on 'legal and policy frameworks for cross-border resolutions and its follow-up work to identify the lessons learned from the financial crisis'.[5] The IMF, on 11 June 2010, published the *Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination*, which highlighted the need for 'effective cooperation between authorities at the international level' as well as resolution frameworks at the national level.[6]

The FSB published a more detailed proposal the *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes or KAs) in 2011,[7] which was later updated in 2014.[8] The Key Attributes' objective is an effective resolution regime 'to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanism which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation.'[9] These Key Attributes set out a general legal framework for an effective resolution law, which is recommended that national legislators incorporate into their national legal systems.

Accordingly, many of the FSB jurisdictions have amended their bank insolvency laws or promulgated new bank resolution laws. As of the end-of-2019, some FSB jurisdictions, mostly the home jurisdictions of global systematically important bank (G-SIB), have implemented bank resolution regimes with comprehensive powers that are broadly in line with the Key Attributes.[10] Of the 24 FSB jurisdictions, European Union (EU) Member States (France, Germany, Italy, the Netherlands, Spain), the United Kingdom (UK), Hong Kong, Switzerland and the United States (US) have fully implemented resolution powers for banks (powers to transfer or sell assets and liabilities, powers to establish a temporary bridge institution,

[5] BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010).

[6] IMF, 'Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination' (11 June 2010).

[7] FSB 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (October 2011).

[8] FSB, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (15 October 2014). The 2014 version adopted additional guidance that elaborates on specific Key Attributes relating to information sharing for resolution purposes and sector-specific guidance that sets out how the Key Attributes should be applied for insurers, financial market infrastructure (FMIs) and the protection of client assets in resolution.

[9] FSB Key Attributes, 3.

[10] FSB, 'FSB 2019 Resolution Report Eighth Report on the Implementation of Resolution Reforms "Mind the Gap"' (14 November 2019) 24-27.

powers to write down and convert liabilities (bail-in), powers to impose temporary stay on early termination rights, resolution powers in relation to holding companies, recovery planning for systemic firms, resolution planning for systemic firm, and powers to require changes to firms' structure and operations to improve resolvability). [11] Other jurisdictions have to some degree partially implemented resolution regime, and additional reforms are still ongoing.[12]

However, simply establishing domestic bank resolution regimes is not enough to achieve effective global bank resolution objectives and to avoid systemic failure across borders; a transnational bank resolution mechanism is needed, especially for resolving issues with large international banks.[13] The FSB, among others, has been endeavouring to address the issue. The Key Attributes list KAs 7, 8 and 9 as a baseline for cross-border resolution. KA 7 is about the legal framework conditions for cross-border cooperation, with 7.1 setting the general principle that '[t]he statutory mandate of a resolution authority should empower and strongly encourage the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities.'[14] KA 8 calls for the establishment of crisis management groups (CMGs) consisting of both home and key host authorities, which should be a platform for the authorities to cooperate and coordinate their actions in resolving cross-border institutions.[15] KA 9 pursues institution-specific cross-border cooperation agreements, which set out detailed rules and procedures of both home and host authorities in the resolution process.[16] In addition, the FSB published the *Principles for Cross-border Effectiveness of Resolution Actions* (FSB Principles) as a guideline, particularly focusing on the mechanism for giving effect to foreign resolution actions.[17]

In spite of these efforts made by international organisations, cross-border resolution is not adequately addressed by national laws or international laws, and the 'limited mechanism for giving cross-border effect to resolution actions' is identified as one of the key challenges for the implementation

[11] Ibid.

[12] Ibid.

[13] Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019) xvii-xviii. See also Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-border Resolution Gap' (2015) 10 Brook J Corp Fin & Com L 183; Vivien Chen, Andrew Godwin and Ian Ramsay, 'Cross-border Cooperation in Bank Resolution: A Framework for Asia' (2016) Singapore Journal of Legal Studies 1; Matthias Lehmann, 'Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders' (2016) 66 International and Comparative Law Quarterly 107.

[14] KA 7.1.

[15] KA 8.

[16] KA 9.

[17] FSB, 'Principles for Cross-border Effectiveness of Resolution Actions' (3 November 2015).

of financial regulatory reforms.[18] A central problem is the extraterritorial effect of a sovereign state's or its agency's actions, which, as a result of the exercise of sovereignty, can hardly have effects in another jurisdiction. Various solutions have been proposed to address this issue. In this regard, Haentjens, Wessels and Guo summarised four approaches. The first is private law solutions, which correspond to contractual measures of recognition, namely, incorporating provisions in financial contracts that recognise the effects of cross-border resolution actions.[19] The second is cooperative solutions, which emphasise the cooperation of different national resolution authorities, such as information sharing, the establishment of CMGs, entering into institution-specific cross-border cooperation agreements (CoAgs), and jointly formulating recovery and resolution plans (RRPs).[20] The third approach concerns the recognition of foreign resolution measures, which mainly builds on the private international law instruments that can be unilaterally taken by host jurisdictions.[21] And the fourth is global solutions, which aim to establish mandatory instruments at the global level, such as a supranational resolution authority.[22] Ideally, as they suggested, these four solutions 'should be taken in parallel'.[23]

Many of the previous studies focus on cross-border cooperation between national (resolution) authorities.[24] However, cooperation relies too much on

[18] FSB, 'Implementation and Effects of the G20 Financial Regulatory Reforms 28 November 2018 4th Annual Report' (28 November 2018) 39. See also, e.g., FSB, 'Implementation and effects of the G20 financial regulatory reforms Report of the Financial Stability Board to G20 Leaders' (9 November 2015) 20-21; FSB, 'Implementation and Effects of the G20 Financial Regulatory Reforms 31 August 2016 2nd Annual Report' (31 August 2016) 17-18; FSB, 'Implementation and Effects of the G20 Financial Regulatory Reforms 3 July 2017 3rd Annual Report' (3 Juley 2017) 19; INSOL International, 'Bank Resolution: Key Issues and Local Perspectives' (December 2019) 69-75.

[19] Matthias Haentjens, Bob Wessels and Shuai Guo, 'Conclusions' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019) 401-403.

[20] Ibid, 403-404.

[21] Ibid, 405-406.

[22] Ibid, 406-407.

[23] Ibid, 400.

[24] See, e.g., Simon Gleeson, 'The Importance of Group Resolution' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Vincenzo Troiano, 'Cross-border Cooperation between Resolution Authorities in the BRRD' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015); Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Chen, Godwin and Ramsay (n 13); Costanza Russo, 'Third Country Cooperation Mechanism within the Bank Recovery and Resolution Directive: Will They Be Effective?' in Jens-Hinrich Binder and Dalvinder Singh (eds), *Bank Resolution: The European Regime* (OUP 2016); Jens-Hinrich Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019).

political commitment instead of a predictable legal regime.[25] Also, a global solution is difficult if not impossible to reach in the short term, due to high political negotiation costs. And private law solutions do not have binding effects on resolution authorities, which may lead to uncertainty issues. Instead, this dissertation focuses on the recognition mechanism, which relies primarily on a legal framework design. Although some authors have proposed to develop a new legal instrument for recognising foreign resolution actions, such as a model law,[26] none of them has elaborated specific legal rules. Therefore, this dissertation closely studies the mechanism that gives effect to foreign resolution actions and proposes detailed legal principles.

1.2 Research question

This dissertation examines the following research question: **what should be the legal framework for recognition of foreign bank resolution actions**? Once they are recognised, foreign resolution actions can be given effect under domestic law, and the recognition builds the foundation for a successful cross-border bank resolution.

Recognition of foreign resolution actions is emphasised in FSB KA 7.5, which reads

> Jurisdictions should provide for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. Such recognition or support measures would enable a foreign home resolution authority to gain rapid control over the firm (branch or shares in a subsidiary) or its assets that are located in the host jurisdiction, as appropriated, in cases where the firm is being resolved under the law of the foreign home jurisdiction. Recognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding.[27]

[25] Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 500-502.

[26] See, e.g., Jonathan M Edwards, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122; Mevorach (n 13); Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 192; Bob Wessels, 'International Insolvency Law and EU Bank Resolution Rules' in M. Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019); Matthias Lehmann, 'Conflict-of-law Issues' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019).

[27] FSB KA 7.5.

This dissertation thus understands 'recognition' in a broad sense and examines both mutual recognition process and supportive measures, collectively characterised by the FSB as 'statutory approaches'.[28] Mutual recognition means recognising the effects of foreign resolution actions, while taking supportive measures is on the condition that a foreign resolution action is recognised as effective and requires host jurisdictions to implement home resolution actions. This distinction resembles the regime of recognition and enforcement of foreign judgments: any judgment that needs to be enforced needs to be recognised, yet not every judgment needs to be recognised needs to be enforced.[29] Recognition is said to be 'the necessary primary concern',[30] as the pre-condition for enforcement. Similarly, in cross-border bank resolution cases, upon the recognition of a foreign resolution action, some actions can take immediate effect in the domestic regime without additional enforcement, some can be enforced directly as foreign actions, while others need to be transformed into domestic actions (supportive measures) to be effective.[31] Therefore, these two mechanisms are placed under the same term 'recognition'. Unless specified otherwise, the discussions in this dissertation apply to both.

In addition, the FSB Principles propose to adopt 'contractual recognition' to fill the gap until statutory approaches have been fully implemented or to reinforce the legal certainty and predictability.[32] This is the private law approach discussed above. Contractual measures function by way of adding contractual provisions to private financial contracts that recognise actions taken by foreign resolution authorities.[33] These contractual approaches largely reduce the possibility of private parties challenging foreign resolution actions; however, they have no binding effect on authorities designated to decide the effectiveness of foreign resolution actions.[34] As contractual approaches form an integral part of giving effect to foreign resolution actions, they are mentioned as a supplementary tool to the general framework of recognition of foreign resolution actions.

In a cross-border context, at least two types of jurisdictions are involved, namely, a home jurisdiction where a resolution action is initiated, and a host jurisdiction where the action is sought to be recognised. The terminology of home/host will be explained in the next section. It is clarified here that

[28] FSB Principles, 5-6.

[29] AV Dicey, *Dicey, Morris and Collins on the Conflict of Laws* (J. H. C. Morris, Lawrence Collins and Adrian Briggs eds, 15th edn, Sweet & Maxwell Thomson Reuters 2012) para 14-002.

[30] Adrian Briggs, *The Conflict of Laws* (OUP 2013) 116. See also *Clarke v Fennoscandia Ltd* [2007] UKHL 56, para 21.

[31] See Chapter 6 at §6.4.4.2.

[32] Ibid, 6-7, 13-16.

[33] Ibid.

[34] See Chapter 6 at §6.2.3.2.

recognition is mostly perceived from the host jurisdictions' perspective. Therefore, the legal framework for recognition is designed for host jurisdictions and imposes rights and obligations on host authorities. However, it cannot be overlooked that recognition is an interaction between home and host jurisdictions, and in order to reach a decision about recognition or not, actions and legal status of home authorities are necessary to be taken into account.Also, it is acknowledged that, although the subject examined in this dissertation has international factors, the legal framework for recognition of foreign resolution actions rests on domestic legal instruments that can be unilaterally invoked by national authorities. Nonetheless, international standards such as the FSB Key Attributes are also important guidance for the formulation of national laws, and these standards are also frequently referred to throughout the dissertation. In turn, principles proposed in this dissertation are not restricted to apply in the domestic law context alone, but could inspire international agreements in more detail.

1.3 Terminology

First, in this dissertation, bank resolution refers to actions taken by administrative resolution authorities to resolve banks that are failing or likely to fail. Chapter 2 elaborates this concept and explains that resolution is under the general framework of insolvency/bankruptcy. Some insolvency-related rules are also applicable to resolution, subject to special characteristics of resolution. Any action falling outside the scope of resolution, for example, a court-led liquidation/winding-up proceeding, is not discussed in this dissertation, nor are any resolution actions in relation to insurance companies, central counterparties (CCPs), or financial market infrastructures (FMIs).

It is also worth noting that the FSB distinguishes two different stages – recovery and resolution.[35] Recovery measures should be implemented before placing a bank into resolution, including measures to reduce the risk profile of a bank and conserve capital, as well as considering strategic options, such as divestiture of business lines and restructuring of liabilities. [36] Unlike resolution, recovery usually only involves a change in a bank's business strategy and does not substantively alter the debtor-creditor relationship. This dissertation focuses on resolution actions but not recovery.

Second, resolution action is used as an umbrella term in this dissertation, encompassing both resolution proceedings and resolution measures. Resolution actions are a collection of actions, consisting of the commencement of resolution proceedings and the exercise of resolution measures. Resolution

[35] FSB KA 11.

[36] FSB KA I-Annex 4, para 1.5.

proceedings are ongoing processes, having continuous effects, following a decision to place a bank under resolution. Resolution measures take place after a bank has been put into resolution and have immediate effects. As explained in Chapter 6, the two different terms enable us to distinguish between the different procedures and effects of proceedings and those of measures. Recognising foreign resolution proceedings has ongoing continuous effects; while recognising foreign resolution measures requires immediate effect. Unless specified otherwise, other discussions in this dissertation apply to both resolution proceedings and resolution actions.

Third, in terms of cross-border cases, inevitably there are two or more jurisdictions, and this dissertation adopts the distinction of home and host jurisdictions as made by the FSB. A home jurisdiction refers to a jurisdiction where 'the operations of a bank or financial group are supervised on a consolidated basis',[37] which, normally, is where the parent or holding company is located. A host jurisdiction refers to a jurisdiction where subsidiaries, branches, and assets are located, or the law of which is chosen as the governing law.[38] The terms, nevertheless, are different from the concepts in the EU law. According to the Capital Requirements Regulation[39] (CRR), a home Member State means 'the Member State in which an institution has been granted authorisation', and a host Member State means 'the Member State in which an institution has a branch or in which it provides services'.[40] Simply put, an EU Member State where a subsidiary of a non-EU third-country bank is located is a host jurisdiction in this dissertation but a home jurisdiction in the EU context. §6.4.2 in Chapter 6 provides a more detailed explanation.

1.4 Methodology

This dissertation builds on both positive law analysis and normative analysis. The positive law analysis is conducted through comparative law. As emphasised above, this dissertation focuses on domestic laws as the legal basis for national authorities to give effect to foreign resolution actions. A thorough examination of current national laws can provide positive law evidence on currently available legal instruments and is critical to understanding the pros and cons of existing regimes and building foundation for

[37] FSB, 'Key Attributes Assessment Methodology for the Banking Sector: Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions in the Banking Sector' (19 October 2016)(KAAM).

[38] See FSB Principles, 5.

[39] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1.

[40] Article 4(1)(43) and (44) CRR.

additional legal reform recommendations. Normative analysis investigates grounds for recognition, financial stability and resolution objectives, and the position of creditors. The traditional theories for private international law, international financial regulation and international insolvency law are examined in relation to whether they can be applied in cross-border bank resolution and how they can be applied.

1.4.1 Positive law analysis: comparative law

The positive law examination this dissertation undertakes mainly intends to investigate the *status quo* of presently available legal instruments to recognise foreign resolution actions. Given the limited resources and capacity, this dissertation only chooses three representative jurisdictions to conduct a comparative analysis, that is, the European Union (EU), the United States (US) and mainland China.[41] The selection of these jurisdictions was for the following reasons. First, the EU, the US and China have the most G-SIBs.[42] As of November 2019, there are in total 30 G-SIBs, and 11 of them are in the EU, including 3 in the United Kingdom (UK),[43] 8 in the US,[44] and 4 in China.[45] The EU, the US and China are three of the largest economies in the world, and a study of them can present vital guidance for other jurisdictions as well.

Second, as introduced in the following paragraphs and, more specifically, Chapters 3 to 5, each jurisdiction has a different approach to recognition of foreign resolution actions. The EU Member States, as assessed by the FSB, have a comprehensive set of resolution rules in place, in line with the FSB Key Attributes.[46] This is the result of the implementation of the Bank

[41] The discussion of 'China' in this dissertation is limited to mainland China and excludes Hong Kong, Macau and Taiwan.

[42] FSB, '2019 list of global systemically important banks (G-SIBs)' (22 November 2019).

[43] Ibid, Deutsche Bank (Germany), HSBC (the UK), Barclays (the UK), BNP Paribas (France), Group BPCE (France), Group Crédit Agricole (France), ING Bank (the Netherlands), Santander (Spain), Société Générale (France), Standard Chartered (the UK), Unicredit Group (Italy).

[44] Ibid, JP Morgan Chase, Citi Group, Bank of America, Goldman Sachs, Wells Fargo, Bank of New York Mellon, Morgan Stanley, and State Street.

[45] Ibid, bank of China, Industrial and Commercial Bank of China Limited, Agricultural Bank of China, and China Construction Bank.

[46] FSB (n 10) 19-20. See a general overview of literature, e.g., Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009); Charles Randell, 'European Banking Union and Bank Resolution' (2013) 7 Law and Financial Markets Review 30; Kenadjian, *The Bank Recovery and Resolution Directive Europe's Solution for "Too Big To Fail"*; Jeffrey N Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) Columbia Law Review 1297; Michael Schillig, 'The EU Resolution Toolbox' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015); Binder and Singh (n 4); Haentjens, Janssen and Wessels (n 26).

Recovery and Resolution Directive (BRRD)[47] and the Single Resolution Mechanism Regulation (SRMR).[48] The BRRD and SRMR empower EU resolution authorities to directly recognise third-country resolution actions.[49] In other words, the EU adopts an administrative regime of recognition. Most interestingly, the new EU resolution framework provides a special mechanism for cross-border resolution among EU Member States, including the establishment of a Single Resolution Board (SRB),[50] which can be an inspiration for establishing a global cross-border mechanism.

During most of time when this dissertation was being written, the UK was an EU Member State. Thus, the EU section in this dissertation also examines English law. However, as of midnight CET on 31 January 2020, Brexit is official, and the UK is a 'third country' to the EU. After a transition period, the EU law may then no longer apply in to the UK. However, discussions regarding third country relations might apply. The issues regarding Brexit are explained in Chapter 3 at §3.3.1.1.3.

The US, after the financial crisis in 2007/2008, promulgated the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[51] which expands the power of resolution from depository institutions, as stipulated in the Federal Deposit Insurance Act (FDIA),[52] to other regulated financial

[47] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173/190. See also the amendment BRRD II: Directive (EU) 2019/879 of The European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150/296.

[48] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010. See also the amendment SRMR II: Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, OJ L 150/226.

[49] Articles 94-95 BRRD; Article 33 SRMR.

[50] See, e.g., Troiano, 'Cross-border Cooperation between Resolution Authorities in the BRRD'; Geroge S. Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism in the European Banking Union: Legal Foundations, Governance Structure and Financing' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Haentjens, Janssen and Wessles (n 26) 155-198; Binder (n 24); Wessels (n 26).

[51] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 21 July 2010, 124 Stat. 1386.

[52] The Federal Deposit Insurance Act, Pub. L. 81-797, 21 September 1950, 64 Stat. 873.

institutions.[53] The US resolution regime is also in line with the FSB Key Attributes.[54] However, neither the Dodd-Frank Act nor the previous FDIA have special rules for recognition of foreign resolution actions. Chapter 15 of the US Bankruptcy Code can apply,[55] except in circumstances where foreign banks have branches or agencies present in the US.[56] Chapter 15 adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (MLCBI), which prescribes a judicial recognition regime for foreign insolvency proceedings.[57]

China, although being a home jurisdiction to four G-SIBs, is lagging behind in adopting a comprehensive resolution regime.[58] The resolution of failing financial institutions still relies on the general Chinese Enterprise Bankruptcy Law (EBL).[59] For cross-border bank resolution, therefore, Article 5 of

[53] See a general overview of literature, e.g. Skeel (n 3); Douglas G Baird, 'Dodd-Frank for Bankruptcy Lawyers' (2011) 19 American Bankruptcy Institute Law Review 287; Paul L Lee, 'Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part I' (2015) 132 Banking Law Journal 437; Paul L Lee, 'Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part II' (2015) 132 Banking Law Journal 503; Donald Bernstein and Reena Agrawal Sahni, 'United States' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015).

[54] FSB (n 10) 24-27.

[55] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 20 April 2005, 119 Stat. 23.

[56] 11 US Code §109(b)(3)(B); 11 US Code §1501(c)(1).

[57] See a general overview of literature, e.g., Ronald J Silverman, 'Advances in Cross-border Insolvency Cooperation: the UNCITRAL Model Law on Cross-border Insolvency' (1999) 6 ILSA Journal of International & Comparative Law 265; Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015); Look Chan Ho, *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (Global Law and Business 2017); Neil Hannan, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017). See also on the US Chapter 15, e.g. Jay L Westbrook, 'Chapter 15 at Last' (2005) 79 American Bankruptcy Law Journal 713; Jay L Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247; Leif M Clark and Daniel M Glosbank, *Ancillary and Other Cross-border Insolvency Cases under Chapter 15 of the Bankruptcy Code* (LexisNexis Matthew Bender 2008).

[58] FSB (n 10) 24-27.

[59] The Enterprise Bankruptcy Law of the People's Republic of China (《中华人民共和国企业破产法》) was first promulgated on 2 December 1986 and came into force on 1 November 1988. It was later amended on 27 August 2006, and the revision came into force on 1 June 2007. See a general overview of literature, e.g., Qingjiang Kong and Yinhui Sun, 'China' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M. Haentjens, Qingjiang Kong and B. Wessels eds, Eleven International Publishing 2017); Jieche Su, *Supervisory Liability of the Regulator in Bank Insolvency Proceedings* (China University of Political Science and Law Press 2016); Aijun Li, *Study on Legal Issues of Cross-border Insolvency of Commercial Banks* 商业银行跨境破产法律问题研究 (China University of Political Science and Law Press 2012).

the EBL applies, which rests on a judicial recognition regime led by courts.[60] However, unlike the US model, the Chinese judicial recognition is similar to recognition of foreign judgments under general private international law, without adopting the MLCBI and special rules for insolvency proceedings.[61] Each of these three jurisdictions adopts a different approach to recognising foreign resolution actions, thus presenting the basis for further comparison.

It is acknowledged that this dissertation does not cover all the jurisdictions. Although this dissertation intends to formulate internationally applicable standards, it cannot be denied that additional research is needed to adapt these standards into specific domestic regimes. For instance, the selected jurisdictions may be the largest economies, and smaller economies might have different considerations.

1.4.2 Normative analysis: policy goals and legal doctrines

The normative analysis of this dissertation provides a theoretical basis to answer the research question: what should be the legal framework for recognition of foreign bank resolution actions? Normative analysis encompasses both an external framework (policy goals) and an internal framework (legal doctrines).[62]

Recognition of foreign resolution actions needs to balance two policy goals: making home resolution actions effective across borders and protecting host interests. The former policy goal is extensively explained in Chapter 6 at §6.2.3.1, and four reasons are provided: first, modern banks operate globally and are interconnected, and economic analysis shows that international cooperation in the resolution of cross-border operating banks can maintain global financial stability and incur less cost compared to individual reso-

[60] See, e.g., Li (n 59); Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44; Armstrong Chen, 'An Analysis of the Development of Cross-border Crisis Management in China's Bankruptcy Law and Regulations' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019).

[61] See, e.g., Qingxiu Bu, 'China's Enterprise Bankruptcy Law (EBL 2006): Cross-border Perspectives' (2009) 18 International Insolvency Review 187; Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57; Parry Rebecca and Gao Nan, 'The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems' (2018) 27 International Insolvency Review 5.

[62] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) Law and Method 1, 7-9.

lution within national borders;[63] second, recognition of foreign resolution actions follows the universalism principle enshrined in the modern international insolvency law, which facilitates a global administration system;[64] third, recognition of foreign administrative resolution actions is a way of showing comity,[65] which is a cornerstone for recognition of foreign judgments and arises from mutual interest and utility;[66] fourth, *res judicata*[67] prevents creditors from initiating a second proceeding, and the obligation doctrine[68] confirms that the creditor-debtor relationship has been altered by the original resolution action.

On the other hand, Chapters 7 and 8 demonstrate that home jurisdictions usually do not have national or international legal obligations nor internal incentives to fully consider the host jurisdictions' interests. Resolution authorities are administrative authorities, part of the executive branch/ government, and are only accountable to domestic constituencies such as taxpayers, financial institutions and depositors, and therefore they only need to protect home interests. This reality explains the necessity for host authorities to take counter measures to prevent negative or adverse effects from home resolution actions, namely, refusal of recognition, with the aim of protecting host interests.

[63] See, e.g. Zdenek Kudrna, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283; Gleeson, 'The Importance of Group Resolution'; Thomas F Huertas, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series; Charles Randell, 'Group Resolution under the EU Resolution Directive' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013).

[64] See, e.g. Jay L Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276; Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Michigan Law Review 2177; Ian F Fletcher, *Insolvency in Private International Law* (OUP 2005); Wessels (n 57) para 10010; Reinhard Bork, *Principles of Cross-border Insolvency Law* (Intersentia 2017) 26-28; Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018) 755-766.

[65] See, e.g. Ernest G Lorenzen, 'Huber's De Conflictu Legum' (1919) 13 Illinois Law Review 53; Tim W Dornis, 'Chapter C. 18: Comity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

[66] Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray, and Company 1834) §35.

[67] See, e.g. Hans Smit, 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L Rev 44; Courtland H Peterson, 'Res Judicata and Foreign Country Judgments' (1963) 24 Ohio St LJ 291; Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001).

[68] See, e.g. Dicey (n 29) para 14-007; Trevor C Hartley, *International Commercial Litigation: Texts, Cases and Materials on Private International Law* (2nd edn, CUP 2015) 350.

The two policy goals just discussed correspond to the two sides of a recognition mechanism: reasons for recognition and grounds for refusal of recognition. The FSB also clearly stated that both perspectives need to be taken into account.[69] Setting the external framework and identifying the policy goals determine the major issues to be discussed in the context of a (possible) legal framework. Therefore, this dissertation will formulate the general legal framework by taking into account these two opposite aspects.

The boundaries of the recognition framework are set by the external aspect of normative examination, yet specific rules within the recognition framework rely on the internal aspect. In this dissertation, the internal framework draws inspiration from the legal doctrines in the fields of private international law, financial law and insolvency law. Examination of these legal doctrines assists in three ways. First, doctrines, such as comity or universalism, explain why a jurisdiction should recognise a foreign judgment or a foreign insolvency proceeding and, therefore, provide the theoretical rationale for the position that foreign resolution actions should be recognised or not. Second, doctrines, particularly those related to private international law and international insolvency law such as reciprocity, set out the conditions and procedures for recognition of foreign judgments and foreign insolvency proceedings and can help determine which issues should be considered when formulating the legal framework. Third, doctrines, such as (national/domestic) financial stability or equal treatment of creditors, serve as benchmarks to answer the questions raised in the second point.

The discussion of private international law seems obvious because private international law rests on three major pillars: jurisdiction, applicable law and recognition and enforcement of foreign judgments, and recognition of foreign resolution actions closely relates to the third pillar. It is acknowledged that private international law usually deals with judicial judgments rather than administrative resolution actions. This dissertation, however, argues that private international law doctrines serve at least two purposes. First, the rationale behind giving effect to foreign judgments can be extended to recognition of foreign resolution actions. For instance, the comity doctrine means that a jurisdiction shows courtesy to another jurisdiction; it applies to not only judicial actions but also administrative actions. Second, existing rules of private international law can be the inspiration for creating rules for recognition of foreign resolution actions, including the determination of jurisdiction (competent authority to take resolution actions), conditions and procedures for recognition (including reciprocity), effects of recognition (automatic effect and enforcement), as well as refusal of recognition (public policies). In particular, international insolvency law can also directly apply to resolution cases, for example in the

[69] FSB Principles, 12.

US, considering that resolution is a special procedure of insolvency, while rules of international insolvency law largely derive from general principles of private international law. Therefore, based on the doctrines in the field of private international law, Chapter 6 studies the rules regarding determination of jurisdiction, conditions and procedures for recognition and effects of recognition, while Chapters 7 and 8 deal with public policies.

Financial law doctrines are also examined given the subject discussed in this dissertation is banks. In particular, Chapter 7 focuses on financial stability, which is a general principle of financial law and a major objective of resolution. Maintaining global and international financial stability is a rationale for an effective cross-border bank resolution regime and is one of the reasons to recognise foreign resolution actions. However, it is acknowledged that financial regulators and supervisors are only accountable to their domestic constituencies, and home resolution authorities only need to consider home interests and thus may neglect interests of host jurisdictions. Therefore, a host jurisdiction may refuse to recognise foreign home resolution actions, with the purpose of protecting host interests, such as the host jurisdiction's financial stability or avoiding any adverse impact on the host jurisdiction's fiscal policy. Chapter 7 specifically examines these situations.

International insolvency law is another important perspective for the internal analysis. This dissertation views resolution under the general framework of insolvency,[70] and international insolvency law doctrines, especially the debates concerning territoriality and universality, help to interpret why foreign resolution actions should be recognised. Besides, international insolvency law relies on the same pillars as private international law, that is, jurisdiction, applicable law, and recognition and enforcement. Similarly, international insolvency law doctrines can also be the model for designing specific rules for the recognition of foreign bank resolution actions, including the determination of jurisdiction (centre of main interest (COMI)/establishment), conditions and procedures for recognition, effects of recognition, as well as refusal of recognition. The first three issues are examined in Chapter 6. A particular issue and major concern of international insolvency is the creditors' position which is examined in Chapter 8. Doctrines concerning creditors have two implications: on the one hand, creditors are supposed to be treated equally, and a host jurisdiction should recognise home proceedings, so that host creditors should also be placed under the same home proceedings; on the other hand, protection of host creditors' interests is a common reason for refusal of recognition. Creditors' positions are therefore examined from both sides in the process of recognising foreign resolution actions.

[70] See discussions in Chapter 2, §2.1.

1.5 Outline

In the remainder of Part I Introductory Chapters, Chapter 2 explains the concepts of bank resolution and sets out different scenarios of cross-border bank resolution.

Part II is the main part of the comparative law analysis. Legal systems in the EU (Chapter 3), the US (Chapter 4) and China (Chapter 5) are illustrated respectively. Discussions about each jurisdiction include regulation, supervision and resolution frameworks, as well as rules for recognition of foreign resolution actions.

Part III conducts the comparison and evaluation of three normative benchmarks, namely, grounds for recognition (Chapter 6), financial stability and resolution objectives (Chapter 7) and the creditors' position (Chapter 8). Each chapter starts with a theoretical framework, followed by a comparison and evaluation of specific national laws.

Part IV is the concluding part of the dissertation. Chapter 9 proposes a future framework for cross-border recognition of foreign resolution actions, including domestic law instruments, international agreements, a model Law, customary international law and soft law. Chapter 10 is the conclusion.

This dissertation takes into account development up to 25 February 2020.

The author has conducted the research that has resulted in this dissertation in the course of his appointment at Leiden University as a PhD candidate. While being appointed at Leiden, he has been funded by the China Scholarship Council. The China Scholarship Council has never been asked to (substantially) approve of (parts of) this dissertation, nor given its express approval or disapproval.

2 Cross-border Bank Resolution: Definitions and Scenarios*

2.1 The concept of bank resolution

2.1.1 Corporate insolvency and bank insolvency

This chapter starts with a very fundamental question: what is bank resolution? A precise understanding of the term is critical to limiting the scope of further discussion. An action that is not considered as a resolution action cannot be subject to the rules of recognition of foreign resolution actions.[1] This section attempts to reach a consistent understanding of resolution in each jurisdiction, laying out a solid foundation for further comparison.

Before entering into the discussion of the concept of resolution, two additional concepts are illustrated: corporate insolvency and bank insolvency. Corporate insolvency, using current terminology, refers to both reorganisation/restructuring and liquidation/winding up proceedings.[2] However, in many jurisdictions, banks and other financial institutions are excluded from the general corporate insolvency law framework. For example, in the

[*] Some ideas in this Chapter were presented at PhD Workshop on European/International Insolvency Law funded by the Stichting Bob Wessels Insolvency Law Collection on 28 February 2019 in Leiden and Workshop Beyond Bank Resolution: Resolution and its Frontiers on 7 December 2017 in Leiden. I thank Stichting Bob Wessels Insolvency Law Collection, Leiden University and European University Institute for the financial support. Also thank Bob Wessels, Lynette Janssen, Stephan Madaus, Paul Omar, Eric Dirix, Jennifer Gant, Ilya Kokorin, Gert-Jan Boon, Jessie Pool and Elena Lydia Tsioli, Maria Ana Barata, Marije Louise, Agnieszka Smolenska and Geleite Xu for their comments.

[1] For example, *Bayern LB v Hypo Alpe Adria (HETA)*, Regional Court Munich I, Judgment of 8 May 2015, 32 O 26502/12. See below analysis on this case, Chapter 3, §3.3.1.1.1.

[2] Within the insolvency framework, there are other regimes such as state insolvency and personal insolvency, which are not discussed here. The word 'insolvency' is used interchangeably with 'bankruptcy' in this dissertation. There is a preference in different countries when using the two terms. For instance, the United States prefers 'bankruptcy' as indicated by the name of its Bankruptcy Code. See Title 11 US Code. While the United Kingdom distinguishes between 'insolvency' for corporate debtors and 'bankruptcy' for personal debtors. See Reinhard Bork, *Principles of Cross-border Insolvency Law* (Intersentia 2017) 7. The European Union adopts the term 'insolvency', as the title of EU Insolvency Regulation shows. In China, the Chinese term '破产' is usually translated into bankruptcy. See the National People's Congress of the People's Republic of China <http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html> accessed 25 February 2020.

European Union (EU), the European Insolvency Regulation[3] (EIR) and the Directive on Restructuring and Insolvency[4] exclude banks.[5] Similarly, the United States (US) Bankruptcy Code also excludes banks.[6] Only in China, the general corporate insolvency law, the Enterprise Bankruptcy Law (EBL) applies to banks.[7]

Why treat banks differently? To start with, what is a bank? As defined by the Oxford English Dictionary, a bank is a financial establishment where the shop, office, place of business, table or counter of a money changer or moneylender is located; it is an institution that 'invests money deposited by customers or subscribers, typically pays interest on deposits, and usually offers a range of other financial services, including making payments when required by customers, making loans at interest and exchanging currency'.[8]

Legal definitions focus on the functions of these institutions instead of their names. In the EU, a bank is officially referred to as a 'credit institution' and is defined in the Capital Requirements Regulation[9] (CRR) as 'an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'.[10] In the US, the Bank Holding Company Act of 1956[11] (BHCA) defines a bank as (1) any Federal Deposit Insurance Corporation (FDIC) insured bank and (2) any institution that both engages in the business of 'making commercial loans' and accepts 'deposits that the depositor may withdraw by check or similar means for payment to third parties or others'.[12] In China, banks, or commer-

[3] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (EIR 2015 Recast).

[4] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172/18.

[5] Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast; Article 1(2) Directive on Restructuring and Insolvency.

[6] 11 US Code §109(b).

[7] Article 134 EBL.

[8] Oxford English Dictionary <http://www.oed.com/> accessed 20 August 2019.

[9] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1.

[10] Article 4(1)(1) CRR; Article 2(1)(2) BRRD. Matthias Haentjens and Pierre de Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2015) 80; John Armour and others, *Principles of Financial Regulation* (OUP 2016) 293.

[11] The Banking Holding Company Act of 1956, Pub. L. 511, 9 May 1956, ch. 240, 70 Stat. 133.

[12] 12 US Code §1841(c).

cial banks, are defined in the Commercial Bank Law (CBL) as [13] enterprises established in conformity with the CBL and the Chinese Company Law and involved in taking deposits from the general public, granting loans and handling settlements. [14]

Given the core business a bank conducts, this dissertation refers to banks as intermediaries taking deposits from depositors on the one hand, and issuing loans to borrowers on the other hand.[15] It is necessary to point out that banks today are actively involved in investment businesses in the capital market, often referred to as 'investment banking' businesses.[16] These investment banks in the EU context, or broker-dealers in the US or securities firms in China, function in a similar way as traditional deposit-taking banks, that is, raising funds through short-term instruments such as repurchase agreements and making profits by investing in longer maturity instruments.[17]

As their essential function, banks hold 'highly liquid liabilities in the form of deposits' and 'long-term loans that may be difficult to sell or borrow against on short notice'. [18] This means banks are highly vulnerable to delayed loan repayment, and, given a large number of creditors, banks cannot be quickly restructured or wound up swiftly in normal corporate insolvency proceedings. Once a bank is in trouble, public confidence in the financial system may be lost, and in turn result in the so-called contagion effect, such as mass withdrawal of deposits (bank runs) or the discontinuing of other

[13] The Commercial Bank Law of the People's Republic of China (《中华人民共和国商业银行法》) was first promulgated on 10 May 1995 and came into force on 1 July 1995. It was later amended on 27 December 2003 and 29 August 2015 and the lasted version came into force on 1 October 2015.

[14] Article 2 CBL.

[15] As can be seen from the balance sheets of the world's thousand largest banks in 2011, the loans accounted for approximately 40% of the assets of large banks, and deposits and short-term funding for nearly 60% of liabilities. See Armour and others (n 10) 28-29. See also Haentjens and de Gioia-Carabellese (n 10) 80.

[16] Haentjens and de Gioia-Carabellese (n 10) 81-82. This is usually the case for large banks, such as Barclays, Citigroup, Deutsche Bank or HSBC. See also Armour and others (n 10) 293.

[17] Armour and others (n 10) 456.

[18] Eva HG Hüpkes, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada* (Kluwer Law International 2000) 8; Eva HG Hüpkes, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005). See also Carl-Johan Lindgren, Gillian G Garcia and Matthew I Saal, *Bank Soundness and Macroeconomic Policy* (International Monetary Fund 1996) 6.

financial services.[19] With the expansionary business of investment banks, runs can also happen to other investors apart from depositors, for example, money market fund investors during the failure of Lehman Brothers.[20] It is also worth noting that banks often perform fundamental 'public service' functions, such as the payment and settlement system.[21] Any cessation or reduction of banking services would cause great difficulties in the provision of these social functions and interrupt economic activities and social operations.[22] The aim of current insolvency law is maximising debtors' assets for the distribution among creditors or granting second chances for debtors under the current 'rescue' culture;[23] it does not address public interests such as financial stability and systemic risk,[24] and, therefore, cannot resolve bank failures in an orderly manner. These reasons explain why banks need a separate insolvency regime from other companies.

Before the 2007/2008 financial crisis, special bank insolvency laws were already embedded in some jurisdictions. For example, in the US, banks were, and still are, subject to the administrative receivership or conservatorship implemented by the FDIC.[25] In most other jurisdictions, such as Austria, Luxembourg and the Netherlands, banks were resolved under court-led judicial regimes, but with special provisions, such as the commencement of an insolvency proceeding by a competent administrative authority.[26] Each jurisdiction had different approaches to bank failures. And, as Mervyn King concluded in his frequently cited quote, banks were

[19] See, e.g. Andrew D Crockett, 'Why is Financial Stability a Goal of Public Policy?' (1997) 82 Economic Review 5, 7-12; Andrew Campbell, 'Deposit Insurance: Consumer Protection, Banks Safety and Moral Hazard' (1999) 10 European Business Law Review 96; Hal S Scott, *Connectedness and Contagion: Protecting the Financial System from Panics* (MIT Press 2016).

[20] At that time, the Reserve Fund was the largest commercial paper holder of Lehman Brothers. See, e.g., David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (John Wiley & Sons 2010); Oonagh McDonald, *Lehman Brothers: A Crisis of Value* (Manchester University Press 2016); Dennis Faber and Niels Vermunt (eds), *Bank Failure: Lessons from Lehman Brothers* (OUP 2017).

[21] See, e.g. Hüpkes, 'Insolvency – Why a Special Regime for Banks?' (n 18) 472; Armour and others (n 10) 59-60.

[22] See, e.g. Steven L Schwarcz, 'Systemic Risk' (2008) 97 Geo LJ 193; Rosa M Lastra, 'Systemic Risk, SIFIs and Financial Stability' (2011) 6 Capital Markets Law Journal 197.

[23] Bob Wessels, Hon Bruce A. Markell and Jason Kilborn, 'Prominent Principles of Domestic Law' in *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009) 14-16. See also, e.g., Philip Wood, *Principles of International Insolvency* (Sweet & Maxwell 2007); Roy M Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2011).

[24] Lynette Janssen, 'EU Bank Resolution Framework: A Comparative Study on the Relation with National Private Law' (Leiden University 2019).

[25] Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 18) 64-66. See also Chapter 4.

[26] For example, Austria, Luxembourg and the Netherlands. See Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 18) 68-70.

'global in life, but national in death'.[27] These fragmented bank insolvency regimes did not help address financial crises. During the 2009 G20 meetings, global leaders called for a reform of the bank resolution process.[28]

2.1.2 Bank resolution: a new administrative regime

Prior to the global financial crisis (GFC), the phrase 'bank resolution' was already applied in circumstances of resolving banks in distress.[29] However, the meaning of this term was quite vague, and there was no consensus on the definition. In general, the usage of resolution was broad, and it covered almost every stage of resolving an ailing bank, from preventive or corrective measures adopted by banking supervisors,[30] restructuring or reorganisation techniques applied by authorities or courts,[31] to the very end, the liquidation or winding up of a bank,[32] including recapitalisation funded by the government.[33] In a World Bank Research Paper in 2007, bank resolution is understood as 'the set of procedures and measures taken by the authorities to solve the situation of an unviable bank', and it forms part of the supervision conducted by banking supervisory authorities.[34]

Consistent usage of the term only emerged after the financial crisis.[35] During the GFC, only limited instruments were available for authorities, such as national bailout by recourse to taxpayers' money or normal insol-

[27] M. King as quoted on page 36 in the Turner Review: A Regulatory Response to the Global Banking Crisis, Financial Services Authority, March 2009, 36.

[28] G20, 'Declaration on Strengthening the Financial System - London Summit' (2 April 2009) 1; G20, 'Leaders' Statement - The Pittsburgh Summit' (24-25 September 2009) 9.

[29] See, e.g. Helen A Garten, 'A Political Analysis of Bank Failure Resolution' (1994) 74 Boston University Law Review 429; Thomas Glaessner and Ignacio Mas, 'Incentives and the Resolution of Bank Distress' (1995) 10 The World Bank Research Observer 53; Tobias MC Asser, 'Bank Resolution Procedures Used in a Banking Law Receivership' in *Legal Aspects of Regulatory Treatment of Banks in Distress* (International Monetary Fund 2001); Robert A Eisenbeis and George G Kaufman, 'Bank Crisis Resolution and Foreign-Owned Banks' (2005) 1 Pratt's Journal of Bankruptcy Law 588; David S Hoelscher, *Bank Restructuring and Resolution* (Palgrave Macmillan 2006).

[30] See, e.g. Michael Krimminger, 'Banking in a Changing World: Issues and Questions in the Resolution of Cross-Border Banks' in Douglas D Evanoff, George G Kaufman and John R LaBrosse (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007); María J Nieto and Larry D Wall, 'Prompt Corrective Action: Is there a Case for an International Banking Standard' in Douglas D Evanoff, George G Kaufman and John R LaBrosse (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007).

[31] See, e.g. Glaessner and Mas (n 29) 60-62; Asser (n 29); Hoelscher (n 29).

[32] See, e.g. Glaessner and Mas (n 29) 62-63; Steven A Seelig, 'Techniques of Bank Resolution' in David S. Hoelscher (ed), *Bank Restructuring and Resolution* (Palgrave Macmillan 2006) 102-104.

[33] See, e.g., Garten (n 29); Glaessner and Mas (n 29) 61; Seelig (n 32) 104-106.

[34] Bolzico Javier, Granata Paola and Mascaro Yira, 'Practical Guidelines for Effective Bank Resolution' (2007) The World Bank Policy Research Working Paper 4389, 3.

[35] Sven Schelo, *Bank Recovery and Resolution* (Kluwer Law International 2015) 77.

vency proceedings.[36] Neither of these instruments can ensure an orderly resolution of banks. Bailout usually leads to using taxpayers' money and moral hazard issues. [37] Normal insolvency proceedings, on the other hand, are led by courts and thus cannot ensure banks can be revolved in an expedited process without causing systemic risks.[38]

After the 2009 G20 meetings, several international financial organisations drew up proposals for global bank resolution regimes reforms, with the aim being to minimise national bailout and to maintain financial stability. The Basel Committee on Banking Supervision (BCBS) first published the *Report and Recommendations of the Cross-border Bank Resolution Group* in March 2010,[39] but no clear definition of resolution was provided.[40] The International Monetary Fund (IMF), in June 2010, circulated the *Resolution of Cross-border Banks – A Proposed Framework for Enhanced Coordination*, in which 'resolution' was defined in a broad way as 'the full range of recovery and resolution activities that involve public intervention (whether privately or publicly funded) including, for example, mergers and acquisitions, equity recapitalization, debt for equity conversions, transfers of assets and liabilities, temporary administration, reorganization, and liquidation.'[41]

Most importantly, the Financial Stability Board (FSB) formulated the *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes, or KAs), which constitute the fundamental benchmarks for the establishment of new bank resolution regimes in the post-crisis era. Although the Key Attributes do not contain a concrete definition, in a following document, *Key Attributes Assessment Methodology for the Banking Sector: Methodology for Assessing the Implementation of the Key Attributes of Effective Resolution for Financial Institutions in the Banking Sector* (KAAM), 'resolution' is defined as

[36] See, e.g. Andrew Ross Sorkin, *Too big to fail: the inside story of how Wall Street and Washington fought to save the financial system--and themselves* (Penguin 2010); Skeel (n 20); Todd A. Gormley, Simon Johnson and Changyong Rhee, *Ending "Too Big To Fail" Government Promises vs. Investor Perceptions* (National Bureau of Economic Research 2011); Viral V Acharya, *The Social Value of the Financial Sector Too Big to Fail or Just Too Big?* (Thorsten Beck and Douglas D Evanoff eds, World Scientific Publishing 2013); Andreas Dombret, *Too Big to Fail III Should We Break Up the Banks?* (Patrick S. Kenadjian ed, De Gruyter 2015).

[37] See Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009).

[38] Ibid.

[39] BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010).

[40] Cf BCBS, 'Guidelines for Identifying and Dealing with Weak Banks' (July 2015) 66.

[41] IMF, 'Resolution of Cross-Border Banks - A Proposed Framework for Enhanced Coordination' (11 June 2010).

> the exercise of resolution powers, including in particular the exercise of a resolution power specified in KA 3, by a resolution authority in respect of a bank that meets the conditions for entry into resolution, with or without private sector involvement, with the aim of achieving the statutory objectives of resolution set out KA 2.3. The exercise of resolution powers may include or be accompanied by an insolvency proceeding with respect to the bank in resolution (for example, to wind-up parts of that bank).[42]

This definition is similar to the definition in the EU Bank Recovery and Resolution Directive (BRRD), which defines 'resolution' as 'the application of a resolution tool or a tool referred to Article 37(9) in order to achieve one or more of the resolution objectives referred to in Article 31(2)'.[43] Although the US bank resolution laws, that is, the Federal Deposit Insurance Act (FDIA) and the Dodd-Frank Act, do not specify the definition, in the *Resolution Handbook*, which is periodically updated by the FDIC, resolution is interpreted as a variety of resolution actions, involving 'valuing a failing institution, marketing the failing institution to healthy institutions, soliciting and accepting bids for the sale of some or all of the institution's assets and assumption of deposits (including some liabilities), determining which bid is least costly to the insurance fund, and working with the [Assuming Institution] through the closing process (or ensuring the payment of insured deposits in the event there is no acquirer)'.[44] China, for the moment, does not have a comprehensive resolution law and does not prescribe the definition of resolution.[45]

Based on these illustrations, this dissertation defines resolution as actions taken by administrative resolution authorities to resolve banks that are failing or likely to fail.

Resolution objectives, as concluded by the FSB, include

> i. pursue financial stability and ensure continuity of systemically important financial services, and payment, clearing and settlement functions;
> ii. protect, where applicable and in coordination with the relevant insurance schemes and arrangements, such depositors, insurance policy holders and investors as are covered by such schemes and arrangements;

[42] FSB, 'Key Attributes Assessment Methodology for the Banking Sector: Methodology for Assessing the Implementation of the Key Attributes of Effective Regimes for Financial Institutions in the Banking Sector' (19 October 2016) 4.

[43] Article 2(1)(1) BRRD. No definition of 'resolution' is provided in the SRMR.

[44] FDIC, 'Resolutions Handbook' (15 January 2019) 2.

[45] See, e.g. Qingjiang Kong and Yinhui Sun, 'China' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M Haentjens, Qingjiang Kong and B Wessels eds, Eleven International Publishing 2017).

> iii. avoid unnecessary destruction of value and seek to minimise the overall costs of resolution in home and host jurisdictions and losses to creditors, where that is consistent with the other statutory objectives; and
> iv. duly consider the potential impact of its resolution actions on financial stability in other jurisdictions.[46]

What makes resolution different from the pre-crisis bailout or normal insolvency proceedings is that resolution takes into account financial stability, including preserving critical functions of financial institutions and financial markets, and attempts to avoid using taxpayers' money and related moral hazard issues by allocating losses to shareholders and creditors.

These objectives are confirmed in the selected jurisdictions. In the EU, resolution objectives are (a) 'to ensure the continuity of critical functions'; (b) 'to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline'; (c) 'to protect client funds by minimising reliance on extraordinary public financial support'; (d) 'to protect depositors … and investors'; and (e) 'to protect client funds and clients assets'.[47] Section 204 Dodd-Frank Act also stipulates that '[i]t is the purpose of this subchapter to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard'.[48] In China, although there is no resolution law, the recent Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (SIFI Guiding Opinions)[49] set out the general principles of resolution and state that resolution is for the purpose of ensuring a safe, expedited and effective resolution, preserving key businesses and services, and preventing too-big-to-fail risks.[50] Chapter 7 examines these objectives in more detail.

Next, and more distinctly, resolution is an administrative process, and resolution authorities should be administrative authorities,[51] with limited court

[46] FSB KA 2.3.

[47] Article 31(2) BRRD. Similarly, also Article 14(2) SRMR.

[48] 12 US Code §5384(a).

[49] The Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (《关于完善系统重要性金融机构监管的指导意见》) was published on 27 November 2018, <http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3672549/index.html> accessed 25 February 2020.

[50] Article 3(2) SIFI Guiding Opinions.

[51] FSB KA 2.1. See also, e.g. Thomas F Huertas, 'Too Big to Fail: A Policy's Beginning, Middle and End (?)' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015) 11; Matthias Haentjens and Bob Wessels, 'Three Paradigm Shifts in Recent Bank Insolvency Law' (2016) 31 Journal of International Banking Law and Regulation 396, 398-399; Gabriel Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) vi.

involvement.[52] This is the primary legal reform since the GFC. In the EU, each Member State needs to designate one or more administrative resolution authorities.[53] And under the Single Resolution Mechanism Regulation (SRMR), the Single Resolution Board (SRB) – an EU administrative agency – is an administrative resolution authority.[54] In the US, the FDIC conducts resolution.[55] In China, the SIFI Guiding Opinions also confirmed that resolution is under the supervision of administrative authorities, including the central bank – the People's Bank of China and the banking authority – the China Banking and Insurance Regulatory Commission (CBIRC), and the Ministry of Finance (MOF).[56]

As mentioned in Chapter 1, the FSB distinguishes two different stages – recovery and resolution.[57] The FSB further requires that recovery plans should be developed, maintained and executed by the firm's senior management.[58] By contrast, for resolution, a plan is also needed but should be formulated by the resolution authorities.[59] The EU and China follow the recommendations of the FSB.[60] By contrast, in the US, recovery and resolution plans (or 'living wills') are formulated by banks instead of resolution authorities.[61]

2.1.3 Resolution within insolvency

This dissertation also places resolution under the general framework of insolvency. In an IMF/World Bank (WB) 2009 report, 'bank insolvency' is used as an umbrella term covering various mechanisms, including official administration of banks, bank restructuring and bank liquidation.[62]

[52] FSB KA 5.4 and 5.5. *Cf* Jouke T Tegelaar and Matthias Haentjens, 'Judicial Protection in Cross-border Bank Resolution' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019).

[53] Article 3 BRRD.

[54] Article 7 SRMR.

[55] 12 US Code §5390.

[56] Articles 24 and 29 SIFI Guiding Opinions.

[57] FSB KA 11.

[58] FSB KA I-Annex 4, para 1.6.

[59] FSB KA I-Annex 4, paras 1.8-1.9.

[60] Articles 5, 7, 10 and 12 BRRD; Articles 8 and 9 SRMR. Articles 24 and 25 SIFI Guiding Principles.

[61] 12 US Code §5365(d).

[62] IMF and World Bank, 'An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency Prepared by the Staffs of the International Monetary Fund and the World Bank For the IMF, approved by Sean Hagen and Christopher Towe' (17 April 2009), 4. See also Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 12-13. *Cf* Jay L Westbrook, 'SIFIs and States' (2014) 49 Tex Int'l L J 329; Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016) 10.

The EU legislation is quite clear on this relationship. The BRRD amended the Directive on Reorganisation and Winding-up of Credit Institutions[63] (CIWUD) and confirmed that 'in the event of application of resolution tools and exercise of the resolution powers provided for [BRRD], [CIWUD] shall also apply to the financial institutions, firms and parent undertakings falling within the scope of [BRRD].' [64] In addition, the 'reorganisation measures' were redefined in the CIWUD as 'measures which are intended to preserve or restore the financial situation of a credit institution or an investment firm … and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; those measures include the application of the resolution tools and the exercise of resolution powers provided for in [BRRD]'.[65]

The US does not make an explicit reference to resolution vis-à-vis insolvency. As indicated in the *Resolution Handbook*, resolution includes both restructuring and liquidation measures.[66] An administrative liquidation process makes the US resolution different from that of the EU. [67] However, this does not exclude resolution from the overarching concept of insolvency. Chapter 15 of the US Bankruptcy Code adopts the Model Law on Cross-border Insolvency (MLCBI) and interprets insolvency as 'a collective judicial or administrative proceeding … under the law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a … court, for the purpose of reorganization or liquidation'.[68] Under the insolvency framework, a court can be a judicial court or an administrative authority.[69] Therefore, the administrative nature of resolution does not exclude it from insolvency. Several cases also confirmed that resolution is considered as an insolvency proceeding.[70]

China does not yet have a comprehensive resolution law. However, the SIFI Guiding Principles confirmed that Chinese administrative authorities will be able to take resolution actions. Also, a new Commercial Bank Insol-

[63] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of institutions, OJ L 125/15.

[64] Article 1(4) CIWUD; Article 117 BRRD.

[65] Article 2 CIWUD; Article 117 BRRD.

[66] Text to n 44. See also Westbrook (n 62) 330.

[67] European Parliament, 'Liquidation of Banks: Towards an "FDIC" for the Banking Union?', <http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/634385/IPOL_IDA(2019)634385_EN.pdf> accessed 25 February 2020.

[68] 11 US Code §101(23); Article 2(a) MLCBI.

[69] 11 US Code §1502(3); Article 2(e) MLCBI.

[70] See, e.g. *In re Tradex Swiss AG,* 384 B.R. 34, 42 (Bankr. D. Mass. 2008); *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015); *In re ENNIA Caribe Holding N.V.,* 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018). See additional explanation in Chapter 4.

vency Risk Resolution Regulation (CBIRRR) is in the drafting process.[71] As identified from the new regulation's title, resolution is under the general insolvency framework.[72] It is therefore concluded that each jurisdiction compared in this dissertation puts resolution under the insolvency framework.

Consequently, cross-border bank resolution should also be under the general international insolvency framework. However, as shown below in Chapters 3 to 5, current international insolvency law is not adequate to address cross-border bank resolution cases. And several legal instruments explicitly exclude banks from the cross-border insolvency regime, for example, the EIR and the US Bankruptcy Code.[73] These shortcomings, nevertheless, does not undermine the importance of discussion of the international insolvency law framework. For one reason, the *status quo* is that resolution of non-banks, for instance, bank holding companies in the US, may also apply international insolvency laws.[74] For another, international insolvency rules may also be an inspiration for developing new cross-border bank resolution rules.[75] This dissertation proposes new recognition rules for resolution actions based on international insolvency law instruments, such as the MLCBI, with certain modifications.

2.1.4 Resolution toolbox

As said, the FSB Key Attributes empower resolution authorities with a wide variety of resolution powers, generally including: replacement of management, appointment of an administrator, operating and resolving the firm directly, ensuring continuity of essential services, overriding shareholder's rights, transferring assets and liabilities, establishing a bridge institution, establishing a separate asset management vehicle, bail-in, temporary stay of early termination rights, imposing a moratorium, and orderly closure and wind-down (liquidation).[76] The FSB also summarised three common

[71] This Commercial Bank Insolvency Risk Resolution Regulation (《商业银行破产风险处置条例》) is listed in the CBRC 2017 Legislation Plan, see CBRC, 'Announcement on Issuing 2017 Legislation Plan 中国银监会办公厅关于印发2017年立法工作计划的通知' (9 May 2017) <http://www.cbrc.gov.cn/chinese/home/docView/2017D188DE4B4FBABA4EE1F3A3519899.html> accessed 25 February 2020.

[72] Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44, 47-49.

[73] Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast; 11 US Code §1501(c).

[74] More specifically, banks without branches or agencies in the US are subject to Chapter 15. See below, Chapter 4.

[75] See, e.g. Jay L Westbrook, 'The Elements of Coordination in International Corporate Insolvencies: What Cross-Border Bank Insolvency Can Learn from Corporate Insolvency' in Rosa M Lastra (ed), *Cross-Border Bank Insolvency* (OUP 2011); Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481.

[76] FSB KA 3.2.

characteristics of resolution powers, that is, (i) ability to interfere with third party rights; (ii) exercisable by an administrative authority; and (iii) exercisable without shareholder or creditor consent.[77]

Based on the FSB Key Attributes, the IMF further categorised three types of resolution powers: (i) assumption of control, namely, to replace management, clawback remuneration/bonuses; to appoint an administrator to take control/management the firm; (ii) resolution tools, namely, to transfer assets, liabilities to an existing entity, a bridge bank or an asset management company; to bail-in creditors to recapitalize the failed bank or successor; to override stakeholders rights to approve merge, sale, capital injection etc.; (iii) supportive measures, namely, to suspend payments to unsecured creditors and stay creditor actions; to temporarily stay early termination rights; to oblige related group entities to continue to provide essential services and functions.[78]

Resolution authorities can exercise one or more resolution powers. This section briefly introduces three main resolution powers that are specifically created under the new bank resolution regime, namely, bail-in, transfer tool and restrictions on early termination powers. Other powers will also be mentioned in the following chapters.

2.1.4.1 Bail-in

Bail-in is the most controversial resolution tool devised to address the financial crisis.[79] The FSB defines 'bail-in within resolution' as

> restructuring mechanism (however labelled) that enable loss absorption and the recapitalisation of a bank in resolution or the effective capitalisation of a bridge institution through the cancellation, write-down or termination of equity, debt instruments and other senior or subordinated unsecured liabilities of the bank in resolution, and the conversion or exchange of all or part of such instruments or

[77] FSB KAAM, 29-30 (EN 3(f) Characteristics of resolution powers).

[78] IMF, 'The Key Attributes of Effective Resolution Regimes for Financial Institutions - Progress to Date and Next Steps' (27 August 2012) 9-10.

[79] See literature, e.g. Chris Bates and Simon Gleeson, 'Legal Aspects of Bank Bail-ins' (2011) 5 Law and Financial Markets Review 264; Victor de Serière, 'Bail-in: Some Fundamental Questions' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014); Joseph H Sommer, 'Why Bail-in? And How?' (2014) December Federal Reserve Bank of New York Economic Policy Review 207; Emilios Avgouleas and Charles Goodhart, 'Critical Reflections on Bank Bail-ins' (2015) 1 Journal of Financial Regulation 3; Bart PM Joosen, 'Regulatory Capital Requirements and Bail in Mechanisms' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91.

> liabilities (or claims thereon) into or for equity in or other instruments issued by that bank, a successor (including a bridge institution or a parent company of that bank).[80]

Bail-in in the FSB context has two forms: write-down and conversion, targeting at both shareholder's equity and creditors' claims. Liabilities that can be bailed-in are thus called 'bail-inable liabilities'. In principle, 'equity should absorb losses first, and no loss should be imposed on senior debtor holders until subordinated debt (including all regulatory capital instruments) has been written-off entirely'.[81] It is also required that bail-in should respect the hierarchy of claims, and any departure from the equal (*pari passu*) treatment of creditors principle should be stated in the law and meet the necessity either to contain potential systemic risk or to maximise of bank's value for all the creditors.[82]

There are two additional terms that are relevant: regulatory capital and Total Loss-Absorbing Capacity (TLAC). Regulatory capital is the reflection of the BCBS's capital requirements for banks.[83] It has been one of the main pillars in the Basel framework for banking supervision since the time the Basel I[84] and Basel II,[85] which should be 'capable of absorbing the losses in the event that a bank is unable to support itself in the private market' and be allowed to be 'written-off or converted to common shares'.[86] According to 'Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems' (Basel III Capital Requirement), [87] total regulatory capital will consist of the sum of both Tier I (T1) Capital (going-concern capital) and Tier 2 (T2) Capital (gone-concern capital), and T1 Capital covers Common Equity Tier 1 (CET1) and Additional Tier 1 (AT1).[88] A common notion is the minimum capital requirement, which is set as 4.5% of the risk-weighted

[80] FSB KAAM, 2.

[81] KA 5.1.

[82] KA 5.1; KA EC 5.2; KA EN 5(a).

[83] See overview BCBS, 'Literature Review on Integration of Regulatory Capital and Liquidity Instruments' (2016) No 30 BCBS Working Paper.

[84] BCBS, 'International Convergence of Capital Measurement and Capital Standards' (July 1988).

[85] BCBS, 'Basel II: International Convergence of Capital Measurement and Capital Standards: a Revised Framework' (June 2004); BCBS, 'Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework - Comprehensive Version' (June 2006).

[86] BCBS, 'Proposal to Ensure the Loss Absorbency of Regulatory Capital at the Point of Non-viability' (August 2010) 1-2.

[87] BCBS, 'Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems' (December 2010 (rev June 2011)). Additional Basel III documents, see BCBS, 'BCBS, 'Basel III: The Liquidity Coverage Ratio and Liquidity Risk Monitoring Tools' (January 2013); BCBS, 'Basel III: The Net Stable Funding Ratio' (October 2014); BCBS, 'Basel III: Finalising Post-crisis Reforms' (December 2017); BCBS, 'Minimum Capital Requirements for Market Risk' (January 2019 (rev February 2019)).

[88] Basel III Capital Requirement, para.49.

assets (RWAs) for CET1, 6% for T1, and 8% for T1 plus T2.[89] The BCBS also imposes additional buffer requirements, asking banks to maintain additional capital to manage risks.[90]

The TLAC standard, as defined in the FSB TLAC Term Sheet, is 'a requirement for instruments and liabilities that should be readily available for bail-in within resolution at G-SIBs [Global Systemically Important Banks]'. [91] As its manifestation, TLAC imposes 'an additional requirement to minimum regulatory capital requirements' for the G-SIBs.[92] Regarding RWAs, minimum TLAC is set at 16% as from 1 January 2019 and 18% as from 1 January 2022.[93] In addition, TLAC 'should contain a contractual trigger or be subject to a statutory mechanism which permits the relevant resolution authority to effectively write it down or convert it to equity in resolution'.[94] However, TLAC cannot be understood as the statutory mechanism for bail-in. Conversely, the FSB stated that '[i]nstruments or liabilities that are not eligible as TLAC will still be subject to potential exposure to loss in resolution, in accordance with the applicable resolution law'.[95] Also, TLAC only imposes additional capital requirements on G-SIBs, while other institutions subject to resolution are not affected.

2.1.4.2 Transfer tool

The FSB proposes that the resolution authorities should have the power to '[t]ransfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any requirements for consent or novation that would otherwise apply',[96] to '[e]stablish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm',[97] and to '[e]stablish a separate asset management vehicle and transfer to the vehicle for management and run-down non-performing loans or difficult-to-value assets'.[98] A transfer tool in this dissertation refers to the actions transferring assets and liabilities to either an existing third institu-

[89] Basel III Capital Requirement, para.50. There are additional requirements other than the minimum requirement; see more in the Basel III documents.

[90] n 87.

[91] FSB, 'Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution Total Loss-Absorbing Capacity (TLAC) Term Sheet', 3.

[92] Ibid, 11.

[93] Ibid, 10. Additional minimum TLAC requirement is set for leverage ratio denominator at 6% as from 1 January 2019 and 6.75% as from 1 January 2022. By contrast, the Basel III requirement for leverage ratio is set at 3%. See BCBS, 'Basel III: Finalising Post-crisis Reforms' (n 87) 140.

[94] FSB (n 91) 17.

[95] Ibid, 5.

[96] FSB KA 3.2(vi) and 3.3.

[97] FSB KA 3.2(vii) and 3.4.

[98] FSB KA 3.2(viii).

tion or a newly established bridge institution/asset management vehicle. Such transfer helps segregate impaired assets (bad bank) from other healthy parts of a bank (good bank) or assist the bank to go through a transition period.[99] There is no need to require the consent of any interested party or creditor for the exercise of a transfer tool to be valid.[100]

2.1.4.3 Restrictions on early termination rights

In business contracts, there is usually a provision – an '*ipso facto*' clause – granting an automatic effect that a contract is terminated when a party enters into insolvency proceedings.[101] The rationale behind such a clause is that insolvency is an anticipatory default event and the other party in an insolvency proceeding is presumed as incapable of performing the contract. Similarly, financial contracts contain provisions for any party to accelerate, terminate or close-out contractual rights in the case of insolvency of the other party. These are collectively referred to as 'early termination rights'.[102] Some jurisdictions nullify the *ipso facto* clause, which jeopardises the collective nature of insolvency proceedings, but with the exception that financial contracts are under special protection through a so-called safe harbour mechanism.[103] This is because of the need to avoid market risk and systemic risk, since the incapability of exercising these financial contractual terms may lead to contagious effects on the whole financial market.[104]

[99] See literature, e.g. Stephan Madaus, 'Bank Failure and Pre-emptive Planning' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014); Michael Schillig, 'The EU Resolution Toolbox' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015) 91-95; Michael Schillig, 'Private Sector Transfer, Bridge Bank, and Asset Separation' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016).

[100] FSB KA 3.3.

[101] Wood (n 23) 75. See also UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004), 122.

[102] KA Appendix I-Annex 5, para. 1.1. See, e.g. Francisco Garcimartín and Maria Isabel Saez, 'Set-off, Netting and Close-out Netting' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 332; Edward Janger, 'Symposium Introduction: Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 1.

[103] Shmuel Vasser, 'Derivatives in Bankruptcy' (2005) 60 The Business Lawyer 1507; Stephen J. Lubben, 'Repeal the Safe Harbors' (2010) 18 American Bankruptcy Institute Law Review 319, 322-326; Steven L Schwarcz and Ori Sharon, 'The Bankruptcy-Law Safe Harbor for Derivatives: A Path-Dependence Analysis' (2014) 71 Wash & Lee L Rev 1775, 1724-1737; Garcimartín and Saez (n 102) 336-338; Edward Janger and John A.E. Pottow, 'Implementing Symmetric Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 155, 163-168; Mark J Roe and Stephens D Adams, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale J on Reg 363, 377-380.

[104] Ibid.

The recent GFC, however, indicated that exercising these early termination rights may have negative effects on the market, contrary to the common belief that financial contracts should be protected under the safe harbour mechanism. The BCBS explains that the exercise of these early termination rights upon resolution 'could destabilise markets and undermine orderly resolutions of failing institutions' because of the way that '[c]ounterparties may be required to use the asset values determined in the closing out of financial contracts to establish market prices for similar assets subject to contracts with third parties', and thus 'transmit the debtor's instability far beyond its counterparties'.[105] The FSB also confirms that 'the termination of large volumes of financial contracts upon entry into resolution could result in a disorderly rush for the exits that creates further market instability and frustrates the implementation of resolution measures aimed at achieving continuity'.[106] Similarly, some scholars questioned the legality and practicability of safe harbour provisions[107] and even argued for repealing these provisions for financial contracts.[108]

Against this backdrop, the FSB requires that 'entry into resolution and exercise of any resolution powers should not trigger statutory or contractual set-off rights, or constitute an event that entitles any counterparty of the firm in resolution to exercise contractual acceleration or early termination rights'.[109] The KA Appendix I-Annex 5 also further explains that 'entry into resolution and the exercise of any resolution powers should not constitute as an event that entitles the counterparty of the firm in resolution to exercise early termination rights, provided the substantive obligation under the contract … continue to be performed'.[110]

In addition, the FSB Key Attributes advocates that resolution authorities should have the power to '[t]emporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers'[111] and to

[105] BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010) 40.

[106] KA Appendix I-Annex 5, para 1.1.

[107] See, e.g. Schwarcz and Sharon (n 103);Rizwaan J Mokal, 'Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 15; Anna Gelpern and Erik F Gerding, 'Private and Public Ordering in Safe Asset Markets' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 97; Janger and Pottow (n 103); Roe and Adams (n 103).

[108] See, e.g. Lubben (n 103). *Cf* David Skeel and Thomas H Jackson, 'Transaction Consistency and the New Finance in Bankruptcy' (2012) 112 Columbia Law Review 152; Darrell Duffie and David Skeel, 'A Dialogue on the Costs and Benefits of Automatic Stays for Derivatives and Repurchase Agreements' in Kenneth E Scott and John B Taylor (eds), *Bankruptcy Not Bailout: A Special Chapter 14* (Hoover Institution Press 2012).

[109] KA 4.2. See, e.g. Garcimartín and Saez (n 102).

[110] KA Appendix I - Annex 5, para.1.2.

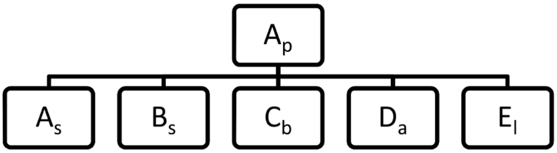
[111] KA 3.2(x).

'[i]mpose a moratorium with a suspension of payments to unsecured creditors and customers', with an exception for 'payments and property transfers to central counterparties (CCPs) and those entered into the payment, clearing and settlements systems', and to impose 'a stay on creditor actions to attach assets or otherwise collect money or property from the firm, while protecting the enforcement of eligible netting and collateral agreements'.[112] These restrictions on early termination rights are for the purpose of protecting the functions of financial markets.

2.2 Recognition of foreign resolution actions: different scenarios

2.2.1 Scenarios

This dissertation summarises four different scenarios in cross-border recognition cases: a foreign subsidiary, a foreign branch, foreign assets, and a contract governed by foreign law. Figure 2.1 below presents the different scenarios in an international banking group. This section illustrates the problems faced in each scenario, and further examinations will be conducted in the following Chapters 3, 4 and 5.



A_p: a parent(holding) firm in jurisdiction A
A_s: a subsidiary in jurisdiction A
B_s: a subsidiary in jurisdiction B
C_b: a branch in jurisdiction C
D_a: assets located in jurisdiction D
E_l: a contract governed by the law of jurisdiction E

Figure 2.1: Different scenarios in a failing international bank group

With regard to a subsidiary (A_s or B_s), general company law principles set the basic rule that subsidiaries are independent legal entities, and thus the foreign subsidiary (B_s) is independent from the parent (A_p) and subject to resolution by host resolution authorities.[113] Usually, when a resolution action is only taken at the parent level, there would be no need for a host authority to recognise home resolution actions. However, a specific scenario is that the shares of a subsidiary may be transferred to a bridge or third institution, thus such a transfer needs to be recognised and enforced in a host jurisdiction (B).

[112] KA 3.2(xi).

[113] Regarding the discussion of resolution of foreign subsidiaries, see Guo (n 75) 499-506.

With regard to branches, resolution actions usually extend to a foreign branch (C_b) in the foreign jurisdiction C, because a branch is part of the parent company (A_p). Resolution actions taken by home (A) resolution authorities, such as transferring a branch to a third or bridge institution, would need to be recognised in the host jurisdiction C. The question, however, is whether the host (C) authority would acknowledge the effects of resolution actions taken by home (A) resolution authority. There might be a problem when the host authority also takes actions on the branch, which would mean that there would be overlapping measures on the same entity.

When there are assets (D_a) located in a foreign jurisdiction D, home (A) resolution actions may also be imposed on these assets, such as transferring the assets to a third or bridge institution. Therefore, a similar question arises with regard to whether the host (D) authority would acknowledge the effects of resolution actions taken by the home (A) resolution authority.

When a foreign law (E_l) is chosen as the governing law for certain financial contracts, according to the party autonomy principle enshrined in private international law,[114] the parties are bound by the chosen governing law. However, resolution authority A might also impose resolution actions on contracts governed by E_l, in accordance with the delegation of jurisdiction A's law. For example, liabilities arising out of this contract might be written down or converted into equity (bail-in), or be put into a stay from exercising early termination rights. The question is whether the authority in jurisdiction E would accept and recognise the effects of actions that are taken according to home (A) law. This is particularly the case where assets are located in jurisdiction E as well. And a typical situation is the passive recognition scenario discussed in below §2.2.3. These scenarios will be closely examined in the following chapters.

[114] See, e.g. Article 3 Rome I Regulation, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations; Article 41 of the Law on Application of Law for Foreign Related Civil Relationships of the People's Republic of China. See literature, e.g. Ernest G Lorenzen, 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 31 Yale Law Journal 565; Willis LM Reese and Maurice Rosenberg, *Cases and Materials on Conflict of Laws* (8th edn, Foundation Press 1984) 576-596; Peter Edward Nygh, *Autonomy in International Contracts* (OUP 1999); Mo Zhang, 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law' (2006) 20 Emory Int'l L Rev 511; AV Dicey, *Dicey, Morris and Collins on the Conflict of Laws* (J. H. C. Morris, Lawrence Collins and Adrian Briggs eds, 15th edn, Sweet & Maxwell Thomson Reuters 2012) paras 32-040ff; Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell 2015) paras 6-001ff.

2.2.2 Single point of entry v multiple points of entry

In resolving banking groups, the FSB developed two distinct approaches: single point of entry (SPE) and multiple points of entry (MPE). SPE refers to the model that 'resolution powers are applied to the top of a group by a single national resolution authority'.[115] In an SPE resolution, the parent issues long-term unsecured debt instruments that would be written down or converted into equity when a subsidiary suffers losses; and thus the parent would be able to recapitalise the subsidiary on a going-concern basis, and the losses by the subsidiary are upstreamed to the parent.[116] An SPE strategy can also be achieved by applying the bridge institution tool. In such a process, the assets of the parent, including the shares in the subsidiaries, are transferred to a third or bridge institution, while the remaining debt instruments issued by the parent are left for loss absorption.[117] In cross-border cases, the SPE strategy would be able to prevent a recognition process since no action is needed for the foreign subsidiary.[118]

However, concerns have been expressed about the practicability of applying SPE across the world. SPE relies on the holding company structure with a parent holding company able to absorb the losses, which is common in the US but not in many other jurisdictions.[119] Although the purpose of SPE includes preserving the functions of operating subsidiaries, host jurisdictions may worry that home jurisdictions do not have incentive to protect foreign subsidiaries.[120] There have also been sceptics about the loss-absorbing capacity of a parent company when the losses of its subsidiaries

[115] FSB, ''Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies' (16 July 2013) 12.

[116] Ibid. See also, e.g., John Bovenzi, Randall Guynn and Thomas Jackson, *Too Big to Fail: The Path to a Solution* (Economic Policy Program Financial Regulatory Reform Initiative, 2013) 23-32; Paul L Lee, 'Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part I' (2015) 132 Banking Law Journal 437, 464-470.

[117] Bovenzi et al (n 116) 23-32; Lee (n 116) 464-470.

[118] Guo (n 75) 503-504.

[119] David Skeel, 'Single Point of Entry and the Bankruptcy Alternative' in Martin Neil Baily and John B. Taylor (eds), *Across the Great Divide: New Perspectives on the Financial Crisis* (Hoover Press 2014) 313; Lee (n 116) 465; Jeffrey N Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) Columbia Law Review 1297, 1330-1332; Wojcik (n 79) 136.

[120] Skeel (n 119) 324; Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 267. See also the financial nationalism theory, Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

are too large to be covered.[121] Also, there are concerns about the feasibility of *ex-ante* valuation and availability of intra-group financing channels.[122] Plus, an SPE strategy does not address the operating problems of subsidiaries, such as non-performing loans or other problematic financial instruments.[123] And it is sceptical about preventing contagious effects among the same banking group because of reputational risks[124] and among the whole banking sector given the interconnectedness of large banks.[125]

In cases where an SPE strategy fails, resolution of a banking group needs an MPE strategy. The FSB describes the MPE strategy as 'resolution tools are applied to different parts of the group by two or more resolution authorities'.[126] An MPE strategy in a cross-border case means the existence of parallel proceedings led by both home and host resolution authorities. The FSB has proposed several solutions for cooperation by different resolution proceedings.[127] For example, crisis management groups (CMGs), comprised of both home and host authorities, should be established as platforms for information sharing and enhanced coordination.[128] Institution-specific cross-border cooperation agreements (CoAgs) should be in place between home and host authorities in relation to specific task arrangements in the resolution process.[129] In an MPE resolution process, different proceedings take place simultaneously, and it is expected that each authority restricts their powers within their territory. However, it is inevitable that one resolution proceeding may need to have effects abroad, for example, shares in the foreign subsidiaries are transferred to a third or bridge institution, or debt instruments governed by foreign laws are affected by bail-in or other restrictions. Under these circumstances, a statutory recognition regime is still needed.

[121] FDIC & BOE, 'Resolving Globally Active, Systemically Important Financial Institutions, A joint paper by the Federal Deposit Insurance Corporation and the Bank of England', para 37; Paul Kupiec and Peter Wallison, 'Can the "Single Point of Entry" Strategy Be Used to Recapitalize a Systemically Important Failing Bank?' (2015) 20 Journal of Financial Stability 184, 189-190.

[122] Lee (n 116) 467-470; Kwon-Yong Jin, 'How to Eat an Elephant: Corporate Group Structure of Systemically Important Financial Institutions, Orderly Liquidation Authority, and Single Point of Entry Resolution' (2014) 124 Yale Law Journal 1746.

[123] Stephen J Lubben and Arthur E Wilmarth Jr, 'Too Big and Unable to Fail' (2017) 69 Fla L Rev 1205, 1228.

[124] Ibid, 1229. See also Charles Goodhart, 'The Regulatory Response to the Financial Crisis' (2008) 4 Journal of Financial Stability 351, 356-357.

[125] Kupiec and Wallison (n 121) 193-194; Skeel (n 119) 325; John Crawford, ''Single Point of Entry': The Promise and Limits of the Latest Cure for Bailouts' (2014) 109 Northwestern University Law Review Online 103; Wolf-Georg Ringe and Jatine Patel, 'The Dark Side of Bank Resolution: Counterparty Risk through Bail-in' (2019) European Banking Institute Working Paper Series 2019 - no 31.

[126] FSB (n 115) 12.

[127] See a general overview, Guo (n 75) 500-502; Davies (n 120)271-281.

[128] KA 8.

[129] KA 9.

A more complex situation is the so-called SPE within MPE. In the new amended EU BRRD II, this strategy might be applied to large multinational banking groups.[130] In a banking group, there might be several resolution groups entering into resolution in parallel (MPE); but within each resolution group, it is also possible that only one resolution entity, usually an intermediate holding company, enters into resolution and absorbs all the losses (SPE). Despite the complex structure of this strategy, for any action to be effective abroad it needs the regular recognition process.

2.2.3 Active recognition v passive recognition

This dissertation further distinguishes two types of recognition requests: active recognition request and passive recognition request. Active recognition refers to the request brought by a resolution authority where recognition in a host jurisdiction is necessary for the implementation of resolution actions. For example, a transfer action towards foreign branches and foreign assets needs active recognition in order to be effective in the host jurisdiction. Passive recognition, conversely, means that recognition is not necessary to effectuate the resolution actions. However, such recognition might be needed in any subsequent litigation. For instance, a resolution authority can take actions on a contract governed by foreign (E) law, but a dissenting contractual party may initiate a case arguing that home law cannot apply to the contract because it is governed by jurisdiction E's law. In such circumstances, recognition of home resolution actions is needed.[131] Regardless of active recognition or passive recognition, the conditions for recognition and grounds for refusal of recognition are the same. In the following discussion, unless specified otherwise, the analysis applies to both circumstances.

[130] See below Chapter 3.

[131] See, e.g. *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2015] EWHC 2371 (Comm), [2015] 2 CLC 475; *Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA, Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092, [2016] 2 CLC 690; *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683. See more analysis on this case in Chapter 3.

Part II

Comparative Studies in the Selected Jurisdictions

3 The EU*

3.1 Introduction

This chapter examines recognition of foreign resolution actions in the European Union (EU). There are four modes[1] of cross-border bank resolution in the EU: first, resolution of cross-border banking groups under the Single Resolution Mechanism (SRM) within the Banking Union; second, resolution of international banks with presence outside the Banking Union but within the EU which is subject to the Directive 2001/24/EC on the Reorganisation and Winding-up of Credit Institutions[2] (CIWUD); third, resolution of international banking groups with presence outside the Banking Union but within the EU which is subject to the Bank Recovery and Resolution Directive (BRRD); and forth, resolution of international banks or banking groups with presence in the third (non-EU) countries. The first three modes are all subject to special EU rules. The fourth mode, nonetheless, also depends on third-countries' law.

In §3.2.1, EU regulation and supervision in the banking sector is first described, including the establishment of the Banking Union and formulation of a single rule book – the result of financial regulation harmonisation across the EU Member States. Next, §3.2.2 introduces EU bank resolution

[*] Part of this chapter is based on the CUPL-Leiden joint research project *New Bank Insolvency Law for China and Europe* generously funded by the Royal Dutch Academy of Sciences (KNAW). Part of this chapter was also presented at the conference New Bank Insolvency Law for China and Europe on 1 April 2017 in Beijing. I thank Qingjiang Kong, Sheng Chen, Wei Shen, Xiaoliang Fan, Xiaobo Fan, Ming Du, Jieche Su, Xifeng Zhang, Bin Gu for their comments.

[1] Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 155-180; Matthias Haentjens, Bob Wessels and Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming).

[2] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of institutions, OJ L 125/15. See literature, e.g. Enrico Galanti, 'The New EC Law on Bank Crisis' (2002) 11 International Insolvency Review 49; Bob Wessels, 'Directive on the Reorganization and Winding-up of Credit Institutions' (2005) American Bankruptcy Institute Journal 34; Bob Wessels, 'Banks in Distress under Rules of European Insolvency Law' (2006) 21 Journal of International Banking Law and Regulation 301; Gabriel Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017).

rules, at both EU level and Member State level. §3.3 examines the central question on recognition of foreign resolution actions in the EU, illustrating both grounds for recognition in §3.3.1 and public policy exceptions in §3.3.2. In particular, four scenarios are analysed, namely, subsidiary (§3.3.1.2.1), branch (§3.3.1.2.2), assets (§3.3.1.2.3) and governing law (§3.3.1.2.4). §3.4 draws conclusions.

3.2 Regulation, supervision and resolution in the EU banking sector

3.2.1 Regulation and supervision

To start with, the general legal and political structure of the EU is briefly introduced. The EU is based on two fundamental treaties agreed by the Member States – the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[3] These two treaties were most recently amended by the Lisbon Treaty.[4] Alongside the course of establishing the current political framework for the EU, an economic and monetary union was created by the Maastricht Treaty in 1992, leading to a single currency area – the Euro Area – and forming a single monetary policy implemented by the European Central Bank (ECB) and national central banks.[5] There are currently 19 countries within the Euro Area [6] and 28 countries (including the UK before 31 January 2020) in the EU. The legislative documents of the EU include primary sources – the treaties, and secondary legislation – regulations, directives, decisions, recommendations and opinions, among which regulations and directives are legally binding in all the Member States.[7] Regulation, such as the Single Resolution Mechanism Regulation (SRMR) is directly applicable in the Member States;

[3] See, e.g., D Chalmers, G Davies and G Monti, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 39-46; Karen Davies, *Understanding European Union law* (6th edn, Routledge 2016) 18-20; Alina Kaczorowska, *European Union Law* (4th edn, Routledge 2016) 26-30; Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2017).

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (2007/C 306/01). The Lisbon Treaty entered into force in December 2009.

[5] See, e.g. Amy Verdun, 'Economic and Monetary Union' in Michelle Cini and N. Borragan (eds), *European Union Politics* (OUP 2016); Alicia Hinarejos, 'Economic and Monetary Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2017).

[6] These countries are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. ECB, 'Euro area 1999-2015' <https://www.ecb.europa.eu/euro/intro/html/map.en.html> accessed 25 February 2020.

[7] See, e.g. Davies (n 3) 53-70; Margot Horspool, Matthew Humphreys and Michael Wells-Greco, *European Union Law* (8th edn, OUP 2014) 87-100.

directives, such as the BRRD, need to be transposed into national laws. [8] Other sources of Union law include case law made by the Court of Justice of the European Union (CJEU)[9], general principles of the Union law and international agreements.[10]

In the banking sector, the EU has been long endeavouring to harmonise the regulatory rules. The earliest attempt was the so-called 'First Banking Directive' in the 1970s.[11] Additional effort was made in the 'Second Banking Directive' to further revise and supplement the previous directive.[12] A vital mechanism developed in this harmonisation process is the 'EU passport' mechanism, which allows a bank licensed in one Member State to operate and provide services in other Member States without the need to obtain additional authorisation.[13] Moreover, the supervisory authority in the Member State where the bank is authorised is supposed to supervise all the bank's activities across the EU, namely 'home country control'.[14] Later in 2001, a group led by Alexandre Lamfalussy drafted the 'Lamfalussy Report',[15] a significant step towards the legislative process in the banking sector in the EU, resulting in a recast Directive 2006/48/EC (Capital Requirements Directive) which amended the Second Banking Directive.[16]

In 2008, in response to the global financial crisis (GFC), Jacques de Larosière de Champfeu chaired the task of further harmonising European financial regulation and formulated the De Larosière Report,[17] which inspired the creation of a European System of Financial Supervision (ESDS), consisting of the European Banking Authority (EBA), the European Securities Markets

[8] Article 288 TFEU.

[9] Article 19 TEU. The CJEU includes the Court of Justice, the General Court and specialised courts, and it ensures that in the interpretation and application of the treaties the law is observed. See, e.g. Chalmers, Davies and Monti (n 3) 156-198.

[10] See, e.g. Davies (n 3) 53-70; Davies (n 3) 53-70; Horspool, Humphreys and Wells-Greco (n 7) 87-100.

[11] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions. See Matthias Haentjens and Pierre de Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2015) 8.

[12] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. See Haentjens & De Gioia-Carabellese (n 11) 8-10.

[13] Haentjens & De Gioia-Carabellese (n 11) 8-10.

[14] Ibid.

[15] Final Report of the Committee of the Wise Men in the Regulation of European Securities Market, Brussels (15 February 2001). See also Haentjens & De Gioia-Carabellese (n 11) 10-11.

[16] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177/1.

[17] The High-Level Group on Financial Supervision in the EU, Brussels (25 February 2009).

Authority (ESMA), the European Insurance and Occupational Pension Authority (EIOPA) and the European Systemic Risk Board (ESRB). [18] The EBA is the main authority responsible for banks, and it can develop regulating and implementing technical standards, issue guidelines and recommendations addressed to authorities and financial institutions and assist authorities in the settlement of disagreements.[19]

Subsequent to the Euro Area crisis in 2010/11, the EU leaders decided to create a Banking Union where EU-wide rules apply to banks in the Euro Area and any non-Euro Member States that wants to join.[20] A new regulatory framework was set out together with a 'single rule book', [21] consisting mainly of the prudential requirements for credit institutions as prescribed in the amended Capital Requirements Directive (CRD IV)[22] and Capital Requirements Regulation (CRR),[23] as well as the rules for recovery and resolution such as those in the BRRD, and the rules of deposit guarantee schemes.

Prudential supervision was largely harmonised within the Banking Union, introducing the so-called Single Supervisory Mechanism (SSM) by the Singe Supervisory Mechanism Regulation (SSMR). [24] This SSM empowers the ECB to act as the ultimate prudential supervisor, directly supervising 114

[18] See, respectively, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (**EBA Regulation**); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (**ESMA Regulation**); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (**EIOPA Regulation**); Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (**ESRB Regulation**). See Haentjens & De Gioia-Carabellese (n 11) 12-13; Haentjens, Janssen and Wessels (n 1) 10.

[19] Article 8 EBA Regulation. See Haentjens, Janssen and Wessels (n 1) 39.

[20] Haentjens & De Gioia-Carabellese (n 11) 94.

[21] See Haentjens & De Gioia-Carabellese (n 11) 94; Haentjens, Janssen and Wessels (n 1) 22.

[22] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338.

[23] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1.

[24] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63. See Haentjens & De Gioia-Carabellese (n 11) 13-14.

significant supervised entities as of 1 July 2019, and indirectly supervising less significant institutions through national competent authorities.[25] The SSM is also the first pillar of the Banking Union, while the second one is the Single Resolution Mechanism (SRM) created by the SRMR, with a debated third one – a single deposit guarantee scheme.[26] The debate revolves around the concern that economic resilient Member States may have to pay for the consequences of actions of riskier Member States.[27]

3.2.2 Resolution

Before the GFC, national laws played a leading role in solving failing banks in the EU. There were two different major approaches towards bank insolvency issues. In some Member States, such as the UK, the general corporate insolvency laws applied to credit institutions; while in other Member States, specific modifications to the general national insolvency laws were applied to address the specifies of bank insolvency, for instance, in Germany and the Netherlands, only the domestic bank supervisory authority could file for bankruptcy.[28] By using both approaches, the courts have the ultimate power and the supervisory authorities exercising specific measures have to be approved by the courts. In general, the bank insolvency proceedings in Europe relied on a 'judicial function'.[29]

In the meanwhile, at the EU level, limited harmonisation was achieved, but only in the field of deposit guarantee schemes, settlement finality, and private international law rules. The deposit guarantee schemes were first harmonised in 1994 by the Directive on Deposit Guarantee Schemes (DGS Directive 1994), [30] against the background of collapse of the Bank of Credit

[25] ECB, 'Who supervised my bank?' (1 July 2019) <https://www.bankingsupervision.europa.eu/banking/list/who/html/index.en.html> accessed 25 February 2020.

[26] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM (2015) 586 final, 2015/0270 (COD). See also, e.g. Daniel Gros and Dirk Schoenmaker, 'European Deposit Insurance and Resolution in the Banking Union' (2014) 52 Journal of Common Market Studies 529; Luc Laeven, 'Deposit Insurance in the European Union' in Charles Enoch and others (eds), *From Fragmentation to Financial Integration in Europe* (International Monetary Fund 2014).

[27] ECB, 'Interview with Der Tagesspiegel' (1 October 2018) <https://www.ecb.europa.eu/press/inter/date/2018/html/ecb.in181001.en.html> accessed 25 February 2020.

[28] See, e.g. Eva HG Hüpkes, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada* (Kluwer Law International 2000) 49-81; Eva HG Hüpkes, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005); Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009); Haentjens, Janssen and Wessels (n 1) 16.

[29] Hüpkes, '*The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada*' (n 28) 81.

[30] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes , OJ L 135/5.

and Commerce International (BCCI) in 1991,[31] with the aim of promoting 'harmonious development of the activities of credit institutions throughout the Community' and 'increasing the stability of the banking system and protection for savers'.[32] It set out the minimum deposit coverage level of EUR 20,000 per depositor.[33] Also, depositors at branches set up by credit institutions in Member States were also covered by the deposit guarantee schemes.[34] The DGS Directive was later first amended in 2009 [35] and amended for the second time in 2014.[36] The current coverage level is set at EUR 100,000.[37]

The Settlement Finality Directive 1998[38] provided a harmonized solution at the EU level addressing legal issues for payment and settlement systems.[39] In terms of insolvency proceedings, it aimed to 'minimise the disruption to a system caused by insolvency proceedings',[40] by providing protection for netting and transfer orders as well as collateral security, ensuring enforceability under insolvency proceedings.[41] It also provided certain conflict of law rules among the EU Member States.[42] This Directive was later amended in 2009.[43]

[31] See, e.g. Galanti (n 2); Bob Wessels, 'Protection of Small Depositors against Banks in Distress' (2004) 19 Journal of International Banking Law and Regulation 331.

[32] Recital DSG Directive 1994. See Haentjens, Janssen and Wessels (n 1) 17-18.

[33] Article 7(1) DGS Directive 1994.

[34] Article 4(1) DGS Directive 1994. See also Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 150-151.

[35] Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.

[36] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

[37] Article 6 DGS Directive 2014.

[38] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166/45.

[39] See, e.g. Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 158-163; Diego Devos, 'Legal Protection of Payment and Securities Settlement Systems and of Collateral Transactions in the European Union' (2008) Current Developments in Monetary and Financial Law 471; Roy M Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2011) 50-51; Matthias Haentjens, 'National Insolvency Law In International Bank Insolvencies' in Bernard Santen and Dick Van Offeren (eds), *Perspectives on International Insolvency Law: A tribute to Bob Wessels* (Kluwer 2014) 74-75; Haentjens, Janssen and Wessels (n 1) 18.

[40] Recital (4) Settlement Finality Directive 1998.

[41] Section II and IV Settlement Finality Directive 1998.

[42] Article 8 Settlement Finality Directive 1998. See Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 161.

[43] Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, OJ L 146/37.

The CIWUD harmonised the private international law rules on the cross-border bank insolvency issues among the EU Member States and applies to 'credit institutions and their branches set up in Member States other than those in which they have their head offices'.[44] This Directive supplements the EU Insolvency Regulation (EIR),[45] which excludes credit institutions.[46] This Directive distinguishes two types of proceedings: reorganisation and winding-up.[47] It is stated that the 'administrative and judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States'.[48] In addition, the reorganisation measures 'shall be effective throughout the Community once they become effective in the Member States where they have been taken'.[49] Similar provisions also apply to winding-up proceedings.[50] In such sense, the CIWUD adopts a unity, universality and single entity approach, only allowing the commencement of the insolvency proceedings in home states, and host states are obligated to recognize such proceedings. [51] The rationale behind this choice is explained in the recital that 'a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted',[52] and it would be 'particularly undesirable to relinquish such unity'.[53] This is the reflection of the 'home country control principle' in the cross-border bank supervision. The CIWUD does not harmonise substantive bank insolvency rules. The new resolution law later undertook this task.

[44] Article 1(1) CIWUD. See, e.g. Hüpkes, *'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada'* (n 28) 164-168; Galanti (n 2); Wessels (n 2); Haentjens, Janssen and Wessels (n 1) 18-20.

[45] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1 (EIR 2000). It was later amended by the 2015 recast: Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (EIR 2015 Recast).

[46] Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast.

[47] Article 2 CIWUD.

[48] Article 3(1) CIWUD.

[49] Article 3(2) CIWUD.

[50] Article 9(1) and 9(2) CIWUD.

[51] Haentjens, Janssen and Wessels (n 1) 18-19; Gabriel Moss, Bob Wessels and Matthias Haentjens, 'Principles for Cross-border Financial Institution Insolvencies' in Gabriel S. Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) para 2.60.

[52] Recital (3) CIWUD.

[53] Recital (4) CIWUD.

The GFC had an enormous impact on the overall European financial market. The national legislators adopted immediate actions to address the crisis with the aim of mitigating the negative effects. For example, the UK,[54] Germany,[55] and the Netherlands[56] successively adopted new laws to address banks in financial difficulties. The lack of cross-border cooperation for orderly resolution of financial institutions, especially in Europe where banks are actively operating internationally,[57] resulted in the harmonisation of substantive bank resolution rules – the BRRD and SRMR – at the EU level. The BRRD is a directive that applies to all EU Member States and has to be transposed into national laws.[58] And the SRMR established the SRM, creating uniform resolution rules that can be directly applicable to credit institutions in the Banking Union. The SRMR also established a Single Resolution Board (SRB) as the resolution authority.[59] At the EU level, credit institutions established in the Banking Union are supervised by the ECB under the SSM, while the resolution powers are conferred upon the SRB. At the national level, a Member State is free to choose and designate its national resolution authority.[60]

Financial institutions that can enter into resolution include entities established in the EU, that is, credit institutions, investment firms, financial holding companies, and subsidiaries of those credit institutions, investment firms or financial holding companies, as well as branches of credit institutions or investment firms that have their head office outside the EU under certain circumstances.[61] As explained in Chapter 2 at §2.1.1, credit institutions in the EU context are understood as banks, which are defined as 'undertaking[s] the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account', not

[54] First, in 2008, the Banking (Special Provisions) Act 2008 was passed to bring the failing bank Northern Rock into public ownership. This temporary Act was replaced by the Banking Act 2009. See Matthias Haentjens and Lynette Janssen, 'New National Solutions for Bank Failures: Game-changing in the UK, Germany and the Netherlands?' (2015) Journal of Financial Regulation 294; Haentjens, Janssen and Wessels (n 1) 20-21.

[55] The Restructuring Act (Restrukturierungsgesetz) 2011. See Haentjens and Janssen (n 54); Haentjens, Janssen and Wessels (n 1) 21.

[56] The Intervention Act (Interventiewet) 2012. See Haentjens and Janssen (n 54); Haentjens, Janssen and Wessels (n 1) 21.

[57] As of the end of 2015, activity abroad accounted for 18% for Euro Area banks. See Thomas Gehrig and others, 'European Banking Supervision: The First Eighteen Months' in Dirk Schoenmaker and Nicolas Véron (eds), *Bruegel Blueprint Series 25* (Bruegel 2016).

[58] Article 130 BRRD.

[59] Article 1 SRMR.

[60] For example, in the UK and the Netherlands, the central banks are designated as resolution authorities; while in Germany, a separate agency preforms as the resolution authority, i.e. Bundesanstalt für Finanzmarktstabilisierung (Federal Agency for Financial Market Stabilisation). See EBA, 'Resolution Authorities' <http://www.eba.europa.eu/about-us/organisation/resolution-committee/resolution-authorities> accessed 25 February 2020.

[61] Article 1 (e) BRRD.

including central banks, post office giro institutions and certain specific national entities.[62] Any investment firm is defined as 'any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis,' such as the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, dealing on own account, portfolio management, and investment advice.[63] Financial holding company is defined as a financial institution the subsidiaries of which are exclusively or mainly credit institutions, investment firms or financial institutions, and at least one of such subsidiaries is a credit institution or an investment firm; and a financial institution is an undertaking other than a credit institution or an investment firm whose principal activity is to acquire holdings or to pursue certain financial activities, such as financial leasing, the participation in securities issues and the provision of services relating to such issues, and portfolio management and advice.[64]

Under the SRM, the SRB is responsible for cross-border banking groups,[65] significant credit institutions identified by the ECB,[66] significant financial holding companies and significant mixed financial holding companies;[67] and other credit institutions in relation to which the ECB has decided to exercise direct supervision.[68]

The BRRD and SRMR empower national resolution authorities and the SRB with four resolution tools when a bank meets the conditions for resolution: the sale of business tool, the bridge institution tool, and assets separation tool and the bail-in tool.[69] The sale of business tool is about the sale of an institution or part thereof to one or more private sector purchasers, by transferring shares or other instruments of ownership issued by the institution under resolution or all or any of its assets, rights, or liabilities.[70] The bridge institution tool shall be applied when no private buyer is quickly available or the failing institution is too big to merge with another institution, which enables the resolution authorities to transfer all or a part of the business of the institution under resolution to a temporary bridge institution.[71] The asset separation tool authorises the resolution authorities to transfer certain

[62] Article 2(1)(2) BRRD; Article 4(1)(1) CRR and Article 2(5) CRD IV.

[63] Article 2(1)(3) BRRD; Article 4(1)(2) CRR; Article 4(1)(1), 4(1)(2) and Annex I Section A and C CRD IV.

[64] Articles 1, 2(1)(4) and 2(1)(9)-(15) BRRD; Article 4(1)(20)-(33) CRR; Annex I CRD IV.

[65] Article 7(2)(b) SRMR.

[66] Article 6(4) and 6(5)(b) SSMR.

[67] Article 7(2)(a)(i) SRMR; Article 6(4) SSMR.

[68] Article 7(2)(a)(ii) SRMR; Article 6(5)(b) SSMR.

[69] Article 37(3) BRRD; Article 22(2) SRMR.

[70] Articles 2(1)(58) and 38-39 BRRD; Articles 3(1)(30) and 24 SRMR.

[71] Articles 2(1)(60) and 40-41 BRRD; Articles 3(1)(31) and 25 SRMR.

assets, rights and liabilities of the institution under resolution or a bridge institution to an asset management vehicle.[72] These three tools are transfer tools.[73]

The bail-in tool refers to the mechanism for empowering a resolution authority with write-down and conversion powers in relation to liabilities of an institution under resolution.[74] Bail-in in the EU context is limited to liabilities, different from the Financial Stability Board (FSB)'s definition that also applies to equity.[75] The EU also introduces the minimum requirement for own funds and eligible liabilities (MREL).[76] To be more specific, 'own funds' refer to 'the sum of Tier 1 and Tier 2 capital';[77] and 'eligible liabilities' refer to 'liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity … that are not excluded from the scope of the bail-in tool'.[78] MREL is similar to the previous mentioned TLAC,[79] with the objective 'of ensuring that institutions and entities … have sufficient loss-absorbing and recapitalisation capacity'.[80]

In addition, resolution authorities can write-down or convert capital instruments before any resolution action is taken.[81] Resolution authorities also have other resolution powers[82] necessary to facilitate the application of the resolution tools, including general powers,[83] ancillary powers,[84] power to require the provision of services and facilities,[85] power to enforce crisis management measures of crisis prevention measures by other Member States,[86] power in respect of assets, rights, liabilities, shares and other instruments of ownership located in third countries,[87] exclusion of certain contractual terms in early intervention and resolution,[88] power to suspend

[72] Articles 2(1)(55) and 42 BRRD; Articles 3(1)(32) and 26 SRMR.
[73] See Chapter 2, §2.1.4.2.
[74] Articles 2(1)(57) and 43-58 BRRD; Articles 3(1)(33) and 27 SRMR.
[75] See Chapter 2, §2.1.4.1.
[76] Recital (80) BRRD; Article 45 BRRD.
[77] Article 2(1)(38) BRRD; Article 3(1)(40) SRMR; Article 4(1)(118) CRR.
[78] Article 2(1)(71) BRRD; Article 3(1)(49) SRMR.
[79] See Chapter 2, §2.1.4.1.
[80] Recital (16) Parliament CRR Amendment Resolution; Recital (2) Commission SRMR Amendment Proposal 2016/0361; Recital (2) Commission BRRD Amendment Proposal 2016/0362.
[81] Recital (81) and Articles 59 and 60 BRRD; Recital (86) and Article 21 SRMR.
[82] 'Resolution power' is defined in Articles 2(1)(20) BRRD as a power referred to in Articles 63 to 72 BRRD.
[83] Article 63 BRRD.
[84] Article 64 BRRD.
[85] Ibid.
[86] Article 66 BRRD.
[87] Article 67 BRRD.
[88] Article 68 BRRD.

certain obligations,[89] power to restrict the enforcement of security interests,[90] and power to temporarily suspend termination rights.[91]

Most recently, two amendments have been enacted, namely, BRRD II[92] and SRMR II.[93] These two amendments incorporate the latest TLAC requirements.[94] The new reform introduces the single point of entry (SPE) within multiple points of entry (MPE) strategy. Two relevant terms are defined. 'Resolution entity' is defined as (a) 'a legal person established in the Union, which, in accordance with Article 12, is identified by the resolution authority as an entity in respect of which the resolution plan provides for resolution action', or (b) 'an institution that is not part of a group that is subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, in respect of which the resolution plan drawn up pursuant to Article 10 of this Directive provides for resolution action'.[95] 'Resolution group' is defined as (a) 'a resolution entity and its subsidiaries that are not: (i) resolution entities themselves; (ii) subsidiaries of other resolution entities; or (iii) entities established in a third country that are not included in the resolution group in accordance with the resolution plan and their subsidiaries'; or (b) 'credit institutions permanently affiliated to a central body and the central body itself when at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries'.[96] Accordingly, within one banking group, there might be several resolution entities entering into resolution at the same time (MPE); a resolution entity might be an intermediate holding, the resolution of which saves its subsidiaries from resolution (SPE). In addition, the new BRRD II and SRMR II distinguish external MREL and internal MREL. Resolution entities should issue external MREL instruments on a consolidated basis

[89] Article 69 BRRD.

[90] Article 70 BRRD.

[91] Article 71 BRRD.

[92] Directive (EU) 2019/879 of The European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150/296.

[93] Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, OJ L 150/226.

[94] Mariken van Loopik and Maurits ter Haar, 'EU Banking Reform Package: Ready for Implementation' (De Brauw Black Stone Westbrook, April 2019) <https://www.debrauw.com/wp-content/uploads/2019/04/Banking-Reform-Package.pdf> accessed 25 February 2020.

[95] Amended Article 2(1)(83a) BRRD, Article 1(1)(e) BRRD II. Amended Article 3(1)(24a) SRMR, Article 1(1)(b) SRMR II.

[96] Amended Article 2(1)(83b) BRRD, Article 1(1)(e) BRRD II. Amended Article 3(1)(24b) SRMR, Article 1(1)(b) SRMR II.

to absorb losses of the whole resolution group.[97] Institutions that are subsidiaries of a resolution entity but are not themselves resolution entities should issue internal MREL instruments on an individual basis in order to upstream losses to parent resolution entities.[98]

3.3 Recognition of foreign resolution actions in the EU

3.3.1 Legal grounds for recognition

3.3.1.1 Institutional framework

3.3.1.1.1 Recognition among the EU Member States

When it comes to recognition of foreign resolution actions in the EU, it is necessary to distinguish two situations: recognition among the EU Member States and recognition of third-countries' resolution actions outside the EU. Third-country resolution refers to 'an action under the law of a third country to manage the failure of a third-country institution or a third-country parent undertaking that is comparable, in terms of objectives and anticipated results, to resolution actions under [BRRD]'.[99] In this section, recognition among the EU Member States is first addressed, while recognition of third-country resolution proceedings is illustrated in the next section.

Among the EU Member States, there are three modes that address different types of cross-border bank resolution in the EU. First, within the Banking Union, cross-border banks are subject to the resolution of the SRB.[100] As mentioned above, the SRB is responsible for the resolution of cross-border groups and significant institutions supervised by the ECB.[101] The SRB is *de facto* a supranational authority with the power to determine the conditions and procedures of cross-border bank resolution within the Banking Union.

[97] Amended Article 45(e)(1) BRRD, Article 1(17) BRRD II. Amended Article 12(f)(1) SRMR, Article 1(6) SRMR II.

[98] Amended Article 45(f)(1) BRRD, Article 1(17) BRRD II. Amended Article 12(g)(1) SRMR, Article 1(6) SRMR II.

[99] Article 2(1)(88) BRRD.

[100] See, e.g. David Howarth and Lucia Quaglia, 'The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism' (2014) 52 Journal of Common Market Studies 125; Alexander Kern, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) European Law Review 154; Geroge S Zavvos and Stella Kaltsouni, 'The Single Resolution Mechanism in the European Banking Union: Legal Foundations, Governance Structure and Financing' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016) 147-150.

[101] Article 7(2) SRMR. Text to n 65-68.

The SRMR applies to the SRB decision-making process. If the SRB reaches a resolution decision, national resolution authorities (NRAs) are supposed to implement the decisions made by the SRB in accordance with national laws transposing the BRRD and other applicable national laws,[102] such as the law related to issuing new shares or exercising rights to new shares during a bail-in/conversion process.[103] NRAs are also responsible for the resolution of non-significant and non-cross-border institutions.[104]

Second, outside the Banking Union, the BRRD amends the CIWUD and makes the private international law rules on cross-border bank insolvency applicable to resolution actions.[105] Most importantly, as explained in Chapter 2 at §2.1.3, the amendment confirms that resolution in the EU context is treated as a reorganisation measure.[106] Reorganisation measures taken in a home Member State should be effective across the EU,[107] confirmed in the *LBI hf v Kepler Capital Market SA*[108] case (moratorium) and *Kotnik v Državni zbor Republike Slovenije*[109] case (bail-in), subject to the conditions that the measures (i) 'must be adopted by the competent administrative or judicial authorities of a Member State'; (ii) 'must be adopted with the purpose of preserving or restoring the financial situation of a credit institution'; and (iii) 'the measure must potentially affect third parties' rights'.[110] Accordingly, resolution actions taken by a home State authority should be automatically recognised across the Union, without any public policy exception.[111]

[102] Article 29 SRMR. See also Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15).

[103] See DNB, 'Operation of the bail-in tool' <https://www.dnb.nl/en/binaries/Communication%20regarding%20the%20operation%20of%20the%20bail-in%20tool_tcm47-370119.pdf> accessed 25 February 2020.

[104] Article 7(3) SRMR.

[105] Article 117 BRRD.

[106] Ibid.

[107] Article 3(2) CIWUD.

[108] Judgment of 24 October 2013, *LBI hf v Kepler Capital Markets SA and Frédéric Giraux*, C-85/12 EU:C:2013:697.

[109] Judgment of 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, C-526/14 EU:C:2016:570.

[110] Ibid [135]. See also Jens-Hinrich Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019) 54-55.

[111] Moss, Wessels and Haentjens (n 51) para 2.26. *Cf* Haentjens, Janssen and Wessels (n 1) 186-192.

This principle is confirmed in an English case *Goldman Sachs International v Novo Banco SA*.[112] In this case, Novo Banco SA was a bridge entity, to which the Portuguese resolution authority transferred all debt of Banco Espírito Santo in August 2014, including that of Goldman Sachs. However, the Portuguese resolution authority made another decision in December 2014, which excluded the debt of Goldman Sachs from transferring to Novo. Therefore, Goldman Sachs commenced litigation and requested the English court to recognise that its claim had been transferred to Novo. The appeal judgment explicitly stated that '[m]easures taken in the application of [resolution] tools and the exercise of [resolution] powers were by Article 117 expressly brought within the definition of "reorganisation measures" in Article 2 of the [Winding-up Directive] and thus within the scheme of mutual recognition'.[113] The UK Supreme Court also confirmed this opinion, namely, resolution is one type of reorganisation measures.[114]

Another case, *Bayern LB v. Hypo Alpe Adria (HETA)* decided by a German court, showed that in order to apply the above rule, a measure needs to be recognised as a 'resolution' measure.[115] Bayern LB, a German bank, is the shareholder and loan provider of Hypo Alpe Adria, an Austrian bank, which ended up in a deteriorating situation, and the residual asset was later transferred to a bridge institution *HETA* (bad bank) as ordered by the Austrian authority. The Austrian legislator further cancelled or suspended part of the debts held by Bayern according to the HaaSanG Act.[116] The Munich Court, upon the request of Bayern, reached the conclusion that the action taken in Austria cannot be regarded as resolution action and therefore cannot be recognised under the BRRD. First, the court held that the Austrian measure did not contain recapitalisation purposes. However, it seems that the court failed to consider that the asset separation process is with the aim of restructuring the original banking group and making the

[112] Rose Lagram-Taylor, 'Goldman Sachs International v Novo Banco SA' (2019) 16 International Corporate Rescue 115. See also comments, e.g. Matthias Lehmann, 'Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders' (2016) 66 International and Comparative Law Quarterly 107; Matthias Haentjens, 'New Bank Resolution Regime as an Engine of EU Integration' (Oxford Business Law Blog, 14 June 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/06/new-bank-resolution-regime-engine-eu-integration> accessed 25 February 2020.

[113] *Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA, Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092, [2016] 2 CLC 690 [25].

[114] *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683.

[115] *Bayern LB v Hypo Alpe Adria (HETA)*, Regional Court Munich I, Judgment of 8 May 2015, 32 O 26502/12. See, e.g. Lehmann (n 112) 133; Binder (n 110) 53; Bob Wessels, 'International Insolvency Law and EU Bank Resolution Rules' in M. Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019) 166.

[116] Bundesgesetz über Sanierungsmaßnahmen für die Hypo Alpe Adria Bank International AG (HaaSanG) (Austrian Federal Act on Restructuring Measures for Hypo Alpe Adria Bank International AG), 31 July 2014.

shareholders and creditors bear the losses is the objective of resolution.[117] Second, the court maintained that the Austrian action was a legislative act rather than an administrative action, and therefore, it is not subject to the BRRD. One opinion, however, believes that the scope of mutual recognition should extend to legislation.[118] Before the appeal court could decide on these controversial issues, the Austrian Constitutional Court later ruled that HaaSanG was invalid because it discriminated against certain bondholders,[119] and the judgment of Munich Regional Court was set aside.[120] Although the case did not reach a final conclusion, it raised the awareness that the mutual recognition mechanism can be questioned on the basis of the nature of the subject action.

Another provision worth mentioning is Article 66 BRRD, which is about 'power to enforce crisis management measures or crisis prevention measures by other Member State'.[121] This Article prescribes that 'Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State'. This provision makes the transfer actions taken in one Member State effective in another. Particularly, Lord Sumption stated in the above-mentioned *Novo Banco* case that the main purpose of Article 66 is 'to require other member states to take active steps to enforce transfers of assets or liabilities made in the course of a reorganisation in the home state and to prevent challenges to such transfers in their own jurisdictions'.[122] This Article supplements the mutual recognition mechanism enshrined in the CIWUD.

Third, if an institution or part of the cross-border group institution is located in a non-Banking Union Member State, the SRB cannot exercise its powers and a resolution college should be established,[123] which 'should provide a forum for the exchange of information and coordination of

[117] Nikoletta Kleftouri, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017) 18 ERA Forum 263, 273-274. *Cf* Lehmann (n 112) 133.

[118] Lehmann (n 112) 133.

[119] Austrian Constitutional Court, decision of 3 July 2015, AT:VFGH:2015:G239.2014. See the discussion of this case in below Chapter 8, §8.4.1.

[120] *Bayern LB v Hypo Alpe Adria (HETA)*, Higher Court of Munich, Judgment of 25 June 2018, 17 U 2168/15. See, e.g. Binder (n 110) 53.

[121] Article 66 BRRD.

[122] *Novo Banco* (n 114) [22].

[123] Article 88 BRRD.

resolution actions' and 'with a view to agreeing a group resolution'.[124] A resolution college consists of group-level resolution authority, [125] the other resolution authorities and, where appropriate, competent authorities and consolidating supervisors.[126] It is inferred that if a successful group resolution action is reached, there would be no cross-border recognition issue. However, it should be noted that a resolution college is only a 'platform facilitating decision-making by national authorities', but not 'a decision-making body'.[127] And the dissenting resolution authorities can depart from the group resolution action as long as they submit detailed reasons.[128] Thus, hypothetically, authorities of a Member State might refuse to participate in or withdraw from the resolution college, and it is assumed that any following cross-border cooperation or recognition would become extremely difficult.[129] A similar European resolution college is also established when third countries are involved.[130] European resolution colleges provide a cooperation platform for European authorities.[131]

3.3.1.1.2 Recognition of third-country resolution actions

In terms of cross-border resolution related to third-country institutions, two situations are distinguished: with international agreements and without international agreements. If agreements with third countries are in place, the provisions with regard to cross-border resolution in these agreements shall apply.[132] Conversely, if no agreement is effective, or the agreement does not cover the recognition issue, a separate recognition regime shall apply, as provided in Articles 94 to 95 BRRD. Article 94 prescribes the powers of recognition and enforcement of third-country resolution actions, and Article 95 lists five considerations to use when deciding whether to refuse to recognise and enforce third-country resolution actions, specified in below §3.3.2.

[124] Recital (96) BRRD. See also EBA Final draft Regulatory Technical Standards on resolution colleges under Article 88(7) of Directive 2014/59/EU, EBA/RTS/2015/03, 3 July 2015.

[125] 'Group-level resolution authority' means the resolution authority in the Member States in which the consolidating supervisory is situated. Article 2(1)(44) BRRD. The SRMR is, in the event of cross-border group resolution, the relevant group-level resolution authority. Article 5(1) SRMR.

[126] Article 88(1) BRRD.

[127] Recital (98) BRRD.

[128] Articles 91(8) and 92(4) BRRD.

[129] Similar concerns see Lehmann (n 112) 141-142; Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 502. For other criticism on resolution colleges, see, e.g. Seraina Grünewald, *The Resolution of Cross-border Banking Crises in the European Union: A Legal Study from the Perspective of Burden Sharing* (Wolters Kluwer, Law & Business 2014) 114; Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91, 91-138.

[130] Article 89 BRRD.

[131] Ibid.

[132] Article 93 BRRD.

Concerns may arise with regard to the effectiveness of these international agreements. Article 93 BRRD empowers the European Commission to propose the negotiation of agreements with third countries regarding cooperation between resolution authorities. However, the cooperation mainly targets information sharing during the recovery and resolution planning period[133] but there is no mention of the recognition issue. Yet, this is the only type of agreement that can apply in the recognition proceeding,[134] and it is doubtful whether future agreements would actually contain recognition provisions.[135] Apart from such agreement, the EBA may conclude framework cooperation arrangements with third-country authorities.[136] Nevertheless, these arrangements are non-binding[137] and limited to information sharing and cooperation.[138] Also, supervisory and resolution authorities, where appropriate, shall conclude non-binding cooperation arrangements with third-country authorities, but also not on substantive recognition issues.[139] These non-binding agreements cannot guarantee that European authorities would recognise third-country resolution actions.

[133] Article 93(1) BRRD.

[134] Article 94(1) BRRD.

[135] No such statutory agreement is found. The commission, though, has emphasised the importance of cooperation for cross-border resolution of international banks. See, e.g. European Commission, 'Bilateral Relations' <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/bilateral-relations_en#regulatory-dialogues-and-high-level-meetings-on-financial-services-regulation> accessed 25 February 2020.

[136] Article 97(2) BRRD. For instance, the Framework Cooperation Arrangement between the European Banking Authority ('EBA') and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the U.S. Securities and Exchange Commission, and the New York State Department of Financial Services. See EBA, 'EBA and US Agencies Conclude Framework Cooperation Arrangement on Bank Resolution' (29 September 2017) <https://www.eba.europa.eu/-/eba-and-us-agencies-conclude-framework-cooperation-arrangement-on-bank-resolution> accessed 25 February 2020. However, this Framework only provides principles for further cooperation arrangements in order to support cross-border crisis management information sharing and cooperation (Article 1), but not on recognition issues, at least not mentioned specifically. Also, it is highlighted that this is a non-binding framework (Article 3).

[137] Article 92(2) caput BRRD.

[138] Article 97(3) caput BRRD.

[139] Article 97(4)-(5) BRRD. For instance, the Cooperation Arrangement (CA) between the Single Resolution Board (SRB) and the Federal Deposit Insurance Corporation (FDIC) further strengthened the close cooperation between the two organizations in compliance with the legal frameworks in the United States and the European Union. See SRB, 'Single Resolution Board and Federal Deposit Insurance Corporation Sign Cooperation Arrangement' (14 December 2017) <https://srb.europa.eu/en/node/457> accessed 25 February 2020. This CA is non-binding (para 6) and only covers the information-sharing requirement on the statutory and other legal requirements applicable to the recognition and enforcement of foreign resolution proceedings in each jurisdiction (para 18), thus leaves the recognition issue solely in the hands of each jurisdiction.

Without an effective international agreement, the recognition decision is determined at the national level, either by a European resolution college on a joint decision basis or by each NRA individually. A European resolution college should be established when 'a third country institution or third country parent undertaking has Union subsidiaries established in two or more Member States, or two or more Union branches that are regarded as significant by two or more Member States', and consist of resolution authorities of Member States where those Union subsidiaries are established or where those significant branches are located, and performing similar functions and carrying out similar tasks as resolution colleges.[140] Regarding the recognition request of the third-country resolution actions, the European resolution college should reach a joint decision when the relevant third-country institution or a parent undertaking (a) 'has Union subsidiaries established in, or Union branches located in and regarded as significant by, two or more Member States'; or (b) 'has assets, rights, or liabilities located in two or more Member States or are governed by the law of those Member States.'[141] In the absence of a joint decision between the resolution authorities participating in the European resolution college, or in the absence of a European resolution college,[142] the decision should be made by the national authorities.[143]

The SRB, nevertheless, unlike within the SRM regime where it can exercise resolution powers directly, does not have the power to make decisions, but can only provide assessment and recommendations as to whether or not to recognise third-country resolution actions.[144] The final recommendation is not binding because it is up to the national resolution authorities to determine whether to recognise or not third-country resolution actions, though the national resolution authorities need to provide a reasoned statement to the SRB when they cannot implement the recommendation.[145]

After recognising third-country resolution actions, EU authorities are also empowered to enforce the third-country resolution actions, including actions taken on assets, rights or liabilities[146] and shares or other instruments of ownership,[147] suspension or restriction of payment or delivery obligations, enforcement of security rights and termination rights,[148] and exclusion of right to terminate, liquidate or accelerate contracts or affect

[140] Article 89(1)-(2) BRRD.

[141] Article 94(2) BRRD.

[142] This is the situation where only one Member State is involved, e.g. only one branch in one Member State. See Article 96 BRRD.

[143] Article 93(3) BRRD.

[144] Article 33(2) SRMR.

[145] Article 33(4) SRMR.

[146] Article 94(4)(a) BRRD.

[147] Article 94(4)(b) BRRD.

[148] Articles 69-71, 94(4)(c) BRRD.

the contractual rights.[149] These powers are further explained below using different scenarios. However, despite a clear delegation of enforcement powers, the actual procedures are not clearly prescribed in the BRRD. It is up to the national law to determine them.

3.3.1.1.3 Brexit issues

During most of the time of the writing of this dissertation, starting from October 2016, the UK was an EU Member States subject to the EU law.[150] Yet, the UK stopped being a Member State of the EU as of midnight CET on 31 January 2020.[151] The Withdrawal Agreement between the EU and UK entered into force on 1 February 2020.[152] However, it does not mean all the EU laws stopped being applicable to the UK immediately. Instead, the EU and the UK have agreed on a transition period until 31 December 2020.[153] During this period, '[a]ll EU law, across all policy areas, is still applicable to, and in, the United Kingdom, with the exception of provisions of the Treaties and acts that were not binding upon, and in, the United Kingdom before the Withdrawal Agreement entered into force.'[154] And the EU and UK can decide, before 1 July 2020, to extend the transition period once, by up to one or two years.[155]

In terms of bank resolution laws specifically, the impact of Brexit is expected to be limited. The SRMR only applies to States belonging to the Banking Union, to which the UK does not belong. Brexit will not affect the SRMR or relevant laws concerning the Banking Union. The BRRD, on the other hand, was binding on the UK, and the UK has, on the basis of the Banking Act 2009, transposed the BRRD in several statutory instruments.[156] The UK authority has expressed that '[t]he policy aims of the BRRD will remain a core element of [UK's special resolution] regime, providing continuity

[149] Article 94(4)(d) BRRD.

[150] For example, *Goldman Sachs v Novo Banco*, see above n 112 - n 114.

[151] See European Union, 'A Future EU-UK Partnership', <https://europa.eu/newsroom/highlights/special-coverage/future-eu-uk-partnership_en> accessed 25 February 2020.

[152] Ibid.

[153] Ibid.

[154] Ibid.

[155] Ibid.

[156] See, e.g. the Bank Recovery and Resolution Order 2014, the Banking Recovery and Resolution (No. 2) Order 2014; 2016 No. 1239 BANKS AND BANKING FINANCIAL SERVICES AND MARKETS The Bank Recovery and Resolution Order 2016. See the full list of these national transposition EUROPA, 'National transposition measures communicated by the Member States concerning: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance', <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0059> accessed 25 February 2020.

and certainty as the UK leaves the EU, and conformity with the FSB Key Attributes'.[157] However, cross-border cooperation provisions prescribed in the BRRD may no longer apply to the UK, and the UK will treat EU Member States as third countries.[158] However, the UK also confirmed that such withdrawal from mutual cooperation provisions does not prevent UK authorities from future cooperation with EU authorities.[159]

For recognition of winding-up/reorganisation/resolution actions among EU Member States, the UK transposed the CIWUD into its Credit Institutions (Reorganisation and Winding Up) Regulations and adopts the automatic recognition regime for other EU Member States.[160] The UK authority, in response to Brexit, expressed the intention of removing automatic recognition regimes.[161] EU Member States therefore need to go through the recognition process as third countries. For example, the *Gibbs* rule discussed below may be applicable to the future recognition of EU resolution actions.[162] The same applies *vice versa*. When the EU treats the UK as a third country, discussions in above §3.3.1.1.2 (third country) applies rather than §3.3.1.1.1 (EU Member States). As the negotiation between the UK and the EU is still ongoing, it remains to be seen how relationships will change. Nevertheless, this dissertation focuses on third-country issues without special arrangements such as those among the EU Member States, and the discussions would be useful to address future cases between the UK and the EU.

3.3.1.2 Scenarios (with third countries)

3.3.1.2.1 Subsidiary

The BRRD explicitly stated that 'subsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to the

[157] HM Treasury, 'Guidance The Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018: explanatory information' (updated 29 October 2019) <https://www.gov.uk/government/publications/draft-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018/the-bank-recovery-and-resolution-and-miscellaneous-provisions-amendment-eu-exit-regulations-2018-explanatory-information> accessed 25 February 2020.

[158] Ibid.

[159] Ibid.

[160] The Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (S.I. 2004/1045).

[161] HM Treasury, 'Guidance Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2018: explanatory information' (updated 29 October 2019) <https://www.gov.uk/government/publications/credit-institutions-and-insurance-undertakings-reorganisation-and-winding-up-amendment-eu-exit-regulations-2018/credit-institutions-and-insurance-undertakings-reorganisation-and-winding-up-amendment-eu-exit-regulations-2018-explanatory-information> accessed 25 February 2020.

[162] See §3.3.1.2.4.

Union law, including the resolution tools laid down in the [BRRD]'.[163] The BRRD accepts both SPE and MPE,[164] and the new BRRD II and SRMR II allow the SPE within MPE strategy. The new banking package amendment CRD V[165] additionally requires non-EU (third-country) banking groups with two or more institutions in the EU and with the total value of assets no less than EUR 40 billion should establish an intermediate EU parent undertaking (IPU).[166] This is to 'facilitate the implementation of the internationally agreed standards on internal loss-absorbing capacity for Non-EU G-SIIs [Global Systemically Important Institutions] in the Union law, and more broadly, to simplify and strengthen the resolution process of third-country groups with significant activities in the EU'.[167] Therefore, such an EU IPU should hold sufficient funds to absorb the losses of its subsidiaries. It can be seen that EU authorities intend to take actions on Union subsidiaries.

However, it does not exclude the possibility of recognising third-country actions that may have effects on Union subsidiaries. Article 94 BRRD makes it explicit that Member States should ensure resolution authorities have the powers to 'perfect, including to require another person to take action to perfect, a transfer of shares or other instruments of ownership in a Union subsidiary'.[168] This provision should be in light of Article 94 in its entirety which is about 'recognition and enforcement of third-country resolution proceedings'.[169] Accordingly, such power taken on Union subsidiaries is upon the recognition of third-country resolution actions, and, therefore, it produces the effect of enforcement of third-country resolution actions. This corresponds to the scenario explained in Chapter 2 at §2.3.1.

3.3.1.2.2 Branch

According to the BRRD, as a general rule, branches of third-country institutions are subject to the third-country resolution; however, Member States should 'retain the right to act in relation to branches of institutions having their head office in third countries, when the recognition and application of third-country proceedings relating to a branch would endanger financial

[163] Recital (102) BRRD.

[164] Recital (80) BRRD.

[165] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, OJ L 150/253.

[166] Amended 21b (1) and (4) CRD IV. Article 1(9)CRD V.

[167] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, Brussels, 23.11.2016, COM(2016) 854 final, 2016/0364 (COD), 12.

[168] Article 94(4)(b) BRRD.

[169] Article 94, title.

stability in the Union or when Union depositors would not receive equal treatment with third-country depositors'.[170] In particularly, powers in relation to Union branches of third countries should be exercised when 'a Union branch … is not subject to any third-country resolution proceedings or … is subject to third-country proceedings and one of the circumstances referred to Article 95 applies'.[171]

In order to exercise resolution powers on Union branches, the action must be necessary for the public interest and one or more of the following conditions is met:

> (a) the Union branch no longer meets, or is likely not to meet, the conditions imposed by national law for its authorisation and operation within that Member State and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable timeframe;
> (b) the third-country institution is, in the opinion of the resolution authority, unable or unwilling, or is likely to be unable, to pay its obligations to Union creditors, or obligations that have been created or booked through the branch, as they fall due and the resolution authority is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable timeframe;
> (c) the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country institution, or has notified to the resolution authority its intention to initiate such a proceeding.[172]

In short, Union branches are, in principle, subject to third-country resolution actions, but may also be under resolution by EU authorities when the above conditions are met. In terms of recognition of third-country resolution actions, Articles 94 and 95 also apply. Upon recognition, EU resolution authorities should also be empowered to take actions on 'rights or liabilities of a third-country institution that are booked by the Union branch'.[173]

3.3.1.2.3 Assets

For any assets of third-country institutions, EU authorities are also empowered to recognise third-country resolution actions imposed thereon, subject to the conditions of Articles 94 and 95. Member States should ensure resolution authorities can take resolution powers on 'assets of a third-country institution or parent undertaking that are located in their Member State'.[174]

[170] Recital (102) BRRD. The same recital also reaffirms that '[s]ubsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to Union law'.

[171] Article 96(1) BRRD.

[172] Article 96(2) BRRD.

[173] Article 94(4)(a)(ii) BRRD.

[174] Article 94(4)(a)(i) BRRD.

3.3.1.2.4 Governing law

As illustrated in Chapter 2 at §2.2.1, parties to a contract are free to choose the governing law.[175] However, the BRRD explicitly requires that EU Member States should ensure resolution authorities, upon recognition of third country resolution actions, can exercise resolution powers on assets, rights or liabilities of a third-country parent that are governed by the law of EU Member States.[176] It is for the purpose of enforcing third-country resolution actions, and it is inferred that the EU accepts the results of third-country resolution actions imposed on EU-law governed instruments.

However, a particular issue may arise in terms of English law when the *Gibbs* rule applies. This *Gibbs* rule established the long-standing principle that '[a] party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled'.[177] In the *Gibbs* case, Lord Esher explicitly and affirmatively expressed his opinion: '[w]hy should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?'.[178] The *Gibbs* rule subsequently became the overall governing principle regarding recognition of foreign insolvency proceedings in the following years.[179] It is a common law power that can be exercised by the judges outside the scope of Section 426 of the Insolvency Act 1986, the EIR and the Cross-border Insolvency Regulation 2006 (incorporating the Model Law on Cross-border Insolvency (MLCBI)).[180] In the recent *Re OJSC International Bank of Azerbaijan* case, Henderson LJ maintained the application of the *Gibbs* rule, on the basis that 'it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far.'[181] In the *Goldman Sachs v Novo Banco* case mentioned above, the issue of the *Gibbs* rule was also examined in resolution proceedings. As Lord Sumption JSC identified:

[175] See Article 3 Rome I Regulation, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[176] Article 94(4)(a) BRRD.

[177] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399 (CA).

[178] Ibid 406.

[179] See, e.g., *National Bank of Greece and Athens S.A. v Metliss* [1957] 3 W.L.R. 1056; [1958] A.C. 509 (HL); *Adams v National Bank of Greece S.A.* [1960] 3 W.L.R. 8; [1961] A.C. 255 (HL).

[180] Regarding the methods under English law for assisting foreign insolvency proceedings, see *Rubin v Eurofinance SA* [2012] UKSC 46 [30]; [2013] 1 A.C. 235 (SC), on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971.

[181] *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2018] 12 WLK 286 [29], on appeal from [2018] EWHC 59 (Ch).

> The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded.[182]

In other words, Lord Sumption JSC considered the Gibbs rule applicable to debt discharge in resolution proceedings, although in this particular case, the *Gibbs* rule cannot impede recognition because of the special arrangement of cross-border resolution within the EU under the CIWUD and the BRRD. Therefore, under the rule in *Gibbs*, it is possible that an English court would not recognise third-country resolution actions imposed on English-law governed debts.[183]

3.3.2 Public policy exception

Among the EU Member States, the CIWUD, which does not allow public policy exceptions,[184] also applies to resolution cases. So, a host jurisdiction has to recognise foreign resolution actions taken in another EU Member State on an unconditional basis.

With regard to the relationship with third countries, the BRRD Article 95 specifically identifies five situations in which a Member State may refuse to recognise a third-country resolution proceeding, collectively referred to as 'public policy exception' in this dissertation:

> (a) … the third-country resolution proceedings would have adverse effects on financial stability in the Member State in which the resolution authority is based or that the proceedings would have adverse effects on financial stability in another Member State;
> (b) … independent resolution action under Article 96 in relation to a Union branch is necessary to achieve one or more of the resolution objectives;
> (c) … creditors, including in particular depositors located or payable in a Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;

[182] *Novo Banco* (n 114) [12] (citing *Adams v National Bank of Greece SA* [1961] AC 255).

[183] §6.4.4.1.2 in Chapter 6 and § 8.4.3 in Chapter 8 below analyse the *Gibbs* rule from the perspectives of private international law and the creditors' position respectively.

[184] See, e.g. Moss, Wessels and Haentjens (n 51) para 2.26. See the rationale behind - the home-country control principle, §3.2.2 above.

> (d) … recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the Member State; or
> (e) … the effects of such recognition or enforcement would be contrary to the national law.[185]

The interpretation is crucial in terms of the application of public policy exception. Since the BRRD only entered into force recently, there is no case of recognition of third-country resolution actions that interprets the five circumstances listed above. Based on the text of Article 95, especially the words used within such as 'adverse', 'necessary' and 'material', this dissertation believes that Article 95 should be interpreted narrowly.

The European Insolvency Regulation (EIR)[186] regulates cross-border insolvency matters within the EU, which provides that an EU Member State 'may refuse to recognize insolvency proceedings in another Member State … where the effects of such recognition … would be *manifestly* contrary to that State's public policy, in particular its *fundamental* principles or the *constitutional* rights and liberties of the individual.'[187] This is the EIR public policy exception. The EIR excludes banks and thus does not apply to bank resolution.[188] However, the interpretation of EIR, including this public policy exception, can be a supportive reason to uphold the narrow interpretation method of Article 95 BRRD, although it should be noted that the EIR is a regulation that can be directly applied at the European level, while the BRRD is a directive that needs to be transposed into national laws, and its interpretation relies on national laws.

The Virgós-Schmit Report[189] provides that:

> Public policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.
>
> Public policy may thus protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings. Rights

[185] Article 95 BRRD.

[186] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19 (EIR 2015 Recast).

[187] Article 26 EIR 2000; Article 33 EIR 2015 Recast (emphasis added).

[188] Article 1(2) EIR 2000; Article 1(2) EIR 2015 Recast.

[189] The Virgós-Schmit Report, short for Report on the Convention on Insolvency Proceedings (1996) prepared by Miguel Virgós and Etienne Schmit, is the explanation of the EU Convention 1995, and serves as an important accompanying document for the EIR 2000 because the content of 1995 Convention and EIR 2000 is almost identical.

> of participation and non-discrimination play a special role in the case of plans to reorganize businesses or compositions, in relation to creditors whose participation is hindered or who are the subject of unfounded discrimination.[190]

As observed by Moss, Smith as well as Fletcher, the choice of the words 'may' and 'manifestly' and the focus on 'fundamental principles' and 'constitutional rights and liberties of the individual' indicate the restricted application of the public policy exception.[191] Wessels also presents a case of legitimate public interest such as the availability of a minimum quantity of energy.[192] In other words, the violation of non-fundamental and non-constitutional national laws cannot invoke this Article.[193] The *Eurofood* case also confirmed that 'recourse to the public policy clause … is reserved to *exceptional* cases',[194] and a fair legal process should be regarded as a commonly applied public policy, including the right to be notified of procedural documents and the right to be heard.[195] This limited and restricted interpretation method acknowledged in the EU law can be supportive evidence for European national authorities to narrowly interpret Article 95.

3.4 Concluding remarks

The EU framework is quite complicated in terms of recognition of foreign resolution actions because of the different treatment of EU and non-EU resolution actions. Within the Banking Union, the SRB is the authority responsible for cross-border banking groups. Outside the Banking Union, the CIWUD applies, and any resolution action taken in an EU home jurisdiction should be effective in another EU host jurisdiction. Besides, it is required that resolution colleges be established as a platform for cooperation and coordination when a group has different independent entities in several EU Member States.

For recognition of third-country resolution actions, the EU legislation clearly designates resolution authorities, either jointly through a European resolution college or independently, to decide whether or not to recognise and enforce third-country resolution actions. EU authorities are empowered to recognise the effects of third-country resolution actions imposed

[190] Virgós-Schmit Report, para 206.

[191] Gabriel Moss and Tom Smith, 'Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) para 8.362 ff.

[192] Ibid para 8.367.

[193] Ibid para 8.366.

[194] Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, para 62.

[195] Ibid para 66.

on shares of Union subsidiaries, Union branches, assets in the EU, and EU law governed contracts. In addition, upon recognition, EU authorities are designated with a broad range of powers to enforce third-country resolution actions. Last but not least, recognition and enforcement should not violate EU fundamental public policies. A concern is that the English *Gibbs* rule may prevent an English authority from recognising third-country resolution actions on English law governed debts.

EU legislation, compared with the following two jurisdictions, is more clearly prescribed in the way that resolution authorities are clearly designated as the authority to process foreign resolution requests, and specific rules and procedures are also provided in detail. However, given the lack of actual cases decided, it is difficult to authoritatively interpret the public policy exception circumstances listed in Article 95 BRRD.

4 The US*

4.1 Introduction

This chapter examines recognition of foreign resolution actions in the United States (US). Chapter 15 of the US Bankruptcy Code[1] plays an important role in this process. Chapter 15 is a vital mechanism facilitating recognition of foreign insolvency proceedings, and, as shown below, it can be used in cross-border resolution cases. Yet it is not sufficient to address all the issues arising from special resolution procedures. In addition, the US adopts a territorial regime towards branches and agencies of foreign banks, which may impede an effective global resolution. In several other scenarios, uncertainties may also undermine the effectiveness of cross-border resolution.

In §4.2.1 below, US regulation and supervision in the banking sector is first discussed, mainly addressing the dual banking system in order to identify the distinction between federal banks and state banks. Next, in §4.2.2, the mechanism of resolving failing banks is discussed, drawing a preliminary conclusion that the US and the European Union (EU) have similar administrative bank resolution mechanisms. Without a further examination of the details of the US domestic framework, this section only serves the purpose of laying out a general picture of US law and clarifying several key terms for further analysis of cross-border issues. The central question regarding recognition of foreign resolution actions in the US is examined in §4.3, illustrating both grounds for recognition in §4.3.1 and public policy exceptions in §4.3.2. Four particular scenarios are analysed, namely, subsidiary (§4.3.1.2.1), branch (§4.3.1.2.2), assets (§4.3.1.2.3) and governing law (§4.3.1.2.4). §4.4 draws conclusions.

* Special thanks to Prof. Jay Westbrook who kindly invited me to the University of Texas at Austin to conduct research on US law, and to the Leiden University Fund (LUF) which generously sponsored my study trip to the US.

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 20 April 2005, 119 Stat. 23.

4.2 Regulation, supervision and resolution in the US banking sector

4.2.1 Regulation and supervision

The US banking regulation is quite complicated because of its 'dual banking system', that is, banks are chartered under either federal law or state laws,[2] and the involvement of a variety of financial regulators and supervisors, at both federal and state levels.[3] The US banking and financial system has experienced several rounds of regulatory reforms, and the current regulatory and supervisory framework is mostly based on the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[4] a major regulatory change following the latest global financial crisis (GFC) in 2007/2008. This section only presents different types of banks and introduces relevant financial regulators and supervisors, and does not seek to comprehensively describe the overall financial supervision in the US. For a brief overview of authorities for US banking sector institutions, see Table 4.1 below. Some of the details, such as capital requirements and consolidated supervision of banking groups will be mentioned in Chapter 7 on financial stability and resolution objectives.

According to the definitions in the Federal Deposit Insurance Act of 1950 (FDIA),[5] 'bank' (A) 'means any national bank and State bank, and any Federal branch and insured branch'; and (B) 'includes any former savings association'.[6] Banks, or commercial banks, are institutions engaged in the

[2] See, e.g. Carl Felsenfeld and David Glass, *Banking Regulation in the United States* (3rd edn, Juris 2011) 39ff; Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016) 74. See also review of this dual banking system, e.g. Kenneth Scott, 'The Dual Banking System: A Model of Competition in Regulation' (1977) 30 Stanford Law Review 1; Henry Butler and Jonathan Macey, 'Myth of Competition in the Dual Banking System' (1987) 73 Cornell L Rev 677; Christine Blair and Rose Kushmeider, 'Challenges to the Dual Banking System: The Funding of Bank Supervision' (2006) 18 FDIC Banking Rev 1.

[3] See, e.g. Edward Murphy, 'Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets' (2015) Congressional Research Service, <https://fas.org/sgp/crs/misc/R43087.pdf> accessed 25 February 2020; Karol Sparks, *The Keys to Banking Law: A Handbook for Lawyers* (2nd edn, American Bar Association 2017) 58ff.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 21 July 2010, 124 Stat. 1386. See, e.g. Viral V Acharya and others, *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance*, vol 608 (John Wiley & Sons 2010); David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (John Wiley & Sons 2010); Douglas Evanoff and William Moeller (eds), *Dodd Frank Wall Street Reform and Consumer Protection Act: Purpose, Critique, Implementation Status and Policy Issues* (Word Scientific 2014).

[5] The Federal Deposit Insurance Act, Pub. L. 81-797, 21 September 1950, 64 Stat. 873.

[6] 12 US Code §1813(a)(1). See also, e.g. Felsenfeld and Glass (n 2) 3-24; Sparks (n 3) 51-55.

business of receiving deposits.[7] Savings associations, often referred to as 'thrifts',[8] also can take deposits, but are chartered and regulated through different rules, such as limits on loan and investment categories.[9]

At the federal level, the Office of the Comptroller of the Currency (OCC) was established by the National Currency Act (NCA) of 1863[10] and is the chartering authority for national banks and, after the Dodd-Frank Act, for federal thrifts.[11] The NCA was soon replaced by the National Bank Act (NBA) of 1864,[12] but the OCC remained.[13] The OCC is also the supervisor for national banks and federal thrifts.[14] In addition, in 1913, the Federal Reserve Act (FRA)[15] was passed, which established the Federal Reserve System (Fed), headed by the Board of Governors of the Federal Reserve System, or Federal Reserve Board (FRB). The Fed is the central bank of the US and conducts both microprudential supervision on individual banks and macroprudential supervision on the financial system as a whole.[16] All national banks are Fed members,[17] but federal thrifts are not required to be members. What's more, the Great Depression from 1932 to 1934 led to the promulgation of the Banking Act of 1933,[18] which created a temporary agency – the Federal Deposit Insurance Corporation (FDIC) as the insurer of the participating institutions.[19] The FDIC was made a permanent agency by the Banking Act of 1935[20] and later regulated in a separate law the Federal Deposit Insurance Act of 1950 (FDIA).[21] As further explained below in §4.2.2, the FDIC is both the deposit insurance fund managing institution and the resolution authority in the resolution process.

[7] 12 US Code §1813(a)(2)(A).

[8] Felsenfeld and Glass (n 2) 18; Sparks (n 3) 53.

[9] 12 US Code §§1464 and 1813(b). See also OCC, 'Key Differences Between National Bank Regulatory Requirements and Federal Savings Association Regulatory Requirements' (July 2019) <https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/Key-differences-document-public.pdf> accessed 25 February 2020.

[10] The National Currency Act, 25 February 1863, ch. 58, 12 Stat. 665

[11] 12 US Code §§1464(a) and 5412(b)(2)(B). Murphy (n 3) 13; Sparks (n 3) 59.

[12] The National Bank Act, 3 June 1864, ch. 106, 13 Stat. 99.

[13] See OCC, 'A Short History', <https://www.occ.treas.gov/about/what-we-do/history/OCC%20history%20final.pdf> accessed 25 February 2020.

[14] 12 US Code §§24, 1464(a) and 5412(b)(2)(B). Murphy (n 3) 13; Sparks (n 3) 53.

[15] The Federal Reserve Act, Pub. L. 63-43, 23 December 1913, ch. 6, 38 Stat. 251.

[16] See a general introduction, Fed, 'Purposes and Functions', <https://www.federalreserve.gov/aboutthefed/pf.htm> accessed 25 February 2020.

[17] 12 US Code §222.

[18] The Banking Act of 1933, Pub. L. 73-66, 16 June 16 1933, ch. 89, 48 Stat. 193.

[19] See FDIC, 'The First Fifty Years: A History of the FDIC 1933-1983', <https://www.fdic.gov/bank/historical/firstfifty/> accessed 25 February 2020.

[20] The Banking Act of 1935, Pub. L. 305, 23 August 1935, 49 Stat. 684.

[21] n 5.

The Fed is also the federal regulatory and supervisor for a special type of entity – a bank holding company (BHC).[22] BHC is regulated in the Banking Holding Company Act of 1956 (BHCA)[23] and is defined as 'any company which has control over any bank or over any company that is or becomes a banking holding company'.[24] As required by the Dodd-Frank, BHCs are now under enhanced prudential standards. [25] Similarly, savings and loan holding companies (SLHCs) are holding companies of thrifts and are regulated in the Savings and Loan Holding Company Act of 1959 (SLHCA).[26] They were supervised by the Office of Thrift Supervision (OTS) and, after the Dodd-Frank for enhanced supervision purposes, are subject to the supervision of the Fed.[27]

At the state level, the state law applies. However, it does not mean that federal law is irrelevant. State banks can choose to participate in the Fed, unlike national banks that must compulsorily participate in the Fed. Any state bank participating in the Fed is a state member bank, and subject to the supervision of the FRB.[28] State non-member banks, which do not participate in the Fed but are insured by the FDIC, are supervised by the FDIC.[29] For state thrifts, the Dodd-Frank Act empowers the FDIC to exercise supervision.[30]

A recent regulatory change is the new Financial Stability Oversight Council (FSOC), which was created by the Dodd-Frank Act to monitor the overall financial stability in the US.[31] The FSOC may determine a systemically important 'US nonbank financial company',[32] which shall be supervised by the Fed and shall be subject to prudential supervision, if the FSOC 'determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States'.[33] In 2013 and 2014, the FSOC designated four US nonbank financial companies, that is, American International Group, Inc., General Electric Capital Corporation, Inc., Prudential

[22] 12 US Code §1842. Felsenfeld and Glass (n 2) 194-195; Murphy (n 3) 13; Sparks (n 3) 258-261.

[23] The Banking Holding Company Act of 1956, Pub. L. 511, 9 May 1956, ch. 240, 70 Stat. 133.

[24] 12 US Code §1841(a)(1).

[25] 12 US Code §5365. See FRB, *Enhanced Prudential Standards for Banks Holding Companies and Foreign Banking Organizations,* 79 Fed. Reg. 17240 (27 March 2014).

[26] The Savings and Loan Holding Company Act, Pub. L. 86-374, 23 September 1959, 78 Stat. 691.

[27] 12 US Code §§5412(b)(1). Murphy (n 3) 13; Sparks (n 3) 275-277.

[28] 12 US Code §321ff. Murphy (n 3) 13; Sparks (n 3) 52.

[29] 12 US Code §1811ff. Murphy (n 3) 13; Sparks (n 3) 52.

[30] 12 US Code §§5412(b)(2)(C). Murphy (n 3) 13; Sparks (n 3) 55-55.

[31] Title 1 of the Dodd-Frank Act (Financial Stability). 12 US Code §§5311-5374.

[32] 12 US Code §5311(a)(4)(B).

[33] 12 US Code §5323(a)(1).

Financial, Inc., and Metlife, Inc.[34] However, from 2016 to 2018, the FSOC subsequently voted to rescind the designation of three companies, i.e. GE Capital Global Holdings, LLC, American International Group, Inc., and Prudential Financial, Inc.[35]

A special group of entities is international or foreign banks, which have a significant presence in the United States.[36] The next paragraphs briefly illustrate the regulatory framework for these foreign banks. The International Banking Act of 1978 (IBA)[37] is the principal legislation at the federal level, which builds on the 'national treatment' principle, requiring foreign banks to be subject to similar banking regulations as US domestic banks.[38] A foreign bank under the IBA refers to 'any company organized under the laws of a foreign country, … which engages in the business of banking, or any subsidiary or affiliate, organized under such law, of any such company' in a foreign country.[39] The later Foreign Bank Supervision Enhancement Act of 1991 (FBSEA)[40] enhanced supervision over foreign banks.[41]

Another term – foreign banking organization (FBO) – refers to both a foreign bank and any company of which the foreign bank is a subsidiary.[42] The Dodd-Frank also empowers the FSOC to impose additional Fed supervision and prudential regulation for systemically important 'foreign nonbank financial companies',[43] similar to the conditions of regulating any above-mentioned 'US nonbank financial company'.[44] Notably, an FBO with US non-branch assets of $50 billion or more must establish an intermediate holding company (IHC), or designate an existing subsidiary as its IHC.[45] Regarding bank resolution, the US legislation uses the term 'foreign bank' only; therefore, the following discussion also refers to foreign banks for simplicity.

[34] See US Department of the Treasury, 'Financial Stability Oversight Council', <https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx#nonbank> accessed 25 February 2020.

[35] Ibid.

[36] Statistics for US banking offices of foreign entities, see FRB, 'Structure and Share Data for U.S. Banking Offices of Foreign Entities' <https://www.federalreserve.gov/releases/iba/default.htm> accessed 25 February 2020.

[37] The International Banking Act of 1978, Pub. L. No. 95-369, 17 September 1978, 92 Stat. 607.

[38] John C Dugan and others, 'Forms of Entry and Operation in the United States' in Randall Guynn (ed), *Regulation of Foreign Banks and Affiliates in the United States* (9th edn, Thomson Reuters 2016) 9.

[39] 12 US Code §3101(7).

[40] The Foreign Bank Supervision Enhancement Act, Pub. L. No. 102-242, 19 December 1991, 105 Stat. 2286.

[41] Dugan and others (n 38) 12-17.

[42] 12 CFR 211.21(o).

[43] 12 US Code §5323(b)(1). Definition see 12 US Code §5311(a)(4)(A).

[44] n 33.

[45] 12 CFR. §252.153(a).

It is also important to distinguish different forms a foreign bank can choose to conduct business in the US. A common form is a branch/branches of foreign banks, which must obtain either a federal licence from the OCC,[46] or a state licence according to state rules, and approval from the Fed.[47] The activities of branches are subject to the supervision of the Fed, as well as the OCC or the state regulator.[48] Agencies of foreign banks usually may not accept deposits, but are subject to similar regulation and supervision as branches, including obtaining either federal or state licences.[49] The establishment of representative offices of foreign banks that only provide representational and administrative functions, credit approval and other limited functions[50] needs the approval of the Fed.[51] Subsidiaries of foreign banks, different from the above-mentioned forms, which are not independent legal entities, are incorporated in the United States, mostly with the intention to engage in retail banking activities, and thus are subject to the same regulation and supervision as US banks.[52] Establishment of a subsidiary of a foreign bank needs approval from the Fed, which would also consider consolidated supervision status in the bank's homes country.[53]

4.2.2 Resolution

As explained in Chapter 2, resolution in this dissertation refers to the administrative regime for resolving banks that are failing or likely to fail. Even before the enactment of the Dodd-Franck Act, the US had such an administrative resolution regime, and the FDIC has been the resolution authority for insured depository institutions. [54] Insured depository institutions mean 'any bank or savings association the deposits of which are insured by the [FDIC]'.[55] There are 5,291 FDIC-insured institutions as of 12 September 2019.[56]

[46] 12 US Code §3102(a)(1).

[47] 12 US Code §3105(d)(1). Dugan and others (n 38) 29-30.

[48] 12 US Code §§3102, 3105 and 3106a. Dugan and others (n 38) 30-37.

[49] 12 CFR. §§28.10-28.26. Dugan and others (n 38) 37-38.

[50] 12 CRF §211.24(d)(1).

[51] 12 US Code §3107; 12 CFR §§211.21(2)(5) and 211.24(a)(2). Dugan and others (n 38) 38-41.

[52] Dugan and others (n 38) 41-44.

[53] 12 US Code §1842(c)(3)(B). See also FRB, *Enhanced Prudential Standards for Banks Holding Companies and Foreign Banking Organizations*, 79 Fed. Reg. 17240 (27 March 2014).

[54] FDIC, 'History of the FDIC', <https://www.fdic.gov/about/history/> accessed 25 February 2020. See also, e.g., Robert R Bliss and George G Kaufman, 'A Comparison of U.S. Corporate and Bank Insolvency Resolution' (2006) Economic Perspectives 44; Heidi Schooner, 'US Bank Resolution Reform: Then and Again' in Rosa M Lastra (ed), *Cross-border Bank Insolvency* (OUP 2011) 403-425; Schillig (n 2) 238-247.

[55] 12 US Code §1813(c)(2).

[56] FDIC, 'BankFind', <https://research.fdic.gov/bankfind/> accessed 25 February 2020.

A distinct feature of the FDIC is its capacity to directly interfere with the process of resolving failing institutions, without the approval of courts, by either receivership or conservatorship.[57] Receivership is with the purpose of liquidating banks in distress (gone-concern); conservatorship is with the purpose of restructuring banks to normal operation (going-concern).[58] As explained in Chapter 3, under the European regime, resolution authorities only have the powers within the scope of reorganisation measures.[59] By contrast, the US FDIC has additional powers to liquidate institutions. The administrative liquidation power is currently under consideration by EU legislators.[60] According to the FDIC Resolutions Handbook, an overall introduction to the FDIC's work on resolution,

> The resolution process involves valuing a failing institution, marketing the failing institution to healthy institutions, soliciting and accepting bids for the sale of some or all of the institution's assets and assumption of deposits (including some liabilities), determining which bid is least costly to the insurance fund, and working with the [Assuming Institution] through the closing process (or ensuring the payment of insured deposits in the event there is no acquirer).[61]

According to the FDIC Resolutions Handbook, upon notification by an institution's primary regulator of the potential failure, the FDIC can pay an on-site visit to the institution, and select and offer resolution transactions to potential bidders.[62] The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) [63] imposes a least-cost principle during this period.[64] The least cost principle requires that the FDIC may not exercise any resolution power unless: (i) the FDIC determines that 'the exercise of such authority is necessary to meet the obligation of the [FDIC] to provide insurance coverage for the insured deposits'; and (ii) 'the total amount of the expenditures by the [FDIC] and obligations incurred by the [FDIC] … is the least costly to the Deposit Insurance Fund of all possible methods'.[65]

[57] 12 US Code §1821(c)(1).

[58] Richard Scott Carnell, Jonathan R. Macey and Geoffrey P. Miller, *The Law of Financial Institutions* (Wolters Kluwer 2013) 497; Schilling (n 2) para 9.45.

[59] Article 117 BRRD.

[60] European Parliament, 'Liquidation of Banks: Towards an "FDIC" for the Banking Union?', <http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/634385/IPOL_IDA(2019)634385_EN.pdf> accessed 25 February 2020.

[61] FDIC, Resolutions Handbook (15 January 2019), 2.

[62] Ibid, 5.

[63] The Federal Deposit Insurance Corporation Improvement Act of 1991, P.L. 102-242, 19 December 1991, 105 Stat. 2236.

[64] 12 US Code §1823(c)(4).

[65] 12 US Code §1823(c)(4)(A).

In the process, the FDIC can apply the purchase and assumption (P&A) method, and seek a healthy institution to purchase the assets of the failed institution and assume the liabilities.[66] This process parallels to the sale of business tool in the EU law. Besides, during the transition period, a bridge bank may be chartered by the OCC and controlled by the FDIC, with the aim of providing more time for the FDIC to arrange a transaction.[67] This process is similar to the bridge institution tool under the European regime. In cases where no successful P&A is achieved, the FDIC may pay the insured depositors as the deposit insurer, namely, deposit payoff.[68] The present coverage is $250,000.[69]

Prior to the 2007/2008 crisis, apart from insured depository institutions, the failure of other financial institutions was subject to the Bankruptcy Code.[70] This mechanism led to the problems encountered during the crisis. For example, Lehman Brothers went through disorderly corporate insolvency, which caused an 'uncertainty and contagious disruption in financial markets' as well as 'a loss of access to key services'.[71] Another commonly utilised tool is bailout, which was applied to the American International Group (AIG) by injecting public funds into the failing institutions and led to the discussion on large fiscal burden imposed on the taxpayers as well as moral hazard issues.[72]

Subsequently, the Dodd-Frank Act established the Orderly Liquidation Authority (OLA)[73] to be in charge of the resolution of broader coverage of 'financial companies', in a way similar to the FDIC resolution of depository institutions.[74] Section 201(a)(11) of the Dodd-Frank Act defines 'financial company' as including a bank holding company,[75] a nonbank

[66] FDIC (n 61) 6.

[67] Ibid, 18-19.

[68] Ibid.

[69] 12 US Code §1821(a)(1)(E).

[70] Bliss and Kaufman (n 54).

[71] See Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009). Regarding the collapse of Lehman Brothers, see also, e.g., James Bromley and Tim Phillips, 'International Lessons from Lehman's Failure: A Cross-Border No Man's Land' in Roas M Lastra (ed), *Cross-border Bank Insolvency* (OUP 2011) 426-448; Oonagh McDonald, *Lehman Brothers: A Crisis of Value* (Manchester University Press 2016); Dennis Faber and Niels Vermunt (eds), *Bank Failure: Lessons from Lehman Brothers* (OUP 2017).

[72] Čihák and Erlend Nier (n 71). See also, e.g., William Sjostrom, 'The AIG Bailout' (2009) 66 Washington and Lee Law Review 943; William Sjostrom, 'Afterword to the AIG Bailout' (2015) 72 Washington and Lee Law Review 795.

[73] Title II of the Dodd-Frank Act.

[74] Douglas G. Baird, 'Dodd-Frank for Bankruptcy Lawyers' (2011) 19 American Bankruptcy Institute Law Review 287.

[75] n 24.

financial company supervised by the FRB,[76] or any company 'predominantly engaged' in 'activities that are financial in nature', and subsidiaries of these institutions. [77] This means Title II can apply to BHCs, SLHCs and IHCs mentioned above.[78] Putting a financial company into resolution must meet the systemic risk determination made by the Secretary of the Treasury: (1) 'the financial company is in default or in danger of default'; (2) 'the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States'; (3) 'no viable private sector alternative is available to prevent the default of the financial company'; (4) 'any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this subchapter is appropriate, given the impact that any action taken under this subchapter would have on financial stability in the United States'; (5) 'any action under section 5384 of this title would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company'; (6) 'a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order'; and (7) 'the company satisfies the definition of a financial company under section 5381 of this title'.[79] Financial companies that do not meet all the conditions listed above and other financial institutions are still subject to the Bankruptcy Code.[80]

Upon the satisfactory determination by the Secretary of the Treasury, the Secretary shall notify the FDIC and the covered financial company.[81] The board of directors should accept the Secretary's appointment of the FDIC as a receiver, otherwise, the Secretary should petition the United States District Court for the District of Columbia for 'an order authorizing the Secretary to appoint the [FDIC] as receiver'.[82] Similar to the functions as receiver for depository institutions, the FDIC, acting as receiver for covered financial companies, has a broad range of resolution powers, such as acting as successor to the covered financial company and operating the company

[76] 12 US Code §5323 (Authority to require supervision and regulation of certain nonbank financial companies).

[77] 12 US Code §5381(a)(11).

[78] IMF, 'United States Financial Sector Assessment Program: Review of the Key Attributes of Effective Resolution Regimes for the Banking and Insurance Sectors - Technical Note' (July 2015) 138.

[79] 12 US Code §5383(b).

[80] 12 US Code §5382(c)(1).

[81] 12 US Code §5382(a)(1)(A)(i).

[82] Ibid.

during the orderly liquidation period,[83] establishing a bridge company,[84] merging the covered financial company with another company or transferring assets and liabilities of the covered financial company without obtaining consent.[85] In addition, in the US Bankruptcy Code, covered financial contracts are protected through safe harbour provisions,[86] which exempt certain financial counterparties and financial transactions from the automatic stay prescribed in Section 362 of the Bankruptcy Code,[87] from unenforceability of *ipso facto* clause prescribed in Section 365(e) of the Bankruptcy Code,[88] and from preference law and fraudulent conveyances prescribed in Section 547 of the Bankruptcy Code.[89] The Dodd-Frank Act, nevertheless, puts restrictions on these safe harbour provisions, to temporarily stay or disapply early termination, liquidation or netting rights in financial contracts.[90] The US law does not give the FDIC with a direct bail-in power, although a bail-in effect can be achieved through a bridge institution.[91]

During recent discussions regarding the orderly resolution of financial institutions, it was proposed that a new Chapter 14 be added into the Bankruptcy Code.[92] The purpose of this proposed Chapter 14 was to reduce the reliance on administrative decisions reached in private without

[83] 12 US Code §5390(a)(1)(A)-(D).

[84] 12 US Code §5390(a)(1)(F) and (h).

[85] 12 US Code §5390(a)(1)(G).

[86] See, e.g. Shmuel Vasser, 'Derivatives in Bankruptcy' (2005) 60 The Business Lawyer 1507; Stephen J Lubben, 'Repeal the Safe Harbors' (2010) 18 American Bankruptcy Institute Law Review 319, 322-326; Steven L Schwarcz and Ori Sharon, 'The Bankruptcy-Law Safe Harbor for Derivatives: A Path-Dependence Analysis' (2014) 71 Wash & Lee L Rev 1775, 1724-1737; Francisco Garcimartín and Maria Isabel Saez, 'Set-off, Netting and Close-out Netting' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 336-339; Edward Janger and John AE Pottow, 'Implementing Symmetric Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 155, 163-168; Mark J Roe and Stephens D Adams, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale J on Reg 363, 377-380.

[87] 11 US Code §362(b)(6)(exempting automatic stay for commodity contracts, forward contracts and securities contracts and master agreements); 11 US Code §362(b)(7) (exempting automatic stay for repurchase agreements and master agreements); 11 US Code §362(b)(17)(exempting automatic stay for swap agreements and master agreements); 11 US Code §362(b)(27)(exempting automatic stay for master netting agreements).

[88] 11 US Code §§555, 556, 559, 560 and 561.

[89] 11 US Code §546(e),(f),(g),(j).

[90] 12 US Code §5390(c)(10)(B)(i). See also 12 US Code §1821(e)(10)(B)(i).

[91] See below Chapter 8, §8.4.2.1.

[92] Kenneth Scott and John Taylor (eds), *Bankruptcy Not Bailout: A Special Chapter 14* (Hoover Institute Press 2012); Thomas Jackson and David Skeel, 'Dynamic Resolution of Large Financial Institutions' (2012) 2 Harv Bus L Rev 435; Kenneth Scott, Thomas Jackson and John Taylor (eds), *Making Failure Feasible: How Bankruptcy Reform Can End "Too Big To Fail"* (Hoover Institute Press 2015); David Skeel, 'Bankruptcy for Banks: A Tribute (and Little Plea) to Jay Westbrook' (2018) 27 Norton Journal of Bankruptcy Law and Practice 584.

sufficient information disclosed to the public, and give more power to 'judicial hearings and reasoned public opinions'.[93] The Treasury issued a report titled 'Orderly Liquidation Authority and Bankruptcy Reform' to the President, which generally supported this proposal.[94] The Senate Judicial Committee later organised a hearing to discuss the proposal, with the same aim of empowering courts to supervise bank resolution, but for the OLA to retain its administrative power.[95] This Chapter 14 proposal has been received objections from many insolvency and financial lawyers, who question the capacity of bankruptcy courts to handle the insolvency of large financial institutions within a short period of time and the potential adverse impact caused by the lack of administrative intervention in the special financial institution resolution.[96] This dissertation does not further address the deliverability of this new proposal. Yet, it is pointed out that putting financial institution resolution under the framework of the court-supervised bankruptcy/insolvency would make cross-border recognition easier. Should Chapter 14 be put in place, resolution would fall under the general US Bankruptcy Code, and therefore judicial cross-border insolvency legal instruments (Chapter 15) would apply, without the need to address the administrative nature of resolution as discussed below.[97]

[93] Kenneth Scott, 'A Guide to the Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14' in Kenneth Scott and John Taylor (eds), *Bankruptcy Not Bailout A Special Chapter 14* (Hoover Institution Press 2012) 22. See other criticism on the OLA, e.g. Stephanie Massman, 'Developing a New Resolution Regime for Failed Systemically Important Financial Institutions: An Assessment of the Orderly Liquidation Authority' (2015) 89 American Bankruptcy Law Journal 625.

[94] Treasury, 'Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017: Orderly Liquidation Authority and Bankruptcy Reform' (21 February 2018) <https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf> accessed 25 February 2020.

[95] Harvard Law School Bankruptcy Roundtable, 'Senate Judiciary Committee Hearing on Bankruptcy for Banks and Proposed Chapter 14' (4 December 2018) <http://blogs.harvard.edu/bankruptcyroundtable/2018/12/04/senate-judiciary-committee-hearing-on-bankruptcy-for-banks-and-proposed-chapter-14/> accessed 25 February 2020.

[96] Financial Scholars Oppose Eliminating "Orderly Liquidation Authority" As Crisis-Avoidance Restructuring Backstop (23 May 2017) <https://corpgov.law.harvard.edu/wp-content/uploads/2017/05/Scholars-Letter-on-OLA-final-for-Congress.pdf> accessed 25 February 2020. See also e.g. Bruce Grohsgal, 'Case in Brief Against "Chapter 14"' (2014) American Bankruptcy Institute Journal 44; Roe and Adams (n 86); Mark Roe, 'Don't Bank on Bankruptcy for Banks' (Project Syndicate, 18 October 2017) <https://www.project-syndicate.org/commentary/bank-bankruptcy-regulations-by-mark-roe-2017-10?barrier=accesspaylog> accessed 25 February 2020.

[97] See, e.g. Simon Gleeson, 'The Consequences of Chapter 14 for International Recognition of US Bank Resolution Action' in Kenneth Scott, Thomas Jackson and John Taylor (eds), *Making Failure Feasible: How Bankruptcy Reform Can End "Too Big to Fail"* (Hoover Institute Publisher 2015) 111-127.

4.3 Recognition of foreign resolution actions in the US

4.3.1 Legal grounds for recognition

4.3.1.1 Institutional framework

Back to the central question of this dissertation, an effective cross-border resolution requires a swift recognition of foreign resolution actions. This chapter focuses on how the US recognises foreign resolution actions. In the absence of a special cross-border resolution regime, Chapter 15 of the US Bankruptcy Code may apply. Chapter 15 transposes the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (MLCBI), which is identified by the Financial Stability Board (FSB) as an instrument to resolve cross-border bank resolution cases.[98] It should be noted that Chapter 15 excludes 'a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency … in the United States', following the exclusion of eligible debtors in section 109 of the Bankruptcy Code.[99] As discussed in §4.3.1.2.2 below, such exclusion makes many foreign banks that have branches or agencies in the US not subject to Chapter 15, and it would be difficult for foreign resolution actions to be recognised. This is why the International Monetary Fund (IMF) stated that the US regime for cross-border bank resolution generally does not comply with the FSB Key Attributes in the sense that 'a general statutory mechanism to give prompt legal effect in the United States to foreign resolution actions does not exist'.[100]

However, it cannot be overlooked that Chapter 15 still applies in many other scenarios. The exclusion of foreign banks is limited to deposit-taking institutions. If the foreign institution in resolution is not a foreign bank but a foreign banking holding company or nonbank financial company, Chapter 15 still applies. In particular, a foreign insurance company is not excluded.[101] In addition, if a foreign bank does not have any branches or agencies in the United States, Chapter 15 may also apply.[102]

Before further analysis, a premise is first examined: does the court-oriented Chapter 15 regime apply to administrative resolution proceedings? The examination starts with the definitions in Chapter 15. 'Foreign proceeding'

[98] FSB Principles, 18.

[99] 11 US Code §109(b)(3)(B); 11 US Code §1501(c)(1).

[100] IMF (n 78) 8.

[101] For example, *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631 (Bankr. S.D.N.Y. 2018).

[102] For example, *In re Irish Bank Resolution Corporation Ltd,*. 538 B.R. 629 (D.Del. 2015) (confirming that the bank closed all its offices in the US ten months before the petition for Chapter 15).

in the US Bankruptcy Code refers to 'a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation'.[103] In addition, 'foreign court' means 'a judicial or other authority competent to control or supervise a foreign proceeding'.[104] When interpreting Chapter 15, 'the court shall consider its international origin',[105] therefore, this Chapter also takes into account the origin of Chapter 15 – the MLCBI. The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency (MLCBI Guide) further explains that '[a] foreign proceeding … should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body'.[106] Accordingly, an insolvency proceeding can be an administrative one, and a foreign court can be an administrative authority. In other words, the administrative nature of a resolution proceeding administered by a resolution authority does not preclude resolution from insolvency, and should not be an obstacle for the resolution proceeding to be recognised under Chapter 15. This conclusion is in line with the general finding made in Chapters 1 and 2 of this dissertation that resolution is considered as a special insolvency proceeding.

This view is confirmed in several US cases. In the *Irish Bank Resolution Corporation* case, the court ruled that 'the majority of tasks to be undertaken by the Special Liquidators and Minister of Finance [of Ireland] are administrative in nature', which makes the Irish proceeding within the scope of (administrative) insolvency proceedings.[107] Similarly, the *Trades Swiss AG* and *ENNIA Caribe Holding N.V.* cases confirmed the opinion that collective resolution proceedings administered by an administrative resolution authority can be recognised as insolvency proceedings.[108]

Since Chapter 15 can apply in resolution cases, the rest of this section continues to explain the core concepts in Chapter 15, namely, the centre of main interests (COMI) and establishment. Recognition under Chapter 15 can only be granted to a foreign proceeding that is either a foreign main proceeding or a foreign nonmain proceeding.[109] As briefly introduced

[103] 11 US Code §101(23).

[104] 11 US Code §1502(3).

[105] 11 US Code §1508.

[106] MLCBI Guide, para 87.

[107] *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015).

[108] *In re Tradex Swiss AG,* 384 B.R. 34, 42 (Bankr. D. Mass. 2008); In *re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018).

[109] 11 US Code §1517(b). See H.R. Rep. No. 109-31, at 113 (2005).

in Chapter 2, a foreign proceeding can be recognised as a foreign main proceeding 'if it is pending in the country where the debtor has the center of its main interests',[110] or as a foreign nonmain proceeding 'if the debtor has an establishment … in the foreign country where the proceeding is pending'.[111] An establishment is defined as 'any place of operation where the debtor carries out a nontransitory economic activity'.[112] However, there is no clear definition for COMI, and COMI is determined based on a presumption, that is, '[i]n the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests'.[113] The distinction of COMI/establishment sets out the basic rule for determination of jurisdiction.

In the US, an early debate was about the approach to recognising foreign insolvency proceedings: whether judges can make discretionary decisions for the purpose of flexibility,[114] or they merely rely on objective factors, namely, COMI.[115] The first approach received broad criticism,[116] and later judgments strictly applied the COMI test based on objective factors. The judge in the *SPhinX* case enumerated several factors: the 'location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company)'; 'the location of the debtor's primary assets'; 'the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case'; and 'the jurisdiction whose law would apply to most disputes'.[117] Gradually, some US courts formed a 'nerve center' test in determining COMI, relying on the 'principal place of business' concept in the US company law, that is, 'where a corporation's officers direct, control and coordinate the corporation's activities'.[118]

[110] 11 US Code §1517(b)(1).

[111] 11 US Code §1517(b)(2).

[112] 11 US Code §1502(2).

[113] 11 US Code §1516(c).

[114] *In re SPhinX Ltd.*, 351 B.R. 103 (Bankr.S.D.N.Y. 2006); *In re SPhinX, Ltd.*, 371 B.R. 10 (Bankr.S.D.N.Y. 2007).

[115] *In re Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 375 B.R. 122 (Bankr.S.D.N.Y. 2007); *In re Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325 (S.D.N.Y. 2008).

[116] See, e.g. Jay L Westbrook, 'Locating the Eye of the Financial Storm' (2006) 32 Brooklyn Journal of International Law 1019; Daniel M. Glosband, 'SPhinX Chapter 15 Opinion Misses the Mark' (2007) 25 American Bankruptcy Institute Journal 44.

[117] *SPhinX*, 351 B.R. at 117.

[118] *In re Fairfield Sentry*, 400 B.R. 60, 64-65 (Bankr.S.D.N.Y. 2010); *In re Fairfield Sentry*, 714 F.3d 127, 138 (2d Cir. 2013). Citing *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S.Ct. 1181, 1192, 175 L.Ed.2d 1029 (2010). See also Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' (2006) 32 Brook. J. Int'l L. 1019, 1020.

This US approach has been criticised as too narrow for the original meaning under MLCBI.[119] As a general principle, US courts should consider the international origin of Chapter 15,[120] and foreign jurisdictions' statutes.[121] The 2013 MLCBI Guide explicitly stated that the factors determining COMI are mainly the location: (a) 'where the central administration of the debtor takes place', and (b) 'which is readily ascertainable by creditors'.[122] This is similar to the European method, which relies on two major factors: objective factors for determining central administration and ascertainability by third parties, especially creditors.[123] The ascertainability factor is missing in the 'nerve center' test; however, some US judges did consider this point.[124]

Another controversial issue is about the timing for COMI determination. Many US courts determine COMI at the time when a Chapter 15 petition is filed,[125] while the European approach chooses the date when the foreign insolvency proceeding is commenced.[126] A recent Singapore judgment followed the US approach,[127] an approach that was criticised for creating more than one COMI and causing unpredictability for creditors,[128] and providing incentives for *mala fide* forum shopping by intentionally moving the COMI before a Chapter 15 filing.[129]

[119] See, e.g. *In the Matter of Zetta Jet Pet. Ltd. and Zetta Jet USA, Inc* [2019] SGHC 53 at [70].

[120] 11 US Code §1508. H.R. Rep. No. 109-31 (2005), 106, n 101. See also, e.g. *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 633 (Bankr.E.D.Cal. 2006); *Bear Stearns High-Grade Structured Credit*, 374 B.R. at 129.

[121] 11 US Code §1508.

[122] MLCBI Guide, para 145.

[123] EIR 2015 Recast, Article 3(1). See also Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, para 33; Judgment of 20 October 2011, *Interedil Srl v. Fallimento Interedil Srl et al.*, C-396/ 09, EU:C:2011:671, para 49.

[124] See, e.g. *In re Betcorp. Ltd.*, 400 B.R. 266, 290 (Bankr.D.Nev. 2009); *In re Ran*, 607 F.3d 1017, 2015-2016 (5th Cir. 2010); *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 93 (S.D.N.Y. 2012); *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 217 (Bankr.S.D.N.Y. 2017). See also, e.g. Xenia Kler, 'COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application within Cross-Border Insolvency Cases' (2018) 34 Am U Int'l L Rev 429.

[125] *Betcorp*, 400 B.R. at 290-292; *Ran*, 607 F.3d. at 1025-1026; *In re British American Ins Co Ltd*, 425 B.R. 884, 909-910 (Bankr.S.D.Fla. 2010). *Cf In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 73 (Bankr.S.D.N.Y. 2011); *In re Kemsley*, 489 B.R. 436, 354 (Bankr.S.D.N.Y. 2013).

[126] See, e.g. Judgment of 20 October 2011, *Interedil Srl v. Fallimento Interedil Srl et al.*, C-396/ 09, EU:C:2011:671, paras 54-55; *Re Videology Limited* [2018] EWHC 2186 (Ch) at [49].

[127] *In the Matter of Zetta Jet Pet. Ltd. and Zetta Jet USA, Inc* [2019] SGHC 53 at [53].

[128] Bob Wessels and Ilya Kokorin, 'Divergent trends in COMI determination: Singapore's position further drifts from European approach' (11 March 2019) Global Restructuring Review <https://globalrestructuringreview.com/article/1188659/divergent-trends-in-comi-determination-singapore%E2%80%99s-position-further-drifts-from-european-approach> accessed 25 February 2020. See also MLCBI Guide, paras 157-160; National Bankruptcy Conference, Revisions to Chapter 15 of the Bankruptcy Code (20 August 2018).

[129] See, e.g. *Millennium Global*, 458 B.R. at 75; Kler (n 124) 456ff.

Without further analysis of these debates, it can be seen that the central concept in Chapter 15 – COMI – is subject to conflicting interpretation in the US which may lead to uncertainties in cross-border insolvency. With regard to bank resolution, these uncertainties remain when Chapter 15 applies, where a judge still needs to decide whether a foreign home jurisdiction is a COMI jurisdiction. In a cross-border resolution case where an expedited recognition is needed, such a confusing Chapter 15 COMI test is not sufficient to guarantee a predictable cross-border resolution. Actually, in Chapter 6, this dissertation proposes that the jurisdiction rule should shift to home/host distinction.

4.3.1.2 Scenarios

4.3.1.2.1 Subsidiary

As a general principle of company law, a subsidiary is an independent legal entity and should be subject to the law of the place where it is incorporated. Coordination of parent and subsidiary resolution proceedings in different jurisdictions is a critical concern of cross-border resolution.[130] In the US, a preferred solution is to apply a single point of entry (SPE) approach, which is tailored to the US holding company structure. [131] As explained in Chapter 2, SPE refers to the model that 'resolution powers are applied to the top of a group by a single national resolution authority'.[132] In contrast, multiple points of entry (MPE) refer to the situation where 'resolution tools are applied to different parts of the group by two or more resolution authorities'.[133] By adopting SPE, the FDIC would put a top-tier parent holding institution into resolution, which usually only has financing functions, and therefore would not interfere with the operation of subsidiaries.[134] And an FDIC-Bank of England (BOE) joint paper also confirmed the application of SPE in resolution of cross-border banking groups.[135]

[130] FSB KA 7-9. See literature, e.g. Jay L Westbrook, 'SIFIs and States' (2014) 49 Tex Int'l L J 329; Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019).

[131] FDIC, Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, Federal Register, Vol. 78, No. 243, December 18, 2013.

[132] FSB, 'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies' (16 July 2013) 12.

[133] Ibid.

[134] For the operation of SPE, see, e.g. John Bovenzi, Randall Guynn and Thomas Jackson, *Too Big to Fail: The Path to a Solution* (Economic Policy Program Financial Regulatory Reform Initiative, 2013).

[135] FDIC & BOE, 'Resolving Globally Active, Systemically Important Financial Institutions, A joint paper by the Federal Deposit Insurance Corporation and the Bank of England' (10 December 2012). See also FDIC and BOE, 'Resolving Globally Active, Systemically Important Financial Institutions' in Douglas Evanoff and William Moeller (eds), *Dodd-Frank Wall Street Reform and Consumer Protection Act: Purposes, Critique, Implementation Status and Policy Issues* (World Scientific 2014) 175-179.

However, a hypothetical case is that the parent holding company absorbs the losses by writing down or converting its liabilities, but the assets, including shares in its foreign subsidiaries, are transferred to a third institution or a bridge institution. When the subsidiary is in the US, the recognition request is made to a US bankruptcy court, and a US bankruptcy judge is supposed to decide the validity of such a transfer. As highlighted above, Chapter 15 can apply except in the circumstances where the parent company is a foreign bank with branches or agencies in the US.[136] This decision to facilitate a foreign transfer tool falls under the scope of reliefs that can be granted to foreign proceedings. A premise was discussed in the previous section, namely, the foreign resolution proceeding has to be recognised as a foreign main proceeding or a foreign nonmain proceeding.[137] This section continues to examine the rules regarding reliefs. Reliefs under Chapter 15 can be categorised into two types: automatic relief and discretionary relief.[138]

Automatic relief is prescribed in §1520 of the US Bankruptcy Code and can be granted upon the recognition of a foreign main proceeding.[139] Under MLCBI, the corresponding provision is Article 20, which prescribes that (i) '[c]ommencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed'; (b) '[e]xecution against the debtor's assets is stayed'; and (c) '[t]he right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended'.[140] The MLCBI Guide further explains that the 'automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding'.[141] These automatic effects have the same purpose of suspending ongoing proceedings that may undermine cross-border insolvency. Adopting MLCBI into Chapter 15, §1520(a)(1) makes the automatic stay relief under §362 of the Bankruptcy Code available, subject to adequate protection prescribed in §361, which combines subsections 1(a) and 1(b) under Article 20 MLCBI.[142] In addition, §1520(a)(2) – (4) covers reliefs under §363 (use, sale, or lease of property),[143] §549 relief (postpetition transactions),[144] and §552 relief

[136] Text to n 99.

[137] Text to n 109.

[138] MLCBI Guide, para 176. See, e.g. Selinda A Melnik, 'United States' in Look Ho Chan (ed), *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (3rd edn, Global Law and Business 2012) 462-467; Neil Hannan, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017) 124-138.

[139] 11 US Code §1520.

[140] Article 20(1) MLCBI.

[141] MLCBI Guide, para 178.

[142] 11 US Code §1520(a)(1). H.R. Rep. No. 109-31 (2005), 114.

[143] 11 US Code §363.

[144] 11 US Code §549.

(postpetition effect of security interest),[145] which corresponds to subsection 1(c) under Article 20 MLCBI but with a broader scope.[146] In particular, §363 allows a trustee, or a foreign representative in a Chapter 15 case, to continue to use, sale or lease property of the debtor.[147]

The question raised in this part boils down to whether a transfer decided by a foreign resolution authority would fall under automatic relief prescribed in §1520, which must meet the criteria in §363. In the *Elpida Memory* case, the judge confirmed that a sale of assets approved by a Japanese court falls under automatic relief prescribed in §1520(a)(2), namely, 'a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States'.[148] The judge further confirmed that criteria under §363 also applies to §1520, including: (1) 'a sound business purpose exists for the sale'; (2) 'the sale price is fair'; (3) 'the debtor has provided adequate and reasonable notice'; and (4) 'the purchaser has acted in good faith'.[149] In terms of a forced transfer to a bridge institution or a third party decided by a resolution authority, questions may arise, such as (i) whether the transfer is of a sound business purpose, given that resolution authorities usually view public interest as a priority goal, not the business of an individual bank; (ii) whether the debtor has provided adequate and reasonable notice, given that the decision is made by a resolution authority rather than a debtor or a trustee, and notice is not required;[150] and (iii) particularly with regard to bridge institution tool, whether this is a sale with a fair price. Although it is possible that a request is made to apply §1520 to grant automatic relief to a foreign transfer action by a foreign resolution authority, it is not certain whether a US judge would grant such a relief.

However, even if an automatic relief cannot apply, there are other discretionary reliefs under other articles in Chapter 15. Provisional reliefs may be granted upon the application of a foreign representative in accordance with §1519, which are discretionarily determined by judges.[151] Additional discretionary reliefs can be granted upon recognition of both a foreign main proceeding and a foreign non-main proceeding under §1521.[152] Also, in general, §1507 allows additional reliefs after a foreign proceeding has been

[145] 11 US Code §552.

[146] H.R. Rep. No. 109-31 (2005), 114.

[147] 11 US Code §363.

[148] 11 US Code §1520(a)(2). *In re Elpida Memory Inc.*, 2012 WL 6090194, 4 (Bankr. D. Del. 2012). See also Hannan (n 138) 128-129.

[149] *Elpida Memory*, 2012 WL 6090194 at 7, citing *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D.Del. 1991). See also *In re Fairfield Sentry*, 768 F.3d 239, 244-247 (2nd Cir. 2014).

[150] The FSB does not list notice as a prerequisite for resolution. See FSB Key Attributes and KAAM EN 3(o). See also, e.g. the EU law, in which resolution authorities are not subject to procedural requirements such as notice. Article 63(2)(b) BRRD.

[151] 11 US Code §1519.

[152] 11 US Code §1521.

recognised.[153] Even though granting a foreign transfer may fall outside the scope of automatic relief under §1520, it is possible to apply §1521 or §1507 for such a relief. A relevant provision is §1521(a)(5) about asset turnover, namely, entrusting assets located in the US to foreign representatives or other court-authorised persons.[154] In the *In re Lee* case, the judge dealt with the request from Hong Kong representatives for them to exercise control over foreign debtors' equity interests in the US, and the judge ruled, on the basis of successful proof borne by the foreign representatives, that the request regarding equity interests in a US company falls under §1521(a)(5).[155] Although the assets usually should be remitted to foreign representatives, the provision makes it explicit that the assets can be entrusted to another person authorised by the court other than foreign representatives.[156] A likely solution is to interpret this 'another person' as including a solvent institution (buyer) or a bridge institution established by a resolution authority. As required by §1521(b), assets turnover must meet the condition that 'the court is satisfied that the interests of creditors in the United States are sufficiently protected'.[157] In an SPE resolution case, creditors of the US subsidiary are not even materially affected, because applying an SPE strategy in a cross-border case preserves the operation of subsidiaries. This is in line with the sufficient creditor protection principle.[158] In addition, the fact that the US has a comparable P&A method[159] may help judges understand the nature and purpose of such an action and alleviates the concerns for insufficient protection for creditors.[160]

Even if this §1521(a)(5) provision cannot apply, other reliefs are available under either §1521(a) or §1507.[161] For reliefs not explicitly expressed in §1521(a)(1)-(7) or (b), it could be an 'appropriate relief' under §1521(a) if the relief was available under §105 or §304 prior the adoption of Chapter 15,[162] or if it is available under other US law.[163] As explained above, the P&A method, including bridge institution, is available under US law,[164] which could serve

[153] 11 US Code §1707.

[154] 11 US Code §1521(a)(5). See, e.g. *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627 (Bankr.E.D.Cal. 2006); *In re Atlas Shipping A/S*, 404 B.R. 726 (Bankr. S.D.N.Y. 2009); *In re International Banking Corp.*, 439 B.R. 614 (Bankr.S.D.N.Y 2010).

[155] *In re Lee*, 472 B.R. 156 (Bankr.D.Mass. 2012).

[156] 11 US Code §1521(a)(5).

[157] 11 US Code §1521(b).

[158] 11 US Code §1521(b) and 1522(a). See *Lee*, 472 B.R. at 182.

[159] n 66-67.

[160] The same logic can be seen in the above-mentioned case *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015).

[161] *In re Vitro SAB de CV*, 701 F.3d 1031, 1056-1057 (5th Cir. 2012). See also Louise De Carl Adler, *Managing the Chapter 15 Cross-Border Insolvency Case: A Pocket Guide for Judges* (2nd edn, Federal Judicial Center 2014) 17.

[162] H.P. Rep. No. 109-31 (2005), 116. Adler (n 161) 17.

[163] *Vitro*, 701 F.3d at 1056-1057. Adler (n 161) 17.

[164] n 159.

as the basis for granting reliefs under §1521(a). The last resort would be §1507, which, on the basis of comity principle, even provides reliefs not available in the US law,[165] with the aim being to 'permit the further development of international cooperation begun under section 304'.[166] These two provisions provide the additional possibility of granting a transfer decided by a foreign authority, unless it violates public policy in §1506 as discussed in below §4.3.2. Even though there is no actual cross-border bank resolution case requesting reliefs, such as transferring the equity interests to another institution, this chapter argues that under the present US law, such relief can be granted by US judges.

A successful application of SPE, in conjunction with a clear recognition and relief regime, would to a great extent remove the obstacles for cross-border resolution. However, there are real concerns about the practicability of applying SPE. These concerns have been addressed in Chapter 2 at §2.2.2. A particular problem is that a successful SPE relies on a holding company structure with a parent holding company able to absorb the losses; this is common in the US but not in many other jurisdictions.[167]

In the case where an SPE strategy fails, resolution of a banking group needs an MPE strategy. As explained in Chapter 2, a fundamental solution to address cross-border banking group resolution under an MPE strategy would be by enhancing cross-border cooperation. In the US, as concluded by the IMF, the FDIA does not contain any reference to cooperation; while the Dodd-Frank Act does have provisions for cooperation,[168] the scope and mandate of the resolution authority – the FDIC – is not clear.[169]

Apart from cooperation, another likely legal solution is centralising all the proceedings in one centralised authority. The current US law can provide such a solution on the basis of the COMI concept, namely, interpreting the jurisdiction of the parent that conducts central administration and serves

[165] H.P. Rep. No. 109-31 (2005), 109. See also *In re Artimm S.r.L.*, 335 B.R. 149, 160 (Bankr. C.D.Cal. 2005); *Vitro*, 701 F.3d at 1057; Adler (n 161) 17-18.

[166] H.P. Rep. No. 109-31 (2005), 109.

[167] David Skeel, 'Single Point of Entry and the Bankruptcy Alternative' in Martin Neil Baily and John B. Taylor (eds), *Across the Great Divide: New Perspectives on the Financial Crisis* (Hoover Press 2014) 313; Paul L Lee, 'Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part I' (2015) 132 Banking Law Journal 437, 465; Jeffrey N Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) Columbia Law Review 1297, 1330-1332; Karl-Philipp Wojcik, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91, 136.

[168] 12 US Code §5390(a)(1)(N).

[169] IMF (n 78) 89-91.

as the head office as the COMI of a subsidiary.[170] Just as held in the *SPhiX* case, 'location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company)' could be a factor to identify COMI. [171] Also, in the recent *Oi* case, the US judge ruled that the COMI of a Dutch company was actually in Brazil, based on the fact that the Dutch company was only a financing company, serving as a special purpose vehicle (SPV) for its parent company in Brazil.[172] Such a proposal heavily relies on a unified jurisdiction rule and contains the premise that a proceeding in a COMI jurisdiction has global effects. However, even after a foreign parent proceeding is recognised as a foreign main proceeding, it does not guarantee that the effects of foreign resolution proceedings can be achieved under current Chapter 15. As explained above about various reliefs under Chapter 15, automatic relief only extends to certain measures, and any relief substantively altering the creditor/debtor relations is at the sole discretionary power of a judge. In other words, there is no guarantee that a foreign resolution action can be enforced in the US.

4.3.1.2.2 Branch

As already mentioned above, foreign banks with branches or agencies in the United States are excluded from the list of eligible debtors prescribed in Section 109 of the Bankruptcy Code and, therefore, are excluded from Chapter 15.[173] However, if the institution in resolution is not a bank with branches or agencies in the US, Chapter 15 still applies. Therefore, as briefly summarised in the previous sections, the whole recognition process needs to consider COMI, and reliefs can be granted by judges.

In the US, branches and agencies of foreign banks are subject to special liquidation rules, which can be categorised into three different types. [174] The first category is FDIC-insured foreign branches.[175] Since the enactment of the FBSEA on 19 December 1991, branches of foreign banks are generally prohibited from taking deposits and cannot be insured by the FDIC.[176]

[170] Samuel L Bufford, 'Coordination of Insolvency Cases for international Enterprise Groups: A Proposal' (2012) 86 American Bankruptcy Law Journal 685 (Enterprise COMI); Irit Mevorach, 'The Home Country of A Multinational Enterprise Group Facing Insolvency' (2008) 57 International and Comparative Law Quarterly 427. See also the *Nortel* case in the UK, Re Nortel [2015] EWHC 2506 (Ch).

[171] *In re SPhinX Ltd.*, 351 B.R. 103, 117 (Bankr.S.D.N.Y. 2006).

[172] *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 217 (Bankr.S.D.N.Y. 2017), citing *In re OAS S.A.*, 533 B.R. 83, 92 (Bankr.S.D.N.Y. 2015).

[173] n 99.

[174] See, e.g. Steven L Schwarcz, 'The Confused US Framework for Foreign-Bank Insolvency: An Open Research Agenda' (2005) 1 Review of Law & Economics 81; Paul L Lee, 'Cross-Border Resolution of Banking Groups: International Initiatives and US Perspectives-Part III' (2014) 10 Pratt's J Bankr L 291, 298-317.

[175] Schwarcz (n 174) 87; Lee (n 174) fn 54; Dugan and others (n 38) 775 ff.

[176] 12 US Code §3104(d).

However, insured branches of foreign banks operating at that time were permitted to continue operating and be insured by the FDIC thanks to a 'grandfather' provision. [177] As FDIC-insured depository institutions, they are resolved by the FDIC under the FDIA.[178]

The second category is uninsured federal foreign branches or agencies.[179] They are regulated by the IBA.[180] As prescribed in the Sections 4(i) and (j) of the IBA, the OCC may revoke the authority of a branch or an agency or appoint a receiver 'who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller'.[181] As the OCC clarified, this type of branches or agencies is not subject to the appointment provision under the FDIC.[182] In other words, the FDIC may not be the OCC-appointed receiver, and resolution tools available to the FDIC under the FDIA are not available to OCC-appointed receivers. In addition, it should be noted that the OCC-appointed receiver can take possession of 'all the property and assets' of a foreign bank,[183] which indicates that when a foreign bank has both federal branches or agencies and state branches or agencies, the OCC-appointed receiver should act for both federal-level and state-level branches or agencies.[184]

The third category is uninsured state foreign branches, which are subject to state laws.[185] As summarised by Lee, the laws of the states that have a large foreign bank presence have similar provisions as the IBA.[186] For example, in New York, the superintendent of the Department of Financial Services (Superintendent) 'may also, in his or her discretion, forthwith take possession of the business and property in this state of any foreign banking corporation that has been licensed by the superintendent' and further put the entity into receivership liquidation.[187] In Texas, the Finance Commission

[177] 12 US Code §3104(d)(2). As of 21 March 2019, there were only 10 operating branches that are insured by the FDIC, i.e. Bank of China (New York and Flushing), Bank of Baroda, State Bank of India (New York and Chicago), Bank Hapoalim B.M., Bank of India, The Bank of East Asia Ltd., Mizrahi Tefahot Bank, Ltd., and Metropolitan Bank and Trust Company. The information can be accessed on the FDIC website, with the institution type as 'insured branches of foreign banks' <https://www5.fdic.gov/idasp/advSearchLanding.asp> accessed 25 February 2020. Degan and others (n 175) 758.

[178] 12 US Code §1821(c).

[179] Schwarcz (n 174) 85ff; Lee (n 174) 299ff; Dugan and others (n 38).

[180] Ibid.

[181] 12 US Code §3102 (i) and (j).

[182] OCC Interpretive Letter #768 (March 1997), 4. See also Lee (n 174) fn 54.

[183] 12 US Code §3102 (j)(1).

[184] IMF (n 78) 22.

[185] Schwarcz (n 174) 87-88; Lee (n 174) 310ff.

[186] Lee (n 174) 310ff. See state laws of New York, California, Illinois, and Florida.

[187] New York Banking Law Section 606(4)(a).

of Texas has similar power to the New York Superintendent in resolving branches and agencies of foreign banks.[188] Generally, above-mentioned federal and state proceedings against branches and agencies are, as the IMF concluded, liquidation-oriented but not resolution-oriented, and are territorial in nature which may not help achieve an effective cross-border resolution.[189]

The problem in relation to resolving branches or agencies of foreign banks may arise in cases where foreign authorities take actions on the same branches or agencies. For example, the Chinese law, as discussed in Chapter 5, explicitly expresses that overseas assets of Chinese enterprises are subject to Chinese law, including overseas branches of Chinese banks. This leads to an overlap of authorities. US and Chinese authorities may impose different approaches on the same branch and thus undermine a complete resolution.[190] A potential request would be from a foreign resolution authority asking a US court to enforce foreign resolution actions. As mentioned above, Chapter 15 does not apply in this scenario. No case was found regarding such request. But as the IMF pointed out, in theory, a court may still address the issue by applying the principle of comity.[191] In addition, section 305 of the Bankruptcy Code may provide the basis to 'dismiss, stay, or limit a case as necessary to promote cooperation and coordination in a cross-border case'.[192] In this case, significant uncertainties remain, and it is difficult to predict the responses of US judges on cases involving branches or agencies of foreign banks.

4.3.1.2.3 Assets

As mentioned above, a foreign bank that has a branch or an agency in the US cannot be a debtor under the US Bankruptcy Code, including under Chapter 15.[193] In other words, if a bank does not have a branch or an agency in the US but only has assets, including representative offices,[194] it could be an eligible debtor.[195] Consequently, Chapter 15 can apply to recognise a foreign proceeding involving a foreign bank with assets in the US.[196]

[188] Texas Finance Code, §204.120 (Seizure and Liquidation).

[189] IMF (n 78) 31.

[190] See, e.g., Federico Lupo-Pasini, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017) 98-101; Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 482.

[191] IMF (n 78) 92.

[192] H.P. Rep. No. 109-31 (2005), 117.

[193] 11 US Code §109(b)(3)(B).

[194] Schwarcz (n 174) 83. See above n 50 and n 51 for the explanation of representative offices.

[195] 11 US Code §109(b)(3)(B).

[196] 11 US Code §1501.

In these circumstances, as briefly summarised in the previous sections, the whole recognition process needs to consider COMI, and judges have the discretion of grating reliefs.

One particular issue concerns section 1528 of the Bankruptcy Code. After recognising a foreign main proceeding, a US court may still commence a proceeding under other titles of the US Bankruptcy Code.[197] It should be noted that 'the effect of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States'.[198] In other words, these concurrent proceedings do not have extraterritorial effects. However, there is still uncertainty regarding the effects of foreign proceedings in the US. Although the US courts confirmed that 'to the extent possible, the administration of a debtor's affairs should be centralized in the foreign main proceeding and other cases should be coordinated with the main case',[199] it is not clear how the coordination should be conducted. Regardless of such concurrent proceedings, the effects of foreign resolution proceedings boil down to available reliefs under Chapter 15. And as discussed above, implementation of foreign resolution actions may fall under discretionary powers of judges, and it is difficult to predict the results.

4.3.1.2.4 Governing law

This section examines how US courts would react to resolution actions imposed on US-law-governed contracts, particularly, bail-in and restrictions on certain contractual rights. As explained in Chapter 2, for example, in a bail-in scenario, debt is either written down partly or entirely or converted into equity, similar to a debt discharge in a reorganisation or restructuring process. This issue boils down to the question whether a US-law-governed contract can only be altered or discharged by a US proceeding.

From a corporate insolvency law perspective, the US authorities, unlike the English courts bound by the *Gibbs* rule, had established the precedent in the *Gebhard* case that foreign reorganisation plans, including debt discharge on US-law-governed obligations, should be recognised in the US.[200] The judgment was made based on two main arguments: first, such recognition is necessary for an effective cross-border insolvency case; second, the lenders should have known that they were lending to foreign debtors and have

[197] 11 US Code §1528.

[198] Ibid.

[199] *In re AWAL Banking*, 455 B.R. 73, 82 (Bankr.S.D.N.Y. 2011).

[200] *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883). See also *Allstate Insurance Co. v. Hughes*, 174 B.R. 884 (S.D.N.Y. 1994); *In re Board of Directors of Hopewell International Insurance Ltd.*, 238 B.R. 25 (Bankr.S.D.N.Y. 1999); *In re Board of Directors of Hopewell International Insurance Ltd.*, 375 B.R. 699 (S.D.N.Y. 2002); *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 505 (Bankr.S.D.N.Y. 2004); *In re Board of Directors of Multicanal S.A.*, 331 B.R. 537 (S.D.N.Y. 2005).

expected that they might be subject to foreign law.[201] Additionally, a similar reorganisation mechanism in the US Bankruptcy Code exists, and judges are equipped with the notion to acknowledge the effects of debt discharge in reorganisation proceedings.[202] Chapter 15 does not mandate the effects of foreign reorganisation measures.[203] Recognising foreign discharge or reorganisation proceedings or judgments is out of the scope of automatic recognition and falls within the judges' discretionary powers.[204] But the principle of giving effect to foreign debt discharge established in the previous cases still guides the judges in Chapter 15 cases.[205] Therefore, a debt governed by US law does not impede recognition of a foreign reorganisation proceeding.[206]

However, bail-in in resolution is achieved without a creditor's consent, while in the normal restructuring process, creditors' approval is necessary. Therefore, a core question is about the creditors' protection. According to Chapter 15, although the creditors' position does not affect recognition since recognition is based on the concepts of COMI/establishment, the creditors' position is a core consideration in granting reliefs.[207] In particular, the US law does not prescribe a direct bail-in power, and it is difficult to predict US judges' attitude towards a European version of bail-in.[208] It is possible that the US would refuse to grant reliefs based on the reason that creditors' rights are not sufficiently protected.

4.3.2 Public policy exception

Apart from conditions for recognition, no public policy violation is also an essential factor.[209] §1506 public policy exception provision follows Article 6 of the MLCBI and adopts a narrow interpretation method, [210] which is

[201] *Gebhard*, 109 U.S. at 536-540. See also Jay L Westbrook, 'Chapter 15 and Discharge' (2005) 13 Am Bankr Inst L Rev 503, 508.

[202] *Allstate,* 174 B.R. at 891; *Hopewell,* 238 B.R. at 52.

[203] Westbrook (n 201) 511.

[204] Text to n 138.

[205] *In re Avanti Commc'n Grp. PLC,* 582 B.R. 603 (Bankr.S.D.N.Y. 2018); *In re Agrokor*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

[206] See one exception *In re SunEdision, Inc.*, 577 B.R. 120 (Bankr.S.D.N.Y. 2017). See comment Jay Westbrook, Comity and Choice of Law in Global Insolvencies, forthcoming in Texas International Law Journal.

[207] 11 US Code §1521(b) and §1522.

[208] See below §8.4.2.1.

[209] 11 US Code §1506.

[210] MLCBI Guide, paras 101-104; H.R. Rep. No. 109-31 (2005), 109. See, e.g. Scott C Mund, '11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 Wisconsin International Law Journal 325; Elizabeth Buckel, 'Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 Georgetown Journal of International Law 1281; Michael A Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38 Fordham International Law Journal 1587.

only 'intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting state'.[211]

The *Qimonda* case[212] extensively analyses the application of this public policy exception and generalises three principles. First, '[t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception'.[213] Regarding the procedural rights, 'the mere absence of certain procedural or constitutional rights does not by itself satisfy section 1506'.[214] For instance, the inability to choose to have a jury trial does not necessarily violate the public policy in the US.[215] Regarding the substantive aspect, for instance, 'the mere fact that application of foreign law will result in different creditor priorities than those recognized by U.S law is hardly a sufficient basis for not according comity to foreign law'.[216] Second, '[d]eference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections'; and third, '[a]n action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding'.[217] For instance, denial of the opportunity to be heard and refusal to receive evidence can be considered as violation of US public policies.[218]

Only in a small number of cases was such an exception successfully invoked. For instance, in the *Gold & Honey* case, the court denied the recognition request of an Israeli receivership proceeding, on the basis that such proceeding was not 'collective in nature',[219] and further explained that

[211] MLCBI Guide, paras 102 and 104. See cases, e.g. *In re Ephedra Products Liability Litigation*, 349 B.R. 333, 336 (S.D.N.Y. 2006); *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 638 (Bankr.E.D.Cal. 2006); *In re Lida*, 377 B.R. 243, 259 (9th Cir. BAP 2007); *In re Ran*, 607 F.ed 1017, 2012 (5th Cir. 2010); *In re Fairfield Sentry*, 714 F.3d 127, 139 (2dn Cir. 2013); *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 194-195 (Bankr.S.D.N.Y. 2017).

[212] *In re Qimonda AG*, 433 B.R. 547(E.D.Va. 2010).

[213] *Qimonda*, 433 B.R. at 570. See also, e.g. *In re British American Isle of Venice (BVI)*, Ltd., 441 B.R. 713, 717 (Bankr.S.D.Fla. 2010); *In re Qimonda AG*, 462 B.R. 165, 184 (Bankr.E.D.Va. 2011); *In re Rede Energia S.A.*, 515 B.R. 69, 104 (Bankr.S.D.N.Y. 2014).

[214] *In re Ashapura Minechem Ltd.*, 480 B.R. 129, 139 (S.D. N.Y. 2012). See also, e.g., *In re Vitro SAB de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012); *In re OAS S.A.*, 533 B.R. 83, 104 (Bankr.S.D.N.Y. 2015), *Oi*, 578 B.R. at 195.

[215] *Ephedra Products Liability Litigation*, 349 B.R. at 335-337.

[216] *Qimonda*, 462 B.R. at 184.

[217] *Qimonda*, 433 B.R. at 570. See also, e.g., *Qimonda*, 462 B.R. at 183; *In re ABC Learning Ctrs.*, 728 F.3d 301, 309 (3d Cir. 2013); *Ashapura Minechem*, 480 B.R. at 139; *In re Manley Toys Limited*, 580 B.R. 632, 648 (Bankr.D.N.J. 2018).

[218] *Ashapura Minechem*, 480 B.R. at 139.

[219] *In re Gold & Honey, Ltd.*, 410 B.R. 357, 370 (Bankr.E.D.N.Y. 2009).

recognising such a proceeding would 'severely impinge the value and import of the automatic stay', and 'severely hinder United States bankruptcy courts' abilities to carry out … the most fundamental policies and purposes of the automatic stay'.[220] Apart from refusing to recognise foreign proceedings, the public policy exception can also be invoked to refuse to grant relief. For instance, in the *Sivec* case, the court applied the public policy exception to deny the requested relief even after it recognised the foreign proceeding, in order to protect the creditors' 'fundamental rights of notice and opportunity to be heard'.[221] Other public policies invoked by bankruptcy courts include protection for US patents licensees in the *Qimonda* case,[222] US privacy legislation in the *Toft* case,[223] and third parties' guarantees in the *Vitro* case.[224]

As a general rule, the US courts adopt a restricted application of this public policy exception within the scope of most fundamental issues.[225] However, the actual interpretation is somewhat discretionary, and different courts may have different opinions. For example, in the above-mentioned *Vitro* case, the appeal court – the fifth circuit questioned the public policy analysis of the lower court and stated that 'the court holds that the Bankruptcy Code precludes non-consensual, non-debtor releases. … Nevertheless, not all our sister circuits agree…'.[226] Some scholars also criticise that some courts unjustifiably extend the public policy exceptions to those non-fundamental areas.[227] There is still no consistent formula for a public policy decision.

In cross-border bank resolution cases, public policy is a controversial issue. A particular concern is depriving creditor's rights in the process because the actions taken by resolution authorities do not need the consent of creditors. However, in the recent *ENNIA* case, the judge found no public policy exception with regard to due process, especially when the foreign law provides a judicial review for administrative actions.[228] Similarly, in the *Irish Bank Resolution Cooperation* case, the court found no violation of due process or other constitutional rights in resolution proceedings, especially as the US has parallel provisions in law in response to the global financial crisis.[229] It can be concluded that a direct administrative intervention does not necessarily violate public policies. However, these cases cannot exclude the possibilities of invoking other public policies.

[220] *Gold & Honey*, 410 B.R. at 372.

[221] *In re Sivec SRL*, 2011 WL 3651250, 3 (Bankr.E.D.Okla. 2011).

[222] *Qimonda*, 462 B.R. at 185.

[223] *In re Toft*, 453 B.R. 186, 189 (Bankr.S.D.N.Y. 2011).

[224] *In re Vitro, SAB de CV*, 473 B.R. 117, 132 (Bankr.N.D.Tex. 2012).

[225] See cases cited in n 211.

[226] *In re Vitro SAB de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012).

[227] Buckel (n 210); Garza (n 210); Hannan(n 138) 83.

[228] In *re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 640-642 (Bankr. S.D.N.Y. 2018).

[229] *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 698 (D.Del. 2015).

4.4 Concluding remarks

The US is a leading jurisdiction formulating bank resolution rules; however, unlike the EU, it generally lacks a special recognition mechanism tailored to cross-border bank resolution. Chapter 15 of the Bankruptcy Code is a judicial recognition regime for cross-border insolvency proceedings, which does play an important role in cross-border bank resolution but has its limitations. On the one hand, Chapter 15 does not apply to banks with branches or agencies in the United States. On the other hand, even when a foreign resolution proceeding can be recognised as a foreign main or nonmain insolvency proceeding, judges have wide discretionary powers to determine whether or not to enforce foreign resolution actions. In a nutshell, large uncertainties exist, and these uncertainties may undermine the effectiveness of a cross-border resolution.

Table 4.1 Authorities for US banking sector institutions

Type			Chartering authority	Supervisory authority	Resolution authority
Federal institutions	National banks		OCC	OCC and Fed	FDIC
	Federal thrifts		OCC	OCC	FDIC
	BHCs		Fed[1]	Fed	court-appointed administrator/ FDIC[2]
	SLHCs		Fed[3]	Fed	court-appointed administrator/ FDIC[2]
	Non-bank financial companies designated by the FSOC under Title I of the DFA		N/A[4]	Fed	court-appointed administrator/ FDIC[2]
	Branches and agencies of FBOs	Grandfathered FDIC coverage	OCC	OCC	FDIC
		Non FDIC coverage	OCC	OCC	OCC appointed receiver
State institutions	State banks	Fed member	State authority	Fed	FDIC
		Non Fed member	State authority	FDIC	FDIC
	State thrifts		State authority	FDIC	FDIC
	Branches and agencies of FBOs	Grandfathered FDIC coverage	State authority	FDIC	FDIC
		Non FDIC coverage	State authority	State authority	State authority

[1] BHCs are required to register with the Fed within 180 days after May 9, 1965, or within 180 days after becoming a BHC, whichever is later. 12 US Code §1844(a).

[2] In normal circumstances, the US Bankruptcy Code applies. When an institution meets the systemic risk determination test, the Dodd-Frank Act applies and the FDIC is appointed as the resolution authority.

[3] SLHCs are required to register with the Fed within 90 days after becoming an SLHC. 12 US Code §1467a(b)(1).

[4] Non-bank financial companies are designated by the FSOC after the companies are chartered and can be rescinded from the designation.

5 China*

5.1 Introduction

This chapter examines cross-border resolution in China. In general, China lacks a comprehensive bank resolution law, although it is in the process of drafting a new bank resolution regulation that aims to implement the Financial Stability Board (FSB) Key Attributes. Currently, cross-border bank resolution still relies on the cross-border provisions in the Enterprise Bankruptcy Law (EBL).[1] Article 5 of the EBL prescribes that Chinese insolvency proceedings have worldwide effects, and China recognises and enforces foreign insolvency judgments under certain conditions. This chapter, based on this provision, analyses the application of Article 5 in cross-border bank resolution cases.

In §5.2.1 below, Chinese regulation and supervision in the banking sector are first discussed. Next, §5.2.2 illustrates the Chinese bank resolution regime, focusing on the assumption of control tool currently available to Chinese authorities. §5.3 examines the central question regarding recognition of foreign resolution actions in China, analysing both grounds for recognition in §5.3.1 and public policy exceptions in §5.3.2. Following the same analytical method in the previous two chapters, four scenarios are analysed, namely, subsidiary (§5.3.1.2.1), branch (§5.3.1.2.2), assets (§5.3.1.2.3) and governing law (§5.3.1.2.4). §5.4 draws conclusions.

[*] Part of this chapter is based on the CUPL-Leiden joint research project *New Bank Insolvency Law for China and Europe* generously funded by the Royal Dutch Academy of Sciences (KNAW), and the article *'Conceptualising Upcoming Chinese Bank Insolvency Law'*, 28 International Insolvency Review 44 (2019). Some ideas were presented at the European China Law Studies Association 2017 Annual Conference on 24 August 2018 in Leiden, and at the workshop Resolution and Its Frontier - An Integrated Law and Economic Approach on 3 March 2017 in Florence. I thank Leiden University and the European University Institute for the financial support. Also I thank Christos Gortsos, Dalvinder Singh, Maria Ana Barata, Marije Louise, Christian Mechlenburg, Agnieszka Smolenska, Chao Xi, Bingdao Wang, Huifen Yin for their comments.

[1] The Enterprise Bankruptcy Law of the People's Republic of China (《中华人民共和国企业破产法》) was promulgated on 2 December 1986 and came into force on 1 November 1988. It was later amended on 27 August 2006, and the revision came into force on 1 June 2007.

5.2 Regulation, supervision and resolution in the Chinese banking sector

5.2.1 Regulation and supervision

China, in the last forty years, witnessed the rapid growth of its GDP, as well as an expansion of the Chinese banking industry.[2] According to the data collected by the China Banking Regulatory Commission (CBRC), as at the end of 2016, China's banking sector had in total 4, 399 incorporated banking institutions, with 4.09 million employees and RMB 232.3 trillion assets (approximately around EUR 30 trillion).[3] In 2017, China surpassed the Euro Area and became the world's largest banking industry by assets.[4] There are four Chinese banks among the 30 global systemically important banks (G-SIBs) in the 2019 list, i.e. the Industrial and Commercial Bank of China (ICBC), the Agricultural Bank of China (ABC), the Bank of China (BOC), and the China Construction Bank (CCB),[5] collectively referred to as the 'big-four' banks in China.

Within the Chinese legal system, the Chinese Constitution[6] is the highest legislation and governs the most fundamental affairs of the function of the country. The Constitution empowers the National People's Congress (NPC) and its Standing Committee to formulate laws, which are inferior to the Constitution.[7] The State Council is the central government, and it is empowered to make regulations based on the laws.[8] The internal depart-

[2] Since the open and reform policy in 1978, China's GDP increased from 0.15 trillion US dollars in that year to 12.2 trillion US dollars in 2017, and now is the second largest economy in the world. See World Bank website <http://databank.worldbank.org/data/reports.aspx?source=2&country=CHN> accessed 25 February 2020.

[3] CBRC Annual Report 2016, 28-29. There are one national development bank, two policy banks, five large commercial banks, 12 joint stock commercial banks, 134 city commercial banks, 1,114 rural commercial banks, 8 private banks, 40 rural cooperative banks, 1,125 rural credit cooperatives (RCCs), 1 postal savings bank, 4 asset management companies, 39 locally incorporated foreign banking institutions, Sino-German Bausparkasse, 68 trust companies, 236 finance companies of corporate groups, 56 financial leasing companies, 5 money brokerage firms, 25 auto financing companies, 18 consumer finance companies, 1,443 village or township banks, 13 lending companies and 48 rural mutual cooperatives.

[4] See Financial Times, 'China Overtakes Eurozone as World's Biggest Bank System' (5 March 2017) <https://www.ft.com/content/14f929de-ffc5-11e6-96f8-3700c5664d30> accessed 25 February 2020.

[5] The FSB, in consultation with the BCBS and national authorities, identifies G-SIBs and updates its list annually. The latest G-SIBs List is the 2019 version. See FSB, '2019 List of Global Systemically Important Banks (G-SIBs)' (22 November 2019).

[6] The first Constitution of the People's Republic of China was promulgated in 1954. Later, the Constitution underwent three major amendments in 1975, 1978 and 1982. The current Constitution is the 1982 version, and the lasted revision was in 2004.

[7] Articles 58, 62 and 67 of the Constitution.

[8] Article 89 of the Constitution.

ments of the State Council, including the banking supervisory authorities, are empowered to make department rules that have direct instructions on specific issues, subject to the Constitution, the laws and the regulations.[9]

In the field of banking regulation, the general governing law is the Commercial Bank Law (CBL),[10] which was approved by the Standing Committee of the NPC. The CBL generally prescribes the establishment and organisation of commercial banks, protection of depositors, basic rules for loans and other business operations, financial affairs and accounting, supervision and control, assumption of control and termination, and legal responsibility.[11] Commercial banks, the research subject of this dissertation, are defined as institutions engaged in businesses like deposit-taking, loan issuing and settlement transactions.[12] The formation of Chinese banks should follow the requirements prescribed in Chinese Company Law.

Additionally, the Measures for the Management of Capitals of Commercial Banks (Provisional) (the Capital Rules) [13] was issued by the CBRC in 2012 as a response to the post-crisis reform required by the Basel III package, which set the minimum ratios for Common Equity Tier 1 (CET1), Tier 1 (T1) and total capital (T1 plus Tier 2 (T2)) are 5%, 6% and 8% respectively.[14] The CBRC further promulgated the Supervisory Guidance on Capital Instruments Innovation for Commercial Banks (the Capital Guidance).[15] Accordingly, upon the occurrence of a trigger event for Additional Tier 1 (AT1) capital instruments, that is, CET1 capital ratios falls to or below 5.125%, the principal amount of AT1 capital instruments shall be immediately written down or converted into CET1, in full or in part, pursuant to the contractual arrangement.[16] Although these instruments involve the powers of write-down and conversion, they are subject to contractual arrangements and can only be imposed on capital instruments. They are responses to the Basel reforms rather than resolution powers.

[9] Article 90 of the Constitution.

[10] The Commercial Bank Law of the People's Republic of China (《中华人民共和国商业银行法》) was first promulgated on 10 May 1995 and came into force on 1 July 1995. It was later amended on 27 December 2003 and 29 August 2015 and the last version came into force on 1 October 2015.

[11] Chapters 2-8 CBL.

[12] Article 2 CBL.

[13] The Measures for the Management of Capitals of Commercial Banks (《商业银行资本管理办法（试行）》) was promulgated on 7 June 2012 and came into effect on 1 January 2013.

[14] Article 23 Capital Rules.

[15] The *Supervisory Guidance of the CBRC on Capital Instruments Innovation for Commercial Banks* (《中国银监会关于商业银行资本工具创新的指导意见》) was enacted on 29 November 2012. See also Capital Rules, Annex I.

[16] Section 2 Capital Guidance. See also Annex I Article 2(10) Capital Rules.

The Foreign Funded Banks Regulation (FFBR)[17] and the Implementing Rules for the Foreign Funded Banks Regulation (FFBRIR)[18] apply to foreign banks, which include wholly foreign-owned banks (WFO banks), Sino-foreign joint venture banks (JV banks), branches of foreign banks and representative offices of foreign banks.[19]

The supervisors in the Chinese banking sector are the People's Bank of China (PBOC) – the Chinese central bank – and the China Banking and Insurance Regulatory Commission (CBIRC), which replaced the previous CBRC in 2018.[20] This dissertation refers to both the CBIRC and the CBRC as the same banking authority. The PBOC and the CBIRC are regulated by the People's Bank of China Law (PBOCL)[21] and the Law on Regulation of and Supervision over the Banking Industry (RSBIL)[22] respectively. The PBOC is in charge of monetary policies, macroprudential supervision and financial stability maintenance.[23] The CBIRC is responsible for the daily supervision of banks' business operations.[24]

The power allocation among different supervisors has been debated and discussed for a long time.[25] Several attempts had been made to coordinate the power allocation between various authorities, for example, the Financial Crisis Response Group (FCRG) and the Financial Regulatory Coordination

[17] The Foreign Funded Banks Regulation of the People's Republic of China (《中华人民共和国外资银行管理条例》) was first promulgated by the State Council on 8 November 2006 and amended on 27 November 2014. The last version entered into force on 1 January 2015, State Council Decree No. 657.

[18] The Implementing Rules for the Foreign Funded Banks Regulation of the People's Republic of China (《中华人民共和国外资银行管理条例实施细则》) was promulgated by the CBRC on 1 July 2015 and entered into force on 1 September 2015.

[19] Article 2 FIBR.

[20] See 'State Council Institutional Reform Plan (国务院机构改革方案)' (17 March 2018) <http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm> accessed 25 February 2020.

[21] The People's Bank of China Law of the People's Republic of China (《中华人民共和国中国人民银行法》) was first promulgated on 18 March 1995 and later amended on 27 December 2003 and entered into force on 1 February 2004.

[22] The Law on Regulation of and Supervision over the Banking Industry of the People's Republic of China (《中华人民共和国银行业监督管理法》) was first promulgated on 27 December 2003 and came into effect on 1 February 2004. It was later amended on 31 October 2006 and came into effect on 1 January 2007.

[23] Articles 1-3 PBOCL.

[24] Article 2 RSBIL.

[25] See, e.g. Hui Huang, 'Institutional Structure of Financial Regulation in China: Lessons from the Global Financial Crisis' (2010) 10 Journal of Corporate Law Studies 219; Patrick Hess, 'China's Financial System: Past Reforms, Future Ambitions and Current State' in Frank Rövekamp and Hanns Günther Hilpert (eds), *Currency Cooperation in East Asia*, vol 38 (Springer 2014); Andrew Godwin, Li Guo and Ian Ramsay, 'Is Australia's' Twin Peaks' System of Financial Regulation a Model for China?' (2016) CIFR Working Paper No 102/2016/Project E018; Jun Ou, Wei Xiong and Shiyu Yang, 'Research on Reforming and Improving China's Financial Regulatory Framework' (2017) Finance & Economics 37.

Joint Ministerial Committee (JMC).[26] In November 2017, the Financial Stability and Development Committee (FSDC) under the State Council was established, which is the latest coordination mechanism for different financial regulators and supervisors, and includes one mandate to study resolution of systemic risks.[27]

In 2015, the Deposit Insurance Regulation (DIR)[28] was promulgated, which established the Chinese deposit insurance system. Accordingly, the deposit holders with deposits below RMB 500,000 (approximately EUR 62,500)[29] should be repaid within seven working days in the case of a banking crisis.[30] Research shows this coverage level can provide full protection for over 99.6% depositors.[31] A Deposit Insurance Fund Management Institution (DIFMI) was formed as the managing authority for the deposit insurance fund.[32]

5.2.2 Resolution

In China, there is currently no comprehensive bank resolution law, and the general EBL applies, which prescribes the general court-supervised insolvency proceedings. Article 134 EBL specifies special procedures for the insolvency of financial institutions, and empowers the financial supervisory authorities to file applications to courts to commence insolvency proceedings for financial institutions, either reorganisation proceedings or liquidation proceedings.[33] A bankruptcy declaration needs approval from the authorities, and the liquidation team should also include staff from banking authorities.[34]

[26] Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M. Haentjens, Qingjiang Kong and B. Wessels eds, Eleven International Publishing 2017) 26-27.

[27] State Council, The Financial Stability and Development Committee under the State Council Was Established and Convened Its First Meeting, (8 November 2017) <http://www.gov.cn/xinwen/2017-11/08/content_5238161.htm> accessed 25 February 2020 (in Chinese).

[28] The Deposit Insurance Regulation（《存款保险条例》）was promulgated on 17 February 2015 and came into effect on 1 May 2015.

[29] Article 5 DIR.

[30] Article 19 DIR.

[31] Z Chen, 'Multi-Angle Analysis on Deposit Insurance Regulation', *Guangdong Economy*, 5 (2015), 23-29.

[32] The DIFMI was officially registered as a limited liability company on 25 May 2019 with the POBC as its single shareholder. See the National Enterprise Credit Information Publicity System <http://bj.gsxt.gov.cn/%7B4C4BE37D2B2D12F0C759494F785EAEF866EB1C2B2DA0861AB2B4E27CF1D2B22C3CB1970BA3A552B0E5B35104F3E3141260348C1C7DFD7ED151E950FF7FDB36A23621362136AA36F3E42136F3672141766DF1A4B-3849307412116B504E371E377C6DDDA27B5306C9CBFF3F3C4E212C0D086B1B92DB-99388B94EACF90E8373444CD84C5B4C5B4C-1559895700462%7D> accessed 25 February 2020.

[33] Article 134 para 1 EBL.

[34] Article 71 CBL.

In particular, there is an assumption of control tool that can be exercised by Chinese administrative authorities, when a bank has suffered or will possibly suffer a credit crisis, thereby seriously affecting the interests of creditors.[35] The assumption of control mechanism is similar to the United States (US) administrative way of resolving failing FDIC-insured banks by the FDIC, given that many US bankruptcy provisions were transplanted into the Chinese legal framework.[36] However, unlike receivership in the US, the Chinese authorities do not have the power to liquidate failing banks. Only a court can declare a bank bankrupt and put it in liquidation, but a liquidation process should also involve banking authorities.[37] The purpose of assumption of control is to enable a failing bank to resume normal business and to protect the depositors, but it cannot affect the debtor-creditor relationship.[38] As it directly interferes with the operation of a bank, assumption of control is considered as one of the administrative resolution measures.[39] When an assumption of control measure is taken, the authorities can apply to the court to suspend civil or enforcement proceedings against the bank.[40]

The resolution authority, that is, the authority competent to exercise assumption of control, is defined as the banking supervisory authority under the State Council.[41] This was referred to the CBRC and now is replaced by the CBIRC.[42] China does not make a clear distinction between supervisory authorities and resolution authorities. However, the reality is more complex. In 1997, the Hainan Development Bank was put into administrative resolution by the PBOC.[43] At that time, the PBOC was the only banking supervisory authority, and the CBRC only came into existence later in 2003. Most recently, in May 2019, Baoshang Bank was put into resolu-

[35] Article 64 CBL; Article 38 RSBIL.

[36] See Eu Jin Chua, 'Bankruptcy Reform in China' (2006) 1 Pratt's Journal of Bankruptcy Law 552; Shuguang Li and Zuofa Wang, 'The Gap between Expectation of Legislation and Judicial Practice and its Resolution: Empirical Analysis of Bankruptcy Law's Three-years Implementation' (2011) 22 Journal of China University of Political Science and Law; Simin Gao and Qianyu Wang, 'The US Reorganization Regime in the Chinese Mirror: Legal Transplantation and Obstructed Efficiency' (2017) 91 American Bankruptcy Law Journal 139.

[37] Article 71 CBL.

[38] Article 64 para 2 CBL.

[39] IMF, 'The Key Attributes of Effective Resolution Regimes for Financial Institutions - Progress to Date and Next Steps' (27 August 2012) 9. See also KA 3.2(i) and (ii).

[40] Article 134 para 1 EBL.

[41] Article 64 CBL; Article 38 RSBIL.

[42] Jieche Su, *Supervisory Liability of the Regulator in Bank Insolvency Proceedings* (China University of Political Science and Law Press 2016) 270-274; Kong (n 26) 29-31.

[43] Qingjiang Kong and Yinhui Sun, 'China' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 429-430; CBRC Shanghai Legal Department, 'The Division of Powers in Resolving Commercial Bank Bankruptcy Risks' (2016) Financial Regulation Research 79, 81

tion/assumption of control, which was jointly decided by the PBOC and the CBIRC. [44] The current PBOCL gives the PBOC inspection powers in case financial institutions have payment problems,[45] as well as the rights to recommend the CBIRC to conduct inspections for the purpose of financial stability.[46] However, it does not have a specific resolution mandate. In reality, the PBOC works closely with the CBIRC in bank resolution cases with the aim of maintaining financial stability.

What makes the situation more complex is the above-mentioned DIFMI under the DIR. One the one hand, the DIFMI may make recommendations to the CBIRC to adopt an assumption of control measure and to close a financial institution.[47] On the other hand, it seems that the DIFMI may function as a resolution authority, together with the CBIRC. Article 19 DIR specifies that depositors are entitled to reimbursement where the DIFMI assumes control over a bank.[48] An opinion of the staff of the CBIRC Shanghai Office distinguishes two stages, that is, decision making and resolution implementation, with the former made by the CBIRC only, and the latter conducted by both the CBIRC and the DIFMI.[49] However, in the recent Baoshang Bank case, the DIFMI did not participate in the assumption of control process.[50] The appointment of resolution authorities needs further clarification.

Apart from the assumption of control power, Chinese authorities do not have other resolution powers such as bail-in or temporary stay on early termination rights. Despite being the home jurisdiction to four G-SIBs, China is significantly lagging behind other G-SIB home jurisdictions.[51] Fortunately, the CBRC has confirmed that a new Commercial Bank Insolvency Risk Resolution Regulation (CBIRRR) is being discussed.[52] In its letter in response to the NPC Recommendations, the CBRC announced that it is in the process of drafting the regulation in accordance with the FSB

[44] See CBIRC, Announcement of the PBOC and the CBIRC on Assumption of Control of Baoshang Bank (24 May 2019) <http://www.cbrc.gov.cn/chinese/newShouDoc/F630D8A10309400D8C9F5F1ECAAC6B84.html> accessed 25 February 2020.

[45] Article 34 PBOCL.

[46] Article 33 PBOCL.

[47] Article 17 DIR.

[48] Article 19 DIR.

[49] CBRC Shanghai Legal Department (n 43) 84.

[50] n 44.

[51] FSB, 'FSB 2018 Resolution Report: "Keeping the pressure up" – Seventh Report on the Implementation of Resolution Reforms' (15 November 2018) 19-20.

[52] The Commercial Bank Insolvency Risk Resolution Regulation (《商业银行破产风险处置条例》) is listed in the CBRC 2017 Legislation Plan, see CBRC, 'Announcement on Issuing 2017 Legislation Plan' (中国银监会办公厅关于印发2017年立法工作计划的通知) (9 May 2017) <http://www.cbrc.gov.cn/chinese/home/docView/2017D188DE4B4FBABA4EE1F3A3519899.html> accessed 25 February 2020.

standards.[53] In addition, in November 2018, three major financial sector authorities, the PBOC, the CBIRC, and the China Securities Regulatory Commission (CSRC), jointly issued the Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (SIFI Guiding Opinions),[54] which also added new requirements for bank resolution. Although the document is only a guiding policy statement, several reform proposals are confirmed. First, the PBOC should lead the CBIRC, the CSRC, the Ministry of Finance (MOF) and other relevant ministries to assemble a crisis management group, with the aim to establish special resolution regimes for systemically important financial institutions (SIFIs), to promote formulation of recovery and resolution plans, to conduct resolvability assessments, to ensure that SIFIs can enter into a safe, expedited and effective resolution, to ensure the continuity of critical businesses and services, and to avoid systemic risks.[55] Second, a three-step resolution strategy was established: the first step is to utilise self-raised funds or funds collected from the market; the second step is to ask for liquidity support from industry funds, and the last step, only after the previous two steps prove to be insufficient, is to use the PBOC's funding mechanism.[56] The new SIFI Guiding Opinions show the Chinese regulators' intention to reduce the possibility of government bailout and to turn to the private bail-in mechanism. The detailed implementation rules are still in the progress.

5.3 Recognition of foreign resolution actions in China

5.3.1 Legal grounds for recognition

5.3.1.1 Institutional framework

The EBL still applies to resolution cases, including cross-border provisions.[57] The Chinese EBL does not adopt the MLCBI; only Article 5 of the EBL regulates cross-border insolvency, and is highly criticised for being

[53] See CBRC, 'Letter to the 12th NPC 5th Meeting Recommendation No. 2691' (对十二届全国人大五次会议第2691号建议答复意见的函), Yin Jian Shen Han [2017] No. 105 (4 July 2017) <http://www.cbrc.gov.cn/govView_AB039466FD0144C08EC9FC46B4E1E73D.html> accessed 25 February 2020.

[54] The Guiding Opinions on Improving Supervision on Systemically Important Financial Institutions (《关于完善系统重要性金融机构监管的指导意见》) was published on 27 November 2018, <http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3672549/index.html> accessed 25 February 2020.

[55] Article 24 SIFI Guiding Opinions.

[56] Article 29 SIFI Guiding Opinions.

[57] Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44, 47-49.

overly simplistic and uncertain.[58] Article 5 EBL repeats the general principles of private international law enshrined in Article 282 of Chinese Civil Procedural Law (CPL).[59] In short, China adopts a restricted universalism in the Chinese EBL.[60] On the one hand, the EBL extends a Chinese court's jurisdiction over the overseas assets of the debtor.[61] On the other hand, although recognition of foreign insolvency proceeding is possible, the recognition has to meet very strict conditions, which makes recognition by a Chinese court extremely difficult.[62] Neither Article 5 EBL nor Article 282 CPL distinguishes different conditions for recognition and enforcement. Article 282, though, specifies that an enforcement order is needed to enforce a foreign judgment upon recognition.[63]

According to Article 5 EBL and Article 282 CPL, in order to recognise and enforce a foreign judgment or ruling, there has to be either an international agreement between China and the foreign jurisdiction, or there exists reciprocity,[64] namely, the foreign jurisdiction has previously recognised a Chinese judgment or ruling.[65] There are additional public policy exceptions, which are discussed below in §5.3.2.

As of September 2019, China has entered into legal assistance treaties with 76 countries, among which 19 treaties on legal assistance in civil and criminal matters are effective, and 18 out of 20 treaties on legal assistance in civil and commercial matters are effective.[66] There are international agreements

[58] See, e.g. Qingxiu Bu, 'China's Enterprise Bankruptcy Law (EBL 2006): Cross-border Perspectives' (2009) 18 International Insolvency Review 187; Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57; Parry Rebecca and Gao Nan, 'The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems' (2018) 27 International Insolvency Review 5.

[59] The Civil Procedure Law of the People's Republic of China (《中华人民共和国民事诉讼法》) was first promulgated by the Standing Committee of the NPC on 9 April 1991, and later amended on 28 October 2007 and 31 August 2012. The 2012 version came into effect on 1 January 2013.

[60] Guo (n 57) 49-53.

[61] Article 5 para 1 EBL.

[62] Article 5 para 2 EBL.

[63] Article 282 CPL.

[64] Article 5 EBL.

[65] See, e.g. X Gong, 'To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan' (2013) 10 International Corporate Rescue 240.

[66] See Ministry of Foreign Affairs, 'Overview of Judicial Assistance Treaties' <https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml> accessed 25 February 2020.

between China and 11 EU Member States, including Bulgaria,[67] Belgium,[68] Poland,[69] France,[70] Lithuania,[71] Romania,[72] Cyprus,[73] Spain,[74] Greece,[75] Hungary[76] and Italy.[77] China does not have an international agreement with the US. In the previous cross-border insolvency cases, China recognised insolvency judgments from Italy (the *B&T Ceramic Groups s.r.l.* case[78]) and France (the *Pellis Corium* ("P.E.L.C.O.R") case[79]) based on the judicial assistant agreements with Italy and France.

In terms of reciprocity, China has long maintained a 'real reciprocity' test, namely, a Chinese court can only recognise a foreign judgement on the condition that the foreign jurisdiction has previously recognised a Chinese judgment.[80] The reciprocity principle was applied in the *Sascha Rudolf Seehaus* case, recognising a German insolvency judgment because a German court had previously recognised a Chinese judgment.[81] This reciprocity

[67] Treaty on legal assistance in civil matters between the People's Republic of China and the Republic of Bulgaria, signed on 2 June 1993, came into effect on 30 June 1995.

[68] Treaty on legal assistance in civil matters between the People's Republic of China and the Kingdom of Belgium, signed on 20 November 1987, not effective yet. This treaty only stipulates mutual recognition of arbitral awards.

[69] Treaty on legal assistance in civil and criminal matters between the People's Republic of China and Polish People's Republic, signed on 5 June 1987, came into effect on 13 February 1988.

[70] Treaty on legal assistance in civil and commercial matter between the People's Republic of China and the French Republic, signed on 4 May 1987, came into effect on 8 February 1988.

[71] Treaty on legal assistance in civil and criminal matters between the People's Republic of China and the Republic of Lithuania, signed on 20 March 2000, came into effect on 19 January 2002.

[72] Treaty on legal assistance in civil and criminal matters between the People's Republic of China and Romania, singed on 16 January 1991, came into effect on 22 January 1993.

[73] Treaty on legal assistance in civil, commercial and criminal matters between the People's Republic of China and the Republic of Cyprus, signed on 25 April 1995, came into effect on 11 January 1996.

[74] Treaty on legal assistance in civil and commercial matters between the People's Republic of China and the Kingdom of Spain, signed on 2 May 1992, came into effect on 1 January 1994. The treaty explicitly excludes recognition and enforcement of judgments related to bankruptcy and insolvency proceedings.

[75] Treaty on legal assistance in civil and criminal matters between the People's Republic of China and the Hellenic Republic, signed on 17 October 1994, came into effect on 29 June 1996.

[76] Treaty on legal assistance in civil and commercial matters between the People's Republic of China and the Republic of Hungary, signed on 9 October 1995, came into effect on 21 March 1997.

[77] Treaty on legal assistance in civil matters between the People's Republic of China and the Italian Republic, signed on 20 May 1991, came into effect on 1 January 1995.

[78] (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.

[79] (2005) Sui Zhong Fa Min San Chu Zi No.146 Civil Ruling.

[80] Wenliang Zhang, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"' (2013) 12 Chinese Journal of International Law 143

[81] (2012) E Wu Han Zhong Min Shang Wai Chu Zi No.00016 Civil Ruling.

principle was also applied in the recent *KolmarGroupAG* case in which the Nanjing Intermediate People's Court recognised a Singapore judgment as a Singaporean court has previously recognised a Chinese judgment. [82] Also, a US bankruptcy court in New Jersey recognised a Chinese insolvency proceeding in 2014,[83] which indicates that a reciprocity test has been established between China and the US.

It is worth mentioning recent the Belt and Road Initiative (BRI), previously known as One Belt One Road (OBOR), which aims to boost the global economy by strengthening international trade and investment. [84] Alongside this Initiative, the Supreme People's Court of the People's Republic of China (SPC) promised to facilitate cross-border cooperation by simplifying recognition procedures. In an opinion it published, the SPC recommended expanding the application of reciprocity. [85] The SPC emphasised that the courts may also consider giving judicial assistance first to other parties in foreign jurisdictions and expanding the scope of international judicial assistance.[86] This suggests that the reciprocity principle might be abolished.

In terms of cross-border bank resolution, the applicability of Article 5 on administrative resolution actions is investigated. To be recognised, there must be an effective foreign judgment or ruling on foreign insolvency proceedings. Since there are no statutory rules or cases on resolution in China, it is unclear whether resolution can be considered as a type of insolvency proceedings, and whether resolution decisions made by resolution authorities can be considered as judgments or rulings made by the courts. It is this dissertation's view that the answers to both questions should be positive. As explained in Chapter 2, insolvency proceedings take both judicial and administrative forms,[87] thus the administrative nature of resolution measures should not be an obstacle for recognition. In particular, the Model Law on Cross-border Insolvency (MLCBI), an internationally acknowledged model law, defines 'insolvency' as proceedings of both judicial and administrative nature. This chapter argues, consistently with the position in Chapter 2, that resolution is one of the insolvency proceedings in China. For one reason, the upcoming Chinese resolution law – the Commercial Bank Bankruptcy Risk Resolution Regulation indicates in its name that resolu-

[82] (2016) Su 01 Xie Wai Ren No.3. Relevant information can be found on China Judgments Online: <http://wenshu.court.gov.cn/content/content?DocID=325f81d1-b1c0-4768-9ac3-a48488d5b4bc&KeyWord=%E9%AB%98%E5%B0%94%E9%9B%86%E5%9B%A2> accessed 25 February 2020 (in Chinese only).

[83] *In re Zhejiang Topoint Photovoltaic Co., Ltd.*, case 14-24549 (Bankr.D.N.J. Aug 12, 2014).

[84] For a more detail introduction of the BRI, see the official website <http://english.gov.cn/beltAndRoad/> accessed 25 February 2020.

[85] Several Opinions of the Supreme People's Court on the People's Courts Providing Judicial Service and Guarantee for Belt and Road Initiative, Fa Fa [2015] No.9.

[86] Ibid (translated by the author).

[87] See Article 2(a) UNCITRAL Model Law.

tion is under the general framework of bankruptcy/insolvency. For another reason, given that this is only a 'regulation' subordinated to the law, the general law – the EBL shall apply. Subsequently, after recognition, foreign resolution actions can be enforced according to Chinese law.[88]

Another approach, without recourse to Article 5 EBL, is to treat foreign resolution authorities or other designated representatives as the failing bank's new representative, and they can act in accordance with Chinese Company Law. A recent case worth noting is that of a Chinese subsidiary of a Singapore parent company; the Chinese judge recognised the administrator appointed by the Singapore bankruptcy court as the representative of the Singapore company.[89] The legal basis, however, is the Law on Application of Law for Foreign Related Civil Relationships (LAL),[90] the Chinese private international law code, not Article 5 EBL. Article 14 LAL stipulates that the internal affairs of a legal person and its branch, such as legal rights, legal capacity, internal organisations, and rights and obligations of a shareholder shall be governed by the law of the place where the entity is registered.[91] And where the place of principal office is different from its place of registration, the law of the place of the principal office may apply.[92] Following the reasoning in this case, it could be argued that the foreign resolution authority or its delegated representative should be deemed as a competent representative under Chinese law. And this representative can fulfil its obligations as a shareholder or as a representative of a shareholder in China.

Another issue that needs to be explained is the involvement of administrative authorities in the recognition process. According to Article 5 EBL, a recognition request is made to a Chinese court.[93] The CPL even stipulates more clearly that such a request should be submitted to an intermediate level court,[94] which is higher than a local court. The Chinese resolution authorities, unlike the European authorities, are not empowered to review the recognition request. This should not be a problem for passive recognition in which litigation is initiated, and only courts are competent to adjudicate the disputes.

Nevertheless, in active recognition, it is possible that an administrative authority is involved, especially when the resolution authority maintains an ongoing cooperative relationship with foreign authorities. A typical

[88] Article 282 CPL.

[89] *Sino-Environment Technology Group Ltd, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling. See comments Tu and Li (n 58).

[90] The Law on Application of Law for Foreign Related Civil Relationships of the People's Republic of China (《中华人民共和国涉外民事关系法律适用法》) was promulgated on 28 October 2010 and came into effect on 1 April 2011.

[91] Article 14 para 1 LAL.

[92] Article 14 para 2 LAL.

[93] Article 5 EBL.

[94] Article 281 CPL.

example is when a crisis management group (CMG) is established for a G-SIB. According to the FSB 2018 report, CMGs have been established for all the G-SIBs, including the four in China.[95] Where a CMG is formed, the host authority may, upon the decision of the CMG, adopt measures directly addressed to host institutions or host assets without a formal recognition proceeding. As a matter of fact, when China is the host jurisdiction, the Chinese authorities may, after participating in the CMG decision-making process, individually adopt measures to facilitate home resolution. It is clearly stated in the FFBR that a foreign bank can be imposed with an assumption of control measures by the CBIRC.[96] However, the implementation of these measures should be subject to the Chinese laws, which do not empower the authorities with other resolution powers except for assumption of control. In other words, it is doubtful whether the Chinese authorities can directly implement bail-in or transfer measures even where there is CMG.

Evan in cases where there is no CMG, the Chinese authorities may still respond to the request of a foreign authority. The Chinese authorities do not have powers to directly enforce foreign resolution actions, but the authorities may still facilitate foreign resolution actions by taking independent measures to give effect to foreign resolution actions. This must be based on a cooperative intention. For example, in an FDIC-PBOC Memorandum of Understanding (MOU), the two authorities agreed to ‘endeavour, subject to applicable laws, to cooperate and coordinate in order to identify and implement resolution processes’.[97] However, Chinese authorities are bound by Chinese laws, subject to the restrictions mentioned above. Under the current legal framework, Chinese administrative authorities have limited powers to adopt Key Attributes-like resolution powers, even if they are willing to facilitate foreign resolution proceedings.

5.3.1.2 Scenarios

5.3.1.2.1 Subsidiary

When the recognition involves a foreign bank’s subsidiary in China, China follows the basic principle that a subsidiary is an independent entity incorporated in China, and thus should be subject to Chinese law only.[98] A recognition request directly addressed to a subsidiary would be rare.

[95] FSB, ‘FSB 2018 Resolution Report: “Keeping the pressure up” Seventh Report on the Implementation of Resolution reforms’ (15 November 2018) 1.

[96] Article 59 FIBR.

[97] Article 5 FDIC-PBOC MOU.

[98] Article 2 Chinese Company Law. The Company Law of the People’s Republic of China (《中华人民共和国公司法》) was first promulgated by the NPC Standing Committee on 29 December 1993. It was later amended on 25 December 1999, 28 August 2004, 27 October 2005. The current effective version was amended on 28 December 2013.

One issue may still arise in cases where the shares of the parent in the subsidiary are transferred to a bridge or third institution. This can be illustrated from the previous *B&T Ceramic Groups s.r.l.* case.[99] In this case, an Italian company went bankrupt, and later its shares in a Chinese subsidiary were transferred to a buyer. Subsequently, the buyer submitted to a Chinese court for recognition of such transfer, which was stated in the insolvency judgment, and the court recognised and enforced the judgment.[100] This case showed that Chinese courts can recognise such an ownership transfer, subject to public policy exceptions discussed below.

Another likely approach is to appoint a representative of the parent company in resolution, and the representative must complete all the procedures under Chinese law, such as change of shareholders. As shown in the above-mentioned *Sino-Environment Technology Group v Thumb Env-Tech Group* case,[101] this representative can act as the representative of the bank in resolution and take up responsibilities including transferring the shares to another institution, in accordance with Chinese Company Law.

5.3.1.2.2 Branch

When recognition involves a foreign bank's branch in China, the question is mainly whether China would accept that this foreign branch is subject to a foreign resolution authority or a foreign resolution action. The current law allows Chinese authorities, acting as host authorities, to assume control over or facilitate the restructuring process of foreign funded banks business institutions, including WFO banks, JV banks and branches of foreign banks, when the institution has experienced or is likely to have a credit crisis that may severely affect the interests of depositors or other clients. [102] Aside from WFO banks and JV banks which are Chinese banks, branches of foreign banks, which are part of foreign banks, can also be subject to Chinese authorities' resolution. Given that the legal provision does not specify additional requirements, it is assumed that Chinese authorities can take actions on a branch of a foreign bank without considering any actions in the bank's home jurisdiction. But does it mean that China would not accept foreign jurisdiction over branches of foreign banks in China?

During the insolvency of the Bank of Credit and Commerce International (BCCI) in the early 1990s, a Chinese court in Shenzhen, where the BCCI Shenzhen branch was located, opened a liquidation proceeding in 1992 for

[99] (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.

[100] See Jianhong Liu, 'A Case on Application for Recognition and Enforcement of Italian Court Ruling on Bankruptcy' (2003) China law 32. The author was the judge hearing this case.

[101] (2014) Min Si Zhong Zi No 20 Civil Ruling.

[102] Article 59 FFBR. This article was amended by the State Council Decree No. 653, Decision of the State Council on Amending Certain Regulations (《国务院关于修改部分行政法规的决定》), 29 July 2014.

the Chinese creditors only, and the BCCI Shenzhen branch did not participate in the global insolvency proceedings.[103] This case showed a territorial preference by Chinese courts. It seems that China adopts a similar position as the US in terms of foreign branches, that is, foreign branches are under the sole jurisdiction of the host authority.

However, the BCCI Shenzhen branch case does not represent the current position as this case was adjudicated long before the enactment of the current EBL in 2007; and since China is not a common law jurisdiction, this case does not have binding force on judges. There are other legislative developments that indicate a deviation from the original territorial preference. As demonstrated above by Article 14 of the LAL, which came into effect in 2011, a legal person should be subject to the law where it is registered or where its principal office is located.[104] The habitual residence is a legal person's principal office.[105] The provision should be read together with Article 3 EBL, which stipulates that a bankruptcy case should be under the jurisdiction of a court where the debtor's residence is located.[106] Neither the LAL nor the EBL distinguishes the jurisdiction of a branch from that of its parent company. This is different from the MLCBI or the European Insolvency Regulation (EIR) or the Directive on Reorganisation and Winding-up of Credit Institutions (CIWUD), which makes the situation easier in the Chinese law context. It can be concluded that a branch of a foreign bank can be subject to foreign resolution authorities.

Another supplementary argument is that the DIR excludes foreign banks' branches from the eligible insured institutions,[107] which indicates the intention of the legislator to exclude foreign banks' branches from the scope of resolution. Moreover, although it is acknowledged above that the FFBR empowers the Chinese authorities to assume control over or facilitate the reorganisation of a branch of a foreign bank,[108] attention should be paid to the original words in the legal texts which use 'may' instead of 'shall' or 'should'. This choice of words makes the provision sufficiently flexible to be able to interpret the jurisdiction over a branch. It is assumed that this provision does not exclude the jurisdiction of a foreign home authority

[103] Due to the restricted access and limited online resources, the original judgment cannot be found. However, Chinese scholars have described this case, see, e.g., Jingxia Shi, 'Chinese Cross-border Insolvencies: Current Issues and Future Developments' (2001) 10 International Insolvency Review 33, 39-40.

[104] Article 14 LAL.

[105] Article 14 para 2 LAL.

[106] Article 3 EBL. For similar interpretation, see Bu (n 58) 202-203. *Cf* Aijun Li, *Study on Legal Issues of Cross-border Insolvency of Commercial Banks* 商业银行跨境破产法律问题研究 (China University of Political Science and Law Press 2012) 311.

[107] Article 2 DIR.

[108] Article 59 FIBR.

over a branch in China. Based on these provisions, it is concluded that a foreign resolution measure imposed on a branch in China is unlikely to not be recognised merely on the basis that the foreign resolution authority does not have jurisdiction over the branch. However, the other conditions and public policy considerations still apply.

5.3.1.2.3 Assets

Third, when the assets of a foreign bank are located in China and a foreign resolution measure involves the reallocation of the assets, it is usually a simpler case compared to the previous two situations. As required by Article 3 EBL, the Chinese courts do not have jurisdiction to open a bankruptcy proceeding in this scenario, and pursuant to the banking laws and regulations, the Chinese banking authorities cannot assume control over the assets.

A likely case is in the passive recognition when courts would have to adjudicate litigation brought by a creditor against the debtor. According to the CPL, for disputes arising from a contract or other property rights or interests and where the defendant does not have a residence in China, the competent court can be in places where the distrainable assets of the defendant are located.[109] This was the situation in *Hua An v Lehman Brothers International Europe (the UK)*. Upon the insolvency of the Lehman Brothers, the Hua An fund, a Chinese creditor to the Lehman Brothers, brought the case to the Shanghai High People's Court and claimed for compensation from the assets of Lehman Brothers in the Chinese Qualified Foreign Institutional Investors (QFII) account. The case was finally settled. [110] One particular issue, in this case, was that the judge refused to recognise the insolvency proceeding commenced in the UK on the basis of lack of international agreement and lack of reciprocity. This is a direct reflection of Article 5 EBL.

5.3.1.2.4 Governing law

The question examined in this section is when a resolution action is taken in the EU or the US, which affects a Chinese law governed liability, will the effectiveness of this action be recognised in China? As explained in the previous chapters, this boils down to the question of recognition of foreign reorganisation measures imposed on Chinese-law-governed contracts.

[109] Article 265 CPL.

[110] The final settlement agreement was confidential. The facts and opinions stated here are a reflection of a judge from the Shanghai High People's Court, who heard the Lehman Brothers case. See F. Zhang, 'The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe' (2012) <http://old.ccmt.org.cn/showexplore.php?id=4148> accessed 30 September 2018. See also Gong (n 65).

In the Chinese bankruptcy law and private international law, there is no clear reference to the law applicable to insolvency proceedings. Generally, the scholars hold the view that *lex concursus* applies.[111] A contradictory principle, however, is party autonomy, which requires that the choice of law agreed by the contracting parties should be respected.[112] There is little discussion of this issue in the Chinese insolvency community. Shi, a leading Chinese international insolvency law scholar, pointed out that debt discharge can be recognised in China, provided that Chinese creditors' rights are adequately protected.[113] In particular, she made the point that if Chinese creditors would suffer losses, a debt discharge would not be recognised.[114] However, she does not explicitly mention the conflict between choice of law in the contract and the application of *lex concursus*. This issue remains unsettled in Chinese law.

Simply following the text of Article 5 EBL, application of a law rather than the law parties have chosen is not a reason to refuse to recognise foreign insolvency judgments or rulings. However, the court, as explained immediately below, has the authority to refuse recognition on the basis of violation of Chinese law or inadequate protection of Chinese creditors. A possible reason to refuse to recognise is that the home jurisdiction does not respect the general party autonomy principle enshrined in Chinese law, and thus foreign resolution actions constitute violation of Chinese law. Another possible reason is that creditors may suffer losses because of resolution actions and not be adequately protected, particularly when bail-in is conducted by resolution authorities without the consent of (Chinese) creditors.

5.3.2 Public policy exception

In the Chinese EBL, public policies are stated as 'the basic principles of the PRC laws, the State sovereignty, security or public interest, as well as the interest of Chinese creditors'.[115] Specifically, there are three different categories: first, the basic principles of the PRC law; second, state sovereignty, security or public interest; and third, creditors' interest. Often, a recognition request is denied as a result of a lack of international agreement or reciprocity, as discussed above, and there is no case that can show Chinese

[111] See, e.g. Ling Zhang, 'Study of Private International Law Issues in International Insolvency Cooperation 跨境破产合作中的国际私法问题研究' (China University of Political Science and Law 2005) 47ff; Qisheng He, 'The New Pragmatism and Latest Development of Bankruptcy Conflict Law' (2007) Chinese Journal of Law 140, 145-148.

[112] Article 41 LAL. *Cf* exceptions Article 42 (consumer contracts) LAL and Article 43 (labour contracts) LAL.

[113] Jingxia Shi, *Studies on Legal Issues in Cross-border Insolvency* (Wuhan University Press 1999) 155-158.

[114] Ibid, 156.

[115] Article 5, the EBL.

courts' attitude towards the interpretation of public policy in international insolvency cases.[116] In the broader area of recognition of foreign civil and commercial judgements, as of March 2018, there is no case found refusing a recognition request invoking public policy.[117] The academic community, however, confirms that public policy should be narrowly applied only in exceptional cases.[118] Interestingly, public policy is demonstrated in a domestic bankruptcy case. In this case, an individual debt collection after the debtor had been declared bankruptcy was found invalid on the basis that the action was in violation of the equal treatment of creditors enshrined in bankruptcy law.[119]

With regard to resolution, a variety of factors may be reasons to refuse to recognise foreign resolution actions. For example, first, taking resolution actions does not need the consent of creditors. This is a general violation of the general principles of Chinese law. Under the EBL, creditors' approval, by a majority vote in creditors' meetings, is necessary to implement reorganisation plans or asset distribution plans.[120] In other words, a creditor's claim cannot be altered or discharged, unless the creditor agrees or the creditors' meeting approves the alternation or discharge. In particular, the CBL emphasises that assumption of control does not affect the debtor/creditor relations.[121] Creditors' claims can be altered without consent through a cram-down, but subject to strict conditions.[122] These conditions generally include adequate protection of secured creditors, employees and the tax authority, a fair and just reorganisation plan, no violation of ranking of claims in liquidation, and a feasible business plan.[123] These strict conditions make cram-down different from a direct administrative resolution, and it is difficult to recognise the effectiveness of foreign resolution actions without a proper domestic law designation.

Second, when a transfer is involved, several Chinese laws may apply. For example, under Chinese Company Law, transfer of shares has to either be approved by more than half of the other shareholders in the case of a limited

[116] X Gong, 'A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation' (Leiden University 2016) 55-59.

[117] Li Liu, 'The Reason and Rule for Recognition and Enforcement of Court Judgments among the 'One Belt and One Road' Countries "一带一路"国家间法院判决承认与执行的理据与规则' (2018) Journal of Law Application 40, 45.

[118] See, e.g Xiaoli Gao, 'On the Application of Public Policy in Private International Law 论国际私法上的公共政策之运用' (University of International Business and Economics 2005); Decai Ma, 'A Study of the Order Public in Private International Law 国际私法中的公共秩序研究' (Wuhan University 2010); Dan Ye, *On the Public Policy in Chinese Foreign Judicial Practice Relating to Civil and Commercial Matters* (Law Press 2012).

[119] (2012) Pu Min Er (Shang) Chu Zi No. 1119 Civil Judgment.

[120] Articles 59-65 EBL.

[121] Article 64 CBL, para 2.

[122] Article 87 EBL.

[123] Ibid.

liability company[124] or be subject to the securities registration requirements in the case of a joint-stock company.[125] Under Chinese Contract Law,[126] although transferring claims or rights does not need the consent of debtors,[127] transferring liabilities does need the consent of creditors.[128] A direct transfer without the consent of creditors may also be deemed as a violation of Chinese law.

Nevertheless, administrative resolution of failing financial institution is not a violation of Chinese public policy. As explained above, Chinese authorities have the administrative power to assume control over failing financial institutions. Thus, administrative intervention into an institution's business should not be considered as a public policy violation.

5.4 Concluding remarks

China is slow in adopting a comprehensive resolution regime compared to other large economies such as the EU and the US, thus is also slow in formulating rules regarding cross-border bank resolution, including recognition of foreign resolution actions. Article 5 of the EBL applicable to international corporate insolvency cases also applies to cross-border resolution cases. A general feature of Article 5 EBL is that it follows private international law rules rather than special international insolvency mechanisms such as the EU EIR or US Chapter 15. This means recognition of foreign resolution actions in China also follows a private international law approach.

However, this approach has limitations. For one thing, Article 5 adopts strict conditions for recognition, namely, either international agreements or reciprocity, which makes recognition extremely difficult. For another, Article 5 prescribes a broad range of public policy exceptions, which can be a strong basis for refusal of recognition given that China has not fully acknowledged the effectiveness of resolution in Chinese law. Although it is argued in this chapter that the administrative nature of resolution does not become an obstacle to applying Article 5, uncertainties abound. Among the rules of three jurisdictions compared, the Chinese rules are the least clear.

[124] Article 71 Company Law.

[125] Articles 138-140 Company Law.

[126] The Contract Law of the People's Republic of China (《中华人民共和国合同法》) was promulgated by the NPC on 15 March 1999 and came into effect on 1 October 1999.

[127] Article 79 Chinese Contract Law.

[128] Article 84 Chinese Contract Law.

Part III

Analysis from the Perspectives of Private International Law, Financial Law and Insolvency Law

6 Grounds for Recognition*

6.1 Introduction

Chapters 3 to 5 briefly present each jurisdiction's different approaches to recognition of foreign resolution actions. As a brief summary, the European Union (EU) formulates special rules for recognition of foreign resolution actions, both within the EU and outside the EU, and adopts an administrative approach. The United States (US) relies on the traditional corporate insolvency law led by courts, and Chapter 15 of the US Bankruptcy Code and common law are the grounds for recognition. China also relies on traditional corporate insolvency law. But different from the US, which has a comprehensive mechanism tailored to insolvency proceedings, the Chinese approach generally follows the conventional private international law principles.

Starting with this chapter, a more detailed normative analysis is conducted to search for an appropriate mechanism for recognition of foreign resolution actions. This chapter starts with the examination of grounds for recognition of foreign resolution actions. In this chapter, 'ground' has two layers of meaning: first, the rationale behind recognition, namely, why a foreign resolution action should be recognised; and second, the legal basis for recognition, namely, on what legal rules a foreign resolution action must be recognised.

In §6.2, a theoretical framework is provided, illustrating the grounds for recognition and enforcement of foreign judgments (§6.2.1) and recognition of foreign insolvency proceedings (§6.2.2). Based on the doctrines developed in these two different yet closely related fields, this chapter further draws a preliminary conclusion on the grounds for recognition of foreign resolution actions. Particularly in §6.2.3.2, contractual approaches are discussed. §6.3 subsequently compares the legal regimes for recognition of foreign resolution actions in the selected jurisdictions. Two issues are compared:

* Part of this chapter was presented at Global Bankruptcy Scholars' Work-in-Progress Workshop on 20 September 2019 in Brooklyn Law School in New York, generously sponsored by the International Insolvency Institute (III) and Brooklyn Law School. Special thanks to all the participants for their insightful comments, particularly Edward Janger, Jay Westbrook, Irit Mevorach, Janis Sarra, John Pottow, Stephan Madaus and Line Herman Langkjær.

the prerequisites for recognition, and the procedures of recognition. Next, in §6.4, specific issues are evaluated, answering four questions: (i) Should reciprocity be a pre-condition for recognition? (§6.4.1); (ii) How should jurisdiction be determined? (§6.4.2); (iii) What are the conditions and effects for recognition of a foreign resolution proceeding? (§6.4.3); and (iv) What are the conditions and effects for recognition of a foreign resolution measure? (§6.4.4). §6.5 concludes that recognition of foreign resolution actions shares a similar rationale as that for recognition of foreign judgments and foreign corporate insolvency proceedings, but detailed implementation rules need to be tailored to resolution actions.

6.2 Theoretical Framework

6.2.1 Recognition of foreign judgments

6.2.1.1 National rules of private international law

6.2.1.1.1 Comity and reciprocity

A. Comity

Recognition of foreign judgments is one of the three pillars of private international law, alongside with jurisdiction and applicable law.[1] A jurisdiction where a judgment is made is a rendering jurisdiction; a jurisdiction where a judgment seeks to be recognised is a receiving jurisdiction. As indicated in Chapter 1 at §1.2, recognition of foreign judgments is the pre-condition for enforcement, and the rationale for recognition also applies to enforcement.

The discussion starts with the doctrine of comity. It is a general principle that foreign judgments rendered by foreign courts are the result of the exercise of foreign countries' sovereign, and in the early 19th century in civil law jurisdictions such as France, a territorial sovereign perception prevailed, thus foreign judgments normally could not be recognised.[2] This sovereign principle was inspired by the famous Dutch jurist Ulrich Huber, who formulated a basic notion regarding recognition and enforcement of foreign

[1] Peace Palace Library, 'Private International Law Introduction' < https://www.peacepalacelibrary.nl/research-guides/national-law/private-international-law-in-general/> accessed 30 August 2019. See also literature, e.g. AV Dicey, *Dicey, Morris and Collins on the Conflict of Laws* (JHC Morris, Lawrence Collins and Adrian Briggs eds, 15th edn, Sweet & Maxwell Thomson Reuters 2012); Adrian Briggs, *The Conflict of Laws* (OUP 2013); Adrian Briggs, *Private International Law in English Courts* (OUP 2014); Guangjian Tu, *Private International Law in China* (Springer 2016); Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

[2] Friedrich K Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 American Journal of Comparative Law 1, 5-7.

judgments. In his *De Conflictu Legum*, he set forth three major principles regarding foreign relations and sovereign:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.[3]

The first two principles reflect the traditional notion of sovereignty, while the third one reflects the comity idea, which lays down the rationale for recognition of foreign judgments. This comity principle bridged the gap between sovereignty and international cooperation by allowing 'a state to yield to another state's acts without giving up its claim of absolute power and authority in the process'.[4]

Although originating in the Netherlands, a civil law jurisdiction, the comity principle was largely embraced in common law jurisdictions. In early English common law practices, comity was considered as the basis for recognition and enforcement of foreign judgments.[5] Lord Mansfield adopted Huber's theory and found it 'in good sense, and upon general principles of justice'.[6] Joseph Story, a US judge, further developed Huber's theory and commented that '[t]he true foundation … arise[s] from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return'.[7] In the leading case rendered by the US Supreme Court, *Hilton v Guyot,* comity was interpreted:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. [8]

[3] Ernest G Lorenzen, 'Huber's De Conflictu Legum' (1919) 13 Illinois Law Review 53, 376.

[4] Tim W Dornis, 'Chapter C. 18: Comity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 383.

[5] Dicey (n 1) para 14-007; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett Private International Law* (14th edn, OUP 2008) 514.

[6] *Holman v Johnson* (1775) 1 Cowper 341, 98 E.R. 1120, 1121.

[7] Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray, and Company 1834) §35.

[8] *Hilton v Guyot*, 159 U.S. 113, 163-164 (1895).

The same judgment further explained that comity 'takes into account the interests of the [receiving state], the interest of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law'.[9] Based on these illustrations, comity represents a public (international) law perspective and provides a non-obligatory legal rationale for recognition of foreign judgments. Accordingly, a receiving jurisdiction can unilaterally decide whether or not to recognise and enforce a judgment from a rendering jurisdiction.

B. Reciprocity

In the US *Hilton* case, an additional concept is mentioned – reciprocity. The judges ruled that the US court should not recognise a French judgment because '[i]f the judgment had been rendered in [the US], or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits'.[10] Reciprocity, accordingly, perceives recognition as premised on the condition that the rendering jurisdiction would recognise a judgment from the receiving jurisdiction if the situation is reversed.

Reciprocity, as demonstrated in the *Hilton v Guyot* case, is interpreted under the framework of comity.[11] Just as comity, reciprocity also respects the sovereignty principle and is a non-obligatory approach that could be taken unilaterally. Taking a further step, reciprocity explicitly requires the consideration of potential responses from the rendering jurisdiction as a prerequisite for recognition and enforcement.[12]

Reciprocity is a standard prerequisite for recognition in many European countries, for example, Austria, Poland, Hungary, Czech, Germany and Spain,[13] but some countries have abolished it, such as Switzerland and Belgium.[14] China is another example of a country adopting the reciprocity requirement, as it prescribes the reciprocity rule in its Civil Procedure

[9] *In re Artimm S.r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005), citing *In re Maxwell Communication Corp. plc*, 93 F.3d 1036, 1048, and *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa,* 482 U.S. 522, 107 S.Ct. 2542, 2561-2562.

[10] *Hilton v Guyot*, 159 U.S. at 228.

[11] Elliott E Cheatham, 'American Theories of Conflict of Laws: Their Role and Utility' (1944) 58 Harv L Rev 361.

[12] For similar arguments, see, e.g. Susan L Stevens, 'Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments' (2002) 26 Hastings Int'l & Comp L Rev 115; Yahan Wang, 'Research on Reciprocity in Recognition and Enforcement of Foreign Judgments' (Doctor Thesis, Wuhan University 2018).

[13] Samuel P Baumgartner, 'How Well Do US Judgments Fare in Europe' (2008) 40 Geo Wash Int'l L Rev 173, 191-193.

[14] Ibid. See also Anatol Dutta, 'Chapter R.2: Reciprocity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017). *Cf* Juenger (n 2) 7-8. See below §6.4.1.

Law.[15] In the UK, the Administration of Justice Act 1920 (1920 Act) [16] and Foreign Judgments (Reciprocal Enforcement) Act 1933 (1933 Act)[17] both adopt the reciprocity principle which requires that English judges can recognise foreign judgments from the jurisdictions in which the UK government considers reciprocity exists.[18] The American Law Institute (ALI) also proposed to introduce a reciprocity requirement in judgment recognition and enforcement proceedings.[19]

The reciprocity requirement has been controversial and led to various debates. On the one hand, some believe that reciprocity would create incentives for foreign jurisdictions to cooperate and recognise and enforce judgments rendered in other jurisdictions where reciprocity exists.[20] On the other hand, reciprocity means that a foreign judgment cannot be recognised and enforced without reciprocal treatment from the rendering jurisdiction, which raises concerns about the impediment to recognition and enforcement[21] and uncertainty and unpredictability.[22] Moreover, criticisms have also revolved around ignorance of private rights already confirmed in foreign judgments,[23] as shown in the obligation doctrine and *res judicata* doctrine.

6.2.1.1.2 Obligation doctrine

A different theory, the 'doctrine of obligation', unlike comity or reciprocity, does not address the obligation of a sovereign state from a public law perspective; instead, it takes into account the private obligation of a debtor

[15] Articles 281-281 CPL. Also Article 5 EBL. For the Chinese reciprocity requirement, see Wang (n 12).

[16] The 1920 Act applies to judgments rendered by 'superior courts' in other British dominions. 1920 Act, s 9(1). See Dicey (n 1) para 14-181.

[17] The 1933 Act applies to designated countries, which are listed in Dicey (n 1) para 14-184.

[18] 1920 Act, s 14, and 1933 Act, s 1.

[19] ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006) (ALI Proposed Recognition Statute), §7(a). See additional explanation, Linda Silberman, 'Some Judgments on Judgments: A View from America' (2008) 19 King's L J 235.

[20] ALI Proposed Recognition Statute, §7 comment (b) at 95. See also Louisa B Childs, 'Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law' (2005) 38 NYUJ Int'l L & Pol 221; Silberman, ibid.

[21] See, e.g. Qisheng He and Yahan Wang, 'Resolving the Dilemma of Judgment Reciprocity – From a Sino-Japanese Model to a Sino-Singaporean Model' in Andrea Bonomi and Gian Paolo Romano (eds), *Yearbook of Private International Law Vol XIX – 2017/2018* (2018); Wang (n 12).

[22] See, e.g. Harry Davenport and H. Bartow Farr, 'Recent Decisions' (1913) 13 Colum L Rev 73, 79.

[23] See, e.g. AC Rounds, 'Injunctions Against Liquor Nuisances' (1896) 9 Harv L Rev 521; Hessel E. Yntema, 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33 Mich L Rev 1129; Kermit Roosevelt, 'The Myth of Choice of Law: Rethinking Conflicts' (1999) 97 Michigan Law Review 2448.

arising from a judgment rendered by a foreign court.[24] In an English case, Blackburn J generalised that

> the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in [the receiving jurisdiction] are bound to enforce.[25]

Some US cases also upheld the obligation doctrine, arguing that a debtor is obliged to pay back a creditor on the basis of the legal relationship determined in a foreign judgment.[26] To some extent, the theory implicitly contains the requirement of comity as a courtesy to foreign laws, as well as foreign judgments delivered according to foreign laws. [27] However, this theory fails to explain why a domestic court should recognise an obligation formulated under foreign law, and, in particular, it fails to explain why some judges refuse to recognise the jurisdiction of a rendering court, which is a common ground to refuse to recognise foreign judgments.[28] Simply put, this doctrine cannot adequately explain the rationale behind recognition and enforcement of foreign judgments.

6.2.1.1.3 Res judicata

Another theory – *res judicata* – also provides an alternative underpinning for recognition and enforcement of foreign judgments. Having its roots in domestic law, *res judicata* 'is a judicial decision of special character because … it disposes finally and conclusively of the matters in controversy, such that … the subject-matter cannot be relitigated between the same parties or their privies'. [29] The main objective of *res judicata* is to avoid wasteful and repetitious litigation.[30] On the one hand, from a public law perspective, 'it is in the interest of the State that there be an end to ligation', in order not to disrupt limited national judicial resources; on the other hand, from a private

[24] Dicey (n 1) para 14-007. See also the case cited, *Russell v Smyth* [1842] 9 M. & W. 810, 819; *Williams v Jones* [1845] 13 M. & W. 628, 633; *Godard v Gray* [1870] L.R. 6 Q.B. 139, 149-150; *Schibsby v Westenholz* [1870] L.R. 6 Q.B. 155, 159.

[25] *Schibsby v Westenholz* [1870] L.R. 6 Q.B. 155, 159. See also, e.g., Trevor C Hartley, *International Commercial Litigation: Texts, Cases and Materials on Private International Law* (2nd edn, CUP 2015) 350.

[26] See, e.g. *Johnson v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Cowans v Ticonderoga Pulp and Paper Co.*, 219 App. Div. 120, 219 N.Y. Supp. 284, *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927). See literature, e.g. Hans Smit, 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L Rev 44, 54.

[27] Look Chan Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 International and Comparative Law Quarterly 443.

[28] Willis LM Reese, 'The Status in This Country of Judgments Rendered Abroad' (1950) 50 Colum L Rev 783, 784.

[29] Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001) para 1.11.

[30] Ibid, para 1.13.

law perspective, 'no person should be proceeded against twice for the same cause.'[31]

A relevant effect of *res judicata* is the collateral estoppel doctrine. Different from *res judicata*, which bars a second suit involving the same parties or their privies based on the same cause of action, the doctrine of collateral estoppel is applied in the context of a second action 'upon a different cause of action', but 'the judgment in the prior suit precludes re-litigation of issues actually litigated and necessary to the outcome of the first action'.[32] What is common is that both theories have the 'dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation'.[33]

The *res judicata* theory is broadened to be applied in cross-border cases. Consequently, mostly from a private law perspective, parties to a foreign judgment should not be subject to another litigation of the same claim. [34] In order to avoid re-litigation proceedings between the same parties, a foreign judgment is supposed to have an effect within the receiving jurisdiction, by being recognised by the receiving court. The significance of the *res judicata* theory closely relates to the prerequisites for recognition and enforcement, particularly, the finality condition discussed below in §6.4.4.1.

6.2.1.2 Mutual trust and mutual recognition in Europe

A special regime in the field of recognition and enforcement of foreign judgments is the free movement of judgments mechanism among the EU Member States, which is governed by the Brussels system. The EU has been endeavouring to promote free movement of judgments since the 1960s through international agreements. The 1968 Brussels Convention,[35] expressed, at earliest, its intention to facilitate cross-border recognition and enforcement of foreign judgments. This Brussels Convention, however, was succeeded by the Brussels I Regulation 44/2001 (Brussels I Regulation 2001)[36], which again, was succeeded by the recast Brussels I Regulation

[31] Ibid.

[32] *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), footnote 5 (citing *e. g., Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122; *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898; *Cromwell v. County of Sac*, 94 U.S. 351, 352–353, 24 L.Ed. 681.)

[33] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

[34] See, e.g. Smit (n 26); Courtland H Peterson, 'Res Judicata and Foreign Country Judgments' (1963) 24 Ohio St LJ 291; Barnett (n 29).

[35] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299/32.

[36] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1.

1215/2012 (Brussels I Regulation 2012 Recast).[37] At the moment, the old Convention only applies to certain overseas territories of the Member States, such as Aruba, an overseas territory of the Netherlands.[38]

The present effective law is the Brussels I Regulation 2012 Recast, which carries on with the fundamental principle of 'mutual recognition of judicial and extra-judicial decisions in civil matters'.[39] Recital 26 states that 'a judgement given by the courts of a Member State should be treated as if it had been given in the Member State addressed.'[40] Accordingly, Article 36 requires that '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.[41] Also, Article 39 requires that '[a] judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'.[42]

The Regulation provides that '[m]utual trust in the administration of justice in the Union' justifies the recognition mechanism, and 'the aim of making cross-border litigation less time-consuming and costly' justifies the enforcement mechanism.[43] The statutory ground for such a mutual recognition mechanism is, first, the Brussels Regulation, a legislative instrument, that imposes obligations on the courts in the Member States to follow the rules prescribed.[44] Second and more fundamentally, the mutual recognition mechanism derives from the founding treaties of the EU. Article 81 Treaty on the Functioning of the European Union (TFEU) explicitly states that

> 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.[45]

The founding treaties of the EU are built on the consent of the participating jurisdictions, namely, the EU Member States.

[37] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1.

[38] Fawcett and Carruthers (n 5) 342.

[39] Recital (3) Brussels I Regulation 2012 Recast.

[40] Recital (26) Brussels I Regulation 2012 Recast.

[41] Article 36(1) Brussels I Regulation 2012 Recast.

[42] Article 39 Brussels I Regulation 2012 Recast.

[43] Recital (26) Brussels I Regulation 2012 Recast.

[44] See also Judgement of 16 July 2015, Diageo Brands BV v Simiramida-04 EOOD, C-681/13 EU:C:2015:471, para 40 ('the rules of recognition and enforcement laid down by [the Brussels Regulation] are based, precisely, on mutual trust in the administration of justice in the European Union').

[45] Article 81 TFEU.

The rationale behind such consent or the purpose to reach an agreement is expressed in the earliest Brussels Convention, namely, the desire to implement the provisions of Article 220 of the Treaty Establishing the European Economic Community 'by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals' and to strengthen the legal protection of persons therein established.[46] The Jenard Report,[47] the explanatory report to the Brussels Convention, explains:

> a true internal market between the sis States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.[48]

This mutual trust mechanism extends to cross-border corporate insolvency (European Insolvency Regulation, EIR), cross-border bank insolvency (Directive on Reorganisation and Winding-up of Credit Institutions, CIWUD), as well as cross-border bank resolution (Bank Recovery and Resolution Directive, BRRD). As explained in previous Chapter 3, and also in the following sections, these legal instruments make insolvency/resolution proceedings effective across the European Union.

It should be noted that Demark, although being an EU Member State, is excluded from the Brussels Regulation, but subject to the Council Decision 2006/325/EC, which concluded an agreement and extends the Brussels Regulation to Denmark.[49] In parallel, the 1988 Lugano Convention and its updated 2007 version[50] applies to additional European Free Trade Association (EFTA) States including Iceland, Norway and Switzerland, as well as Denmark, and it also rests on mutual recognition.

[46] Preamble Brussels Convention.

[47] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968), by Mr P Jenard, OJ C 59/1.

[48] Jenard Report, 3.

[49] Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2006/325/EC, OJ L 120/22.

[50] Convention on jurisdiction and enforcement of judgments in civil and commercial matters, Done at Lugano on 16 September 1988, OJ L 319/9. The 1988 Convention was later amended in 2007 by Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339/3.

6.2.2 Recognition of foreign insolvency proceedings

6.2.2.1 National rules of international insolvency law

Recognition of foreign insolvency proceedings is often excluded from the regime of recognition of foreign judgments.[51] This is because, as the United Nations Commission on International Trade Law (UNCITRAL) summarised, the general private international law usually only applies to a two-party dispute, and not to collective proceedings like insolvency proceedings.[52] Also, recognition of foreign judgments is on the condition of a 'final judgment', while an insolvency judgment may be seen merely as 'a declaration of status' instead of a 'judgment', or an ongoing proceeding instead of a 'final' one.[53] However, despite being excluded from the general private international law framework, international insolvency law shares a similar rationale as the private international law and rests on the same three pillars, that is, jurisdiction, applicable law, and recognition and enforcement of foreign judgments.

6.2.2.1.1 Universalism v. territorialism

International insolvency law discussions always start with the two contradictory principles of universalism and territorialism, which address the effects of an insolvency proceeding, either with a universal effect or with only a territorial effect.[54]

Territorialism only accepts the effects of an insolvency proceeding within the jurisdiction where the proceeding is opened.[55] It originated from the Roman Empire and continued in the later Middle Ages when states simply

[51] See, e.g. Article 1(2)(b) Brussels I Regulation 2012 Recast; Article 1(5) 1971 Recognition and Enforcement Convention; Article 2(2)(e) Choice of Court Convention; Article 2(1)(e) Draft Judgment Convention. See also European Parliament, 'The Hague Conference on Private International Law "Judgments Convention", Study Requested by the JURI Committee' (April 2018) 12-13.

[52] MLCBI Guide, para 8.

[53] Ibid.

[54] See, e.g. Ian F Fletcher, *Insolvency in Private International Law* (OUP 2005); Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015); Look Chan Ho, *Cross-border Insolvency: Principles and Practice* (Sweet & Maxwell 2016); Reinhard Bork, *Principles of Cross-border Insolvency Law* (Intersentia 2017).

[55] Thomas C Baxter Jr, Joyce M Hansen and Joseph H Sommer, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57; Wessels (n 54) para 10013; Gabriel Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) para 2.03. *Cf* cooperative territoriality, Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell Law Review 696; Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 Michigan Law Review 2216; virtual territoriality, Edward Janger, 'Virtual Territoriality' (2010) 48 Columbia Journal of Transnational Law 401.

ignored the assets located outside their own territory.[56] Universalism, on the other hand, given the expansion of international business and global asset allocation, maintains that an insolvency proceeding should have worldwide effect.[57] It emerged as a result of expansion of international business and an increasing number of foreign creditors asking for the participation in insolvency proceedings.[58]

Universalism prevails because it adapts to the goals of global insolvency: reaching an efficient and fair proceeding.[59] Allowing creditors from different jurisdictions to participate in the same proceeding would facilitate an efficient process by avoiding costs that might have occurred in territorial proceedings, enhance predictability[60] and ensure creditors are treated equally in one proceeding.[61] Also, universalism corresponds to the globalisation trend, such as mobilisation of international goods and increasing numbers of foreign creditors, and is more tailored to modern business models – multinational enterprises, that require a cross-border insolvency system when they fail.[62] Besides, universalism contributes to the maximisation of debtors' assets by placing them under one proceeding and is more helpful in reaching reorganisation plans where a collective participation of creditors is necessary.[63]

A jurisdiction can accept the effects of foreign insolvency proceedings (incoming universalism) or claim a worldwide effect of insolvency proceedings opened within its territory (outgoing universalism).[64] Although any

[56] Bob Wessels, Hon Bruce A Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009) 40-41.

[57] Bork (n 54) 26-28. See also Jay L Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499; Lucian Arye Bebchuk and Andrew T Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 The Journal of Law and Economics 775; Bob Wessels, 'Cross-Border Insolvency: Do Judges Break New Grounds?' in *Business and Bankruptcy Law in the Netherlands, Selected Essays* (Kluwer Law International 1999); Jay L Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276; Christoph G Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32 Brooklyn Journal of International Law 755.

[58] Paulus (n 57) 755-766.

[59] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018) 6-9.

[60] See, e.g. Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Michigan Law Review 2177, 2181; Wessels (n 54) para 10010; Bork (n 54) 28.

[61] See, e.g. Rizwaan J Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 24-45; Daniel A Farber, 'What (if Anything) Can Economics Say about Equity?' (2002) 101 Mich L Rev 1791, 1821.

[62] Janis Sarra, 'Oversight and Financing of Cross-border Business Enterprise Group Insolvency Proceedings' (2008) 44 Tex Int'l LJ 547, 550-551; Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 153 ff; Mevorach (n 59) 9-11.

[63] Westbrook, 'A Global Solution to Multinational Defaults' (n 57) 2285; Mevorach (n 59) 11-12.

[64] Bork (n 54) 26-27.

jurisdiction can adopt an outgoing universalism, its actual effect solely depends on the counterparty jurisdiction – whether it accepts incoming universalism.[65] Application of universalism requires close cooperation among different jurisdictions. Still, obstacles abound as some jurisdictions are reluctant to recognise and enforce foreign insolvency proceedings, especially when against local interests.[66] In practice, many jurisdictions do not adopt pure territorialism or universalism, rather would follow a 'middle way' – 'modified universalism'.[67]

The section continues to discuss two legal instruments that adopt modified universalism – the UNCITRAL Model Law on Cross-border Insolvency (MLCBI), adopted in the US as Chapter 15 of the US Bankruptcy Code, and the EIR. As stated in the Preamble, the MLCBI sets out its objectives as (i) '[c]ooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency'; (ii) '[g]reater legal certainty for trade and investment'; (iii) '[f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor'; (iv) '[p]rotection and maximization of the value of the debtor's assets'; and (v) '[f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment'.[68] These objectives all explain the rationale for choosing a (modified) universalism choice. Even in jurisdictions that have not adopted the MLCBI, it seems that the increase of global trade and investment incentivises national legislators to adopt a more open attitude towards foreign insolvency proceedings.[69]

A major feature of the MLCBI and the EIR is the distinction of main and nonmain/secondary insolvency proceedings, conveying an idea to the world that one main proceeding can exist with worldwide legal effect,

[65] Ibid.

[66] On the implausibility of universalism principle, see, e.g. Frederick Tung, 'Is International Bankruptcy Possible' (2001) 23 Michigan Journal of International Law 31. See also, e.g. Wessels (n 54) para 10016; Wessels, Markell and Kilborn (n 56) 62.

[67] Westbrook, 'A Global Solution to Multinational Default' (n 57) 2299ff; Miguel Virgós and Francisco J. Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 17; Fletcher (n 54) 15-17. Similar terms include limited, curtailed or controlled universalism. See Wessels (n 54) para 10025. *Cf* multilaterism, Hannah L Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' (2000) 36 Stanford Journal of International Law 23; contractualism, Robert K Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Texas Law Review 51; Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1; Robert K Rasmussen, 'Resolving Transnational Insolvencies through Private Ordering' (2000) 98 Michigan Law Review 2252; universal proceduralism, Edward Janger, 'Universal Proceduralism' (2007) 32 Brooklyn Journal of International Law 819.

[68] Preamble MLCBI.

[69] See, e.g. Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (n 57); Bebchuk and Guzman (n 57).

while local non-main proceedings can have limited legal effects within the territory.[70] A main proceeding takes place where the debtor has its centre of main interests (COMI);[71] and a secondary proceeding takes place where the debtor has an establishment.[72] The MLCBI sets out criteria for determination of COMI: 'in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the [COMI]'.[73] The EIR interprets COMI as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.[74] Establishment is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services' in the MLCBI,[75] and as 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets' in the EIR.[76] In addition, the MLCBI and the EIR allow public policy exception, empowering the court to refuse to take action if the action would be manifestly contrary to the public policy.[77]

The two instruments also have differences. The MLCBI is an international model law that needs to be incorporated into national laws, such as Chapter 15 of the US Bankruptcy Code, and only prescribes the effects of recognition, while the EIR harmonises international insolvency laws for EU Member States, and includes rules on jurisdiction, applicable law, and recognition and enforcement.[78] Under the MLCBI, a foreign resolution proceeding can only be filed for recognition,[79] and upon recognition, different effects may occur, including automatic reliefs[80] and other discretionary effects.[81] However, under the EIR, main proceedings should be recognised and be effective across the Member States.[82] EIR also allows the opening of local secondary proceeding, with its effects 'restricted to the assets of the debtor situated within the territory of the Member State in which [secondary] proceedings have been opened'.[83]

[70] Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review, 257.

[71] Article 2(b) MLCBI, 11 US Code §1502(3); Article 3(1) EIR Recast.

[72] Article 2(c) MLCBI, 11 US Code §1502(4); Article 3(2) EIR 2015 Recast.

[73] Article 16(3) MLCBI, 11 US Code §1516(c).

[74] Article 3(1) EIR 2015 Recast.

[75] Article 2(f) MLCBI. 11 US Code §1502(2).

[76] Article 2(10) EIR 2015 Recast.

[77] Article 6 MLCBI; Article 33 EIR 2015 Recast.

[78] Bork (n 70).

[79] Articles 15-17 MLCBI; 11 US Code §§1515-1517.

[80] Article 20 MLCBI; 11 US Code §1520.

[81] Articles 19 and 21 MLCBI; 11 US Code §§1519 and 1521.

[82] Articles 19-20 EIR 2015 Recast.

[83] Article 34 EIR 2015 Recast.

Subsequent to recognition, under the MLCBI, reliefs can be granted.[84] Relief, in this sense, functions similar to enforcement, yet the scope of relief might be broader, including, for example, recognition and enforcement of foreign insolvency judgments, recognition and enforcement of foreign bankruptcy discharge, turnover of assets to foreign representatives, and antecedent transaction avoidance.[85] In contrast, under the EIR, there is no mention of the word 'relief', while Chapter II is titled 'recognition of insolvency proceedings', with enforcement under the regime of the Brussels system.[86] In this chapter of this dissertation, relief or enforcement is categorised within the scope of 'effects' of recognition.[87] Under international insolvency law, recognition of foreign insolvency actions is the prerequisite for following proceedings, similar to recognition of foreign judgments.

In 2018, the UNCITRAL passed a new Model Law on Recognition and Enforcement of Insolvency -Related Judgments (MLJ),[88] 'designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement the [MLCBI]'.[89] The new MLJ supplements the MLCBI and can be applied to recognise foreign insolvency-related judgments, while courts in some jurisdictions (such as the UK) do not have such power under the MLCBI.[90] The MLJ also reflects the (modified) universalism principle.

6.2.2.1.2 Comity and reciprocity

Although (modified) universalism is the dominant principle in the field of international insolvency law, this principle is not entirely accepted across the world. For example, as explained in Chapter 5, China does not incorporate the MLCBI and does not accept modified universalism.[91] This section continues to examine other traditional private international law doctrines that may provide rationale for the recognition of foreign insolvency proceedings.

[84] Articles 19-21 MLCBI; 11 US Code §§ 1519-1521. See also MLCBI Guide, 29-30.

[85] See, e.g. Ho (n 54) 165-179.

[86] Article 32 EIR 2015 Recast; Articles 39-44 and 47-57 Brussels I Regulation 2012 Recast.

[87] See below § 6.4.3.2 and § 6.4.4.2.

[88] UNCITRAL, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)' (2 July 2018) <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij> accessed 25 February 2020.

[89] Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLJ Guide), 11.

[90] MLJ Guide, 11-12.

[91] Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44. However, Irit Mevorach argues that modified universalism can be deemed as customary international law and thus applies to the whole world. See Mevorach (n 59). See more discussion on customary international law in Chapter 9.

From a public law perspective, recognition of foreign insolvency proceedings, either judicial or administrative,[92] is a form of recognition of foreign sovereignty. The comity theory thus can form the grounds for recognition of foreign insolvency proceedings. UNCITRAL acknowledges that there are two types of legal basis for recognition: comity and international agreement based on the principle of reciprocity.[93] Both of the doctrines, as summarised in §6.2.1.1.1, are manifestations of the comity theory.[94] Also, the new MLJ Preamble 1(d) states one of the purposes of the new Model Law is '[t]o promote comity and cooperation between jurisdictions regarding insolvency-related judgments'.[95] This illustration again also confirms the comity bases for recognition.

In judicial practices, the US courts have been relying on comity to decide cross-border corporate insolvency proceedings, especially when deciding a discretionary relief.[96] In a recent case adjudicated in New York, the judge again confirmed that 'American Courts have recognized the need to extend comity to foreign bankruptcy proceedings'; and it is explained that '[t]he equitable and orderly distribution of a debtor's property requires assembling *all* claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail.'[97] Similarly, in the UK, comity is also recognised in the landmark judgment *Rubin v Eurofinance*: 'comity … requires mutual respect for the territorial integrity …, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former'.[98] In China, reciprocity is the pre-condition for recognition of foreign insolvency judgments when no international agreement exists.[99] It can be concluded that comity and reciprocity play a role in international insolvency.

6.2.2.1.3 Obligation doctrine and res judicata

From a private law perspective, the obligation doctrine and res judicata may also serve as the ground/rationale for recognition of foreign judgments, that is, recognising creditors' rights that have been altered by foreign

[92] Article 2(a) MLCBI, definition of 'foreign proceeding'.

[93] MLCBI Guide, paras 214-215.

[94] See §6.2.1.2.1.

[95] Preamble 1(d) MLJ.

[96] See, e.g. *Canada Southern R. Co. v. Gebhard,* 109 U.S. 527, 539, 3 S.Ct.363, 27 L.Ed. 1020 (1883); *In re British American Insurance Co. Ltd,* 488 B.R. 205, 239 (Bankr. S.D. Fla. 2013); *In re Loy,* 432 B.R. 551, 558 (E.D. Va. 2010); *In re Rede Engegia S.A.*, 515 B.R. 69, 89 (Bankr. S.D.N.Y 2014); *In re Vitro SAB de CV*, 701 F.3d 1031, 1043 et seq., 1053 et seq. (5th Cir. 2012) ; *In re Lida,* 377 B.R. 243, 253 et seq. (9th Cir. BAP 2007). See Bork (n 54) para 2.39.

[97] *In re Agrokor*, 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).

[98] *Rubin v Eurofinance SA* [2012] UKSC 46 [30]; [2013] 1 A.C. 235 (SC), on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971 (citing *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827).

[99] Article 5 EBL.

insolvency proceedings and avoiding re-litigation. This is not a frequently raised topic in the field of cross-border insolvency law. However, there is an opinion that the opening of a foreign insolvency proceeding discourages the receiving jurisdiction from opening another proceeding, also with the purpose of saving debtors from repetitious proceedings.[100] This opinion is said to reflect the adjudicatory comity theory, which refers to 'the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction'.[101] The *AirScan* judgment also mentioned the *res judicata* principle and confirmed its effect of 'bar[ring] [creditors] from raising … objections for the first time in the Bankruptcy Court'.[102] These private law doctrines may be seen as supplementary reasons upholding the recognition of foreign insolvency proceedings.

6.2.2.2 Automatic recognition in Europe

European legislation, once again, represents a more harmonised approach towards cross-border insolvency issues. As illustrated in Chapter 3, the EU adopts a harmonised cross-border insolvency framework under the EIR, with the EIR 2015 Recast as the currently effective version. Accordingly, insolvency proceedings are automatically recognised throughout the EU Member States.[103] The rationale for automatic recognition under the EIR is explained as being for the 'proper functioning of the internal market',[104] and 'to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects'.[105] The rationale falls within the scope of judicial cooperation in civil matters under Article 81 of the Treaty on the European Union (TEU),[106] similar to mutual recognition of judgments under the Brussels system,[107] and on the same basis of mutual trust.[108]

Interestingly, several European jurisdictions also adopt an automatic recognition process for non-EU third countries. For example, the German insolvency law allows for automatic recognition without the need to go

[100] William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071, 2106.

[101] *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014).

[102] *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 699 (Bankr. S.D.N.Y. 2010), citing *Diorinou v. Mezitis*, 237 F.3d 133, 139, 143 (2d Cir. 2001); *Paramedics Electromedicina Commercial, Ltda v. GE medical Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004); *In re Parmalat Sec. Litig.*, 493 F.Supp.2d 723, 737 (S.D.N.Y. 2007); *In re Bd of Directors of Telecom Argentina, S.A.*, No.06 Civ. 2352, 2006 WL 3378687, 5 (S.D.N.Y. 2006).

[103] Chapter 2, Articles 19-33 EIR; Articles 3 and 9 CIWUD. Also, Recital (65) EIR 2015 Recast.

[104] Recital (3) EIR 2015 Recast.

[105] Recital (8) EIR 2015 Recast.

[106] Recital (3) EIR 2015 Recast.

[107] Text to n 39.

[108] Recital (65) EIR 2015 Recast.

through a formal recognition process, except for stakeholders objecting to the enforcement effects of foreign insolvency proceedings.[109] Similarly, Norway, a non-EU third country not bound by the EIR, also passed a new law allowing for automatic recognition of foreign insolvency proceedings.[110] Such automatic recognition might still be rare for most other jurisdictions.

6.2.3 Recognition of foreign resolution actions

6.2.3.1 National rules

As demonstrated in the previous Chapters 3 to 5, the selected jurisdictions, that is, the EU, the US and China, do have some rules on recognition of foreign resolution actions, but in general, lack clear guidance on this particular issue. This section illustrates the rationale why foreign resolution actions should be recognised.

First, from a purely economic point of view, a most effective resolution action is a global resolution strategy, and it requires that the actions taken by home authorities be effective in host jurisdictions.[111] Given the present global operation model for banks, for instance, inter-dependence on central trading, valuation, financial accounting and software systems, etc., it is costly to break down international banks into different segments for resolution and doing so may cause financial instability.[112] Recognition, in this process, is essential to facilitate the cross-border effectiveness of resolution actions.

[109] Section 343 paragraph 1 sentence 1 German Insolvency Code (InsO). See Stephan Madaus, Anna K Wilke and Philipp Knauth, 'Bringing Non-EU Insolvencies to Germany: Really so Different from The UNCITRAL Model Law on Cross-Border Insolvency?' (2020) 17 International Corporate Rescue 21.

[110] Faraz Ahmed Ali and Erik Røsæg, 'New Rules on Cross-Border Insolvencies in Norway' (2015/2016) 17 Yearbook of Private International Law 385.

[111] See, e.g. Thomas F Huertas, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series; Zdenek Kudrna, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283, 284-286; Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 494.

[112] For example, the break down of Lehman Brothers. See Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010) 45. See also Simon Gleeson, 'The Importance of Group Resolution' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Charles Randell, 'Group Resolution under the EU Resolution Directive' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); IMF, 'United States Financial Sector Assessment Program Review of the Key Attributes of Effective Resolution Regimes for the Banking and Insurance Sectors - Technical Note' (2015) IMF Country Report No 15/171, 8; John Armour and others, *Principles of Financial Regulation* (OUP 2016) 631.

Second, resolution is characterised as one type of insolvency proceedings and should follow the universalism principle enshrined in international insolvency law. A proper recognition regime helps effective administration of a debtor, promoting transnational economy and is beneficial to both debtors and creditors.[113] It is acknowledged that some cross-border insolvency law instruments exclude banks and other financial institutions. However, such exclusion does not make the discussions mentioned in §6.2.2 inapplicable. Virgós and Garcimartín put forward the 'hermeneutic circle' theory and maintain that a consistent interpretation of corporate insolvency law and bank insolvency law should be applied. [114] Therefore, the rationale behind cross-border insolvency cases, particularly enhancing international cooperation and coordination, also applies to cross-border bank resolution cases.[115]

Third, a tricky question is raised regarding the administrative nature of resolution actions. Usually, recognition refers to recognising foreign judgments but not administrative actions. However, the comity doctrine can be applied and help explain that the administrative nature does not impede recognition. Discussions about comity start with the sovereignty theory,[116] which falls within the realm of public law, not only for judges but also for states and administrative authorities. In fact, comity 'is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation'. [117] Resolution authorities thus should not be stopped from applying comity. Recognition of resolution actions, therefore, falls under the scope of comity.

Forth, the *res judicata* theory has the effect of barring creditors from initiating a second proceeding in host jurisdictions.[118] The same effect can also apply to resolution cases where creditors are expected to accept the consequences as a result of foreign law. The obligation doctrine also seems to be suitable in this situation because the application of foreign law (by administrative authorities) leads to a new creditor/debtor relationship and thus should be recognised as a new relationship in the host jurisdiction.[119] All these reasons explain why foreign resolution actions should be recognised, and the following sections will explain in more detail the rules (conditions) for recognition and its consequences.

[113] Text to n 59 - n 63.
[114] Virgós and Garcimartín (n 67) 8.
[115] Mevorach (n 59) 10-11.
[116] Text to n 3.
[117] *Hilton v Guyot*, 159 U.S. at 163-164.
[118] n 102.
[119] See §6.2.1.1.2.

6.2.3.2 Contractual basis

As mentioned in Chapter 1 at §1.2, the Financial Stability Board (FSB) summarised both the mutual recognition process and supportive measures as 'statutory approaches'.[120] In the meanwhile, the FSB Principles propose adopting 'contractual recognition' to fill the gap until statutory approaches have been fully implemented or to reinforce legal certainty and predictability. [121] Contractual provisions can be added in financial contracts, recognising the effects of foreign resolution authorities' actions.[122] As evaluated by Schwarcz et al., although '[c]ontractual approaches cannot fill the gap [where no statutory recognition framework is in place]', to an extent, 'they can help to reinforce legal certainty and predictability assent a statutory framework'.[123]

In fact, legislators in both the EU and the US have included contractual approaches in their bank resolution laws, in order to add certainty that third-countries' parties would recognise the effects of EU or US resolution actions. In the EU, Article 55 BRRD prescribed 'contractual recognition of bail-in', which has been implemented in the EU Member States starting from 1 January 2016. [124] In accordance with this Article, institutions in the EU are required to include a contractual term in certain agreements that creditors agree to be bound by the bail-in tool initiated by the European resolution authorities; these agreements are those creating liabilities for the European institutions but which governed by the law of a third country that is not an EU Member States.[125] The purpose of such contractual measures is to 'ensure the ability to write down or convert liabilities when appropriate in third countries',[126] although there is also a possibility that the third countries may forbid such kind of contractual terms. [127] Similarly, the BRRD

[120] FSB Principles, 5-6.

[121] Ibid, 6-7, 13-16.

[122] Ibid.

[123] Steven L Schwarcz and others, 'Comments on the September 29, 2014 FSB Consultative Document,'Cross-Border Recognition of Resolution Action'' (2014) Centre for International Governance Innovation CIGI Paper No 51.

[124] Article 130 BRRD Transposition.

[125] Article 55 BRRD.

[126] Recital (78) BRRD.

[127] European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal amending:
- Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms;
- Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;
- Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms;
- Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, Brussels, 24.11.2016, SWD(2016) 377 final/2, 143-146.

II amendment adds a new Article on 'contractual recognition of resolution stay powers', requiring institutions to add the same provision recognising the effects of EU actions of temporary stay of early termination rights.[128] In the US, two contractual requirements are imposed on foreign-law governed liabilities – contractual recognition of transfer tools and contractual recognition of stay powers. [129]

At the international level, the International Swaps and Derivatives Association (ISDA) published model contracts which add contractual recognition provisions. For instance, the ISDA has also published the Bail-in Article 55 BRRD Protocol, functioning as guidance for international derivative traders to incorporate the contractual bail-in provision. [130] Also, the ISDA has published the ISDA 2015 Universal Resolution Stay Protocol[131] and ISDA Resolution Stay Jurisdictional Modular Protocol (ISDA JMP)[132] as guidance for incorporating contractual temporary stay terms, serving a similar function as the bail-in protocol. According to the FSB report, all the G-SIBs except for Chinese ones have adopted the ISDA 2015 Universal Protocol. [133] It is assumed that the Chinese banks have opted-out because there is not an updated bank resolution law in China at present.

Contractual recognition resolution provisions prevent a foreign party from challenging the resolution actions taken in home jurisdiction A. However, contractual provisions between private parties do not have binding effects on resolution authorities[134] and cannot form the legal grounds for recognition of foreign resolution actions. However, as explained in the following §6.4.4.1.2 and Chapter 8 at §8.4.3, the contractual provisions reduce the possibility of refusal of recognition, because the agreement between the

[128] Amended Article 71a BRRD, Article 1(33) BRRD II.

[129] 12 CFR §252.83(b)(1).

[130] ISDA 2016 Bail-in Article 55 BRRD Protocol (Dutch/French/German/Irish/Italian/Luxembourg/Spanish/UK entity-in-resolution version). A second version was updated in 2017. ISDA, 'ISDA Publishes Second Bail-in Article 55 BRRD Protocol' (19 April 2017).

[131] ISDA, 'ISDA 2015 Universal Resolution Stay Protocol' (4 November 2015).

[132] ISDA, 'ISDA Resolution Stay Jurisdictional Modular Protocol' (3 May 2016).

[133] FSB, 'Ten years on - taking stock of post-crisis resolution reforms: Sixth Report on the Implementation of Resolution Reforms' (6 July 2017) 13.

[134] The EU even acknowledges that some jurisdictions may forbid such contractual terms. See EU Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal amending: Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; Regulation (EU) No 806/2014 of the European Parliament and of the Council of July 15, 2014, establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, SWD/2016/0377 final/2–2016/0360 (COD), 129.

contractual parties is strong evidence that host creditors should have foreseen such a resolution action, and their rights should not be deemed as jeopardised.

6.2.3.3 Mutual recognition under the CIWUD and the BRRD

As illustrated in Chapter 3, resolution recognition within the EU also has a special arrangement, namely, mutual recognition under the BRRD, duplicating the mechanism under the CIWUD.[135] This mutual recognition mechanism applies to the parent-branch situation.[136] As explained in the CIWUD, '[t]he administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State', and 'it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised'.[137] It is because 'a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted',[138] and '[i]t would be particularly undesirable to relinquish such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings'.[139] Also explained in Chapter 3 and in §6.2.1.2 above, such mutual recognition only exists within the EU but not in non-EU jurisdictions.

6.3 Grounds for recognition in the selected jurisdictions

6.3.1 Prerequisites for recognition

This section examines, from a positive law perspective, the *status quo* of laws in the selected jurisdictions with regard to prerequisites for recognition of foreign resolution actions. Two main issues are examined in this section. First, how can each jurisdiction recognise an 'administrative' action? This question derives from the private international law tradition that recognition is for judicial judgements but not administrative actions. Second, what are the conditions for each jurisdiction to recognise foreign resolution actions?

In the EU, as explained in Chapter 3, there are various situations of recognition. In particular, a Member State may adopt different approaches for recognition towards actions from other EU Member States and actions from

[135] Article 117 BRRD.
[136] Article 1 CIWUD.
[137] Recital (6) CIWUD.
[138] Recital (3) CIWUD.
[139] Recital (4) CIWUD.

third countries. In this part, the focus is only about recognition of third-country resolution actions, which is comparable to the situations in the US and China. The legal basis is Articles 93-95 BRRD and Article 33 of the Single Resolution Mechanism Regulation (SRMR). By the BRRD and SRMR, the EU establishes a special administrative regime for recognition, where administrative resolution authorities are designated with direct powers to recognise foreign resolution actions.

With regard to specific conditions for recognition, there are no special requirements in the BRRD or the SRMR, except for those provided in international agreements[140] or five public policy exceptions.[141] One particular issue, however, relates to reciprocity. Recital 101 BRRD states that the European Banking Authority (EBA) should be empowered to develop and enter into non-binding framework cooperation arrangements with authorities of third countries, while '[i]n general, there should be reciprocity in those arrangements'.[142] Nevertheless, in Article 94 BRRD and Article 33 SRMR, there is no reciprocity requirement. A question relates to whether reciprocity is a prerequisite under EU law. This chapter holds the view that reciprocity is only mentioned in the context of international agreements, and it is not any barrier for further recognition. In other words, reciprocity is not a condition for recognition under EU law.

In the US, as explained in Chapter 4, the traditional regime under Chapter 15 US Bankruptcy Code still applies, which incorporated the MLCBI into the US Bankruptcy Code, except for foreign banks with branches or agencies in the US. And it is confirmed that Chapter 15 also applies to resolution actions, because administrative resolution falls under the scope of insolvency. This argument is based on the definitions specified in the US Bankruptcy Code. A foreign proceeding is defined as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation',[143] and a foreign court could be 'a judicial or other authority competent to control or supervise a foreign proceeding'.[144] It follows that an administrative proceeding under the supervision of an administrative authority can be included in the general framework of insolvency, and courts are allowed to recognise foreign administrative resolution actions.[145]

[140] Article 93 BRRD.

[141] Article 95 BRRD; Article 33 SRMR.

[142] Recital (101) BRRD.

[143] Article 2(a) MLCBI; 11 US Code §101(23).

[144] Article 2(e) MLCBI; 11 US Code §1502(3).

[145] See, e.g. *In re Tradex Swiss AG,* 384 B.R. 34, 42 (Bankr. D. Mass. 2008); *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015); *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018).

Accordingly, conditions for recognition of foreign resolution actions are prescribed in Chapter 15 US Bankruptcy Code, in particular, §1517, which requires that: (1) a foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements in section 1515, which lists the documents needed for the court's review.[146] Based on this provision, the most critical criterion is about the determination of the jurisdiction, that is, COMI or establishment jurisdiction. However, in resolution cases, the jurisdiction issue would be less complicated because there would be a clear distinction between home and host jurisdictions. This is further examined in §6.4.2.

The rationale of comity also plays an important role in the US cross-border insolvency regime, which forms a reason for recognition and granting reliefs. §1507 US Code explicitly states that '[i]n determining whether to provide additional assistance …, the court shall consider whether such additional assistance, consistent with the principles of comity …'.[147] Besides, '[i]f the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this Chapter … a court in the United States shall grant comity or cooperation to the foreign representative'.[148] It should be noted that comity was added by the US legislators, while the original MLCBI text does not have such a condition. The comity principle had been confirmed in the previous Section 304,[149] which was replaced by the current Chapter 15. The US courts have been highlighting 'the importance of judicial deference of foreign bankruptcy proceedings'.[150] They realised that '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound,

[146] 11 US Code §1517.

[147] 11 US Code §1507.

[148] 11 US Code §1507(b)(3). See also 11 US Code §1507(c) and (d).

[149] The original Section 304 reads: '(c) In determining whether to grant relief under subsection (b) of this section, the court shall be … consistent with … (5) comity'. See Stacy Allen Morales and Babara Ann Deutcsh, 'Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Trinity of Comity' (1983) 39 Bus Law 1573; Thomas C Given and Victor A Vilaplana, 'Comity Revisited: Multinational Bankruptcy Cases Under Section 304 of the Bankruptcy Code' (1983) Ariz St LJ 325; SR Melissa, 'American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)' (1992) 9 Bankruptcy Developments Journal 453; Stuart A Krause, Peter Janovsky and Marc A Lebowitz, 'Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies' (1995) 64 Fordham L Rev 2591.

[150] *In re International Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Maxwell*, 93 F.3d at 1048; *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Circ. 1993); *Cunard*, 773 F.2d at 458).

a plan of reorganization would fail'.[151] The US is a leading jurisdiction advocating international cooperation in judicial assistance.

China, on the other hand, does not have a comprehensive resolution law, let alone provisions on recognition of foreign resolution actions. The only relevant article is Article 5 of the Enterprise Bankruptcy Law (EBL), which stipulates the conditions for recognising foreign insolvency judgments. However, there is no legislative or judicial authority on whether foreign resolution actions can be deemed as foreign insolvency proceedings or whether foreign resolution decisions can be deemed as foreign insolvency judgments. Given the complete lack of a resolution law, this dissertation proposes that Article 5 EBL should be able to apply, based on the viewpoint demonstrated in Section 2.1.3 that resolution is under the general umbrella of insolvency, taking the same position as the US.

According to Article 5 EBL, only when an international agreement exists, or a reciprocal requirement is met, a Chinese court can recognise an insolvency-related judgment. The two conditions are confirmed in previous cross-border insolvency cases, for example, the *B&T Ceramic Groups s.r.l.* case (China-Italy agreement),[152] the *Pellis Corium* ('P.E.L.C.O.R') case (China-France agreement),[153] and the *Sascha Rudolf Seehaus* case (reciprocity from Germany).[154] In addition, Article 5 EBL follows the general principles under private international law, and if a foreign judgment is to be recognised, it has to be a valid judgment or ruling rendered by a foreign court.[155]

In addition, if Chinese judges do not accept resolution as insolvency, this dissertation further puts forward an alternative solution that was invoked in a recent case *Sino-Environment Technology Group v Thumb Env-Tech Group*, which recognised the status of a foreign insolvency practitioner as a legal representative of the debtor.[156] In this way, the foreign representative, including representatives in resolution proceedings, can still get access to Chinese assets and proceedings, under the Chinese company law framework, but not insolvency law.

[151] *In re Agrokor*, 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).
[152] (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.
[153] (2005) Sui Zhong Fa Min San Chu Zi No.146 Civil Ruling.
[154] (2012) E Wu Han Zhong Min Shang Wai Chu Zi No.00016 Civil Ruling.
[155] Article 282 CPL.
[156] *Sino-Environment Technology Group Ltd, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling.

6.3.2 Procedures for recognition

For the European regime in relation to third-country resolution actions, Title VI BRRD applies, and the EU adopts an administrative recognition regime.[157] According to Article 94, a European resolution college should jointly decide on whether to recognise a third-country resolution proceeding and, subsequently, 'respective national resolution authorities shall seek the enforcement of the recognised third-country resolution proceedings in accordance with their national law'.[158] While in the absence of a joint decision reached in the European resolution college or in the absence of a European resolution college, each national resolution authority should make its own decision regarding recognition and enforcement of third-country resolution proceedings.[159]

One particular issue is about the recognition under the Single Resolution Mechanism (SRM). Under Article 33 SRMR, the competent authority authorised to make decisions of (non-)recognition and (non-)enforcement is national authorities. The SRB can only assess and issue a recommendation letter to national resolution authorities.[160] National resolution authorities usually should implement the recommendation, but can refuse to implement with a reasoned statement explaining their considerations.[161] Therefore, procedures for recognition under the SRM are subject to national laws of the Member States.

In the US, under Chapter 15, a foreign representative should apply for recognition following the requirements of §1515. Here, foreign representatives could be foreign resolution authorities or other natural or legal persons appointed by foreign resolution authorities. The court should decide in accordance with §1516 and §1517. The prerequisites are discussed above. One particular feature of Chapter 15, also the MLCBI, is the relief granted. When a foreign proceeding is recognised as a foreign main proceeding, automatic relief should be granted under §1520. While for other reliefs, more discretion is allowed. For instance, upon filing a petition for recognition, the court can discretionally grant certain reliefs prescribed in §1518. Also, additional relief can be discretionally granted for both foreign main proceedings and foreign nonmain proceedings per §1521. It is noted that in determining reliefs, unlike in the recognition process where the criteria are entirely objective, it 'turns on subjective factors that embody principles of comity".[162]

[157] Articles 93-98 BRRD.

[158] Article 94(2) BRRD.

[159] Article 94(3) BRRD.

[160] Article 33(2) BRRD.

[161] Article 33(4) BRRD.

[162] *In re Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

In China, the EBL only regulates recognition and enforcement of foreign judgments.[163] This recognition request is submitted to an Intermediate People's Court through a judicial deciding process.[164] If a foreign judgment, in this case, a resolution decision, needs to be enforced in China, after recognition, the court shall issue an enforcement order to commence the enforcement process.[165] Chinese law does not prescribe the recognition of a foreign proceeding, yet it is possible to recognise an appointed foreign representative.[166] In resolution cases, the foreign resolution representative can act as a company representative, subject to the Chinese Company Law.

6.4 Comparison and evaluation

6.4.1 Should reciprocity be a pre-condition for recognition?

After the above comparison, this section continues to examine several particular issues. The first question relates to the reciprocity requirement. As mentioned above, reciprocity can be a prerequisite for recognition of foreign judgments and foreign insolvency proceedings.[167] Similarly, in cross-border resolution cases, reciprocity can also be a prerequisite for recognition of foreign resolution actions. This is the case in China. However, the FSB expressed the opinion that recognition of foreign resolution measures 'should in principle not be contingent on reciprocity', and this is because 'such a condition could unnecessarily constrain the circumstances in which recognition could be granted and even prevent recognition where it would clearly be in the jurisdiction's interest to grant it'.[168]

This chapter supports the view that reciprocity should not be a prerequisite for recognition. In recognition of foreign judgments cases, a strong argument, just as the FSB mentioned, is that the rights confirmed in foreign judgments should not be denied simply because of the lack of reciprocity between the jurisdictions.[169] Requiring reciprocity is demonstrated as unlikely to generate benefit for nationals, because adding reciprocity will make it more difficult for domestic creditors to recognise and enforce

[163] Article 5 EBL.

[164] Article 281 CPL.

[165] Article 282 CPL.

[166] *Sino-Environment Technology Group Limited, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling. See comments Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57.

[167] Article 5 EBL. See also American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statue (2006). Also the explanation expressed by its reporter, Silberman (n 19) 259-262.

[168] FSB Principles, 12.

[169] See, e.g. Reese (n 28); Smit (n 26). See also n 23.

foreign judgments but has little impact on foreign countries' recognition and enforcement practice.[170] Also, the presence of reciprocity may lead to retaliation, or a 'reciprocity dilemma', if the rendering jurisdiction and the receiving jurisdiction both require reciprocity and neither of them is sufficiently convinced that the other party would grant recognition.[171] More specifically, in cross-border insolvency cases, reciprocity is detrimental to an international administration of insolvent debtors.[172] In cross-border resolution cases, reciprocity serves no function except for impeding expedited international resolution, which may endanger to global financial stability. In addition, reciprocity does not need to concern itself with the protection of public interest.[173] Public policy exceptions explained in the following Chapters 7 and 8 can address public interest considerations.

Current international developments also demonstrate a trend to abolishing reciprocity. [174] For example, Switzerland abolished reciprocity in its 1987 Switzerland's Federal Code on Private International Law (CPIL),[175] except for insolvency proceedings.[176] More recently, Belgium abolished reciprocity in its 2004 private international law code.[177] Similarly, in the US, where the *Hilton v Guyot* case firstly established the reciprocity rule, the subsequent cases, such as the *Johnston v Compagnie Generale Transatlantique* case[178] and the *Erie Railroad v Tompkins* case rendered by the Supreme Court,[179] gradually abandoned the reciprocity requirement. On a global scale, Elbalti summarised that reciprocity no longer plays a significant role as 'the test for establishing reciprocity has now become so relaxed that the requirement will normally be met if it is shown that the courts of the rendering State are likely to recognize the enforcing State's judgments'.[180]

[170] John F Coyle, 'Rethinking Judgements Reciprocity' (2013) 92 NCL Rev 1109.

[171] He and Wang (n 21).

[172] Keith D Yamauchi, 'Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 International Insolvency Review 145.

[173] Coyle (n 170); Dutta (n 14).

[174] Baumgartner (n 13) 193.

[175] Articles 25-32 CPIL. Bundesgesetz über das Internationale Privatrecht (IPRG), vom 18. Dezember 1987. An English translation is available at <https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20%D0%B2%20%D1%80%D0%B5%D0%B4.%20 2007%20(%D0%B0%D0%BD%D0%B3%D0%BB.).pdf> accessed 25 February 2020.

[176] Article 166 CPIL.

[177] Articles 22-31 Loi du 16 juillet 2004 portant le Code de droit international privé, Moniteur Belge 27 July 2004, ed 1, 57344-57374. An English translation is available at <https://sociedip.files.wordpress.com/2013/12/belgica-the-code-of-private-international-law-2004.pdf> accessed 25 February 2020.

[178] *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121 (N.Y. 1926).

[179] *Erie Railroad v Tompkins*, 304 U.S. 64 (1938).

[180] Béligh Elbalti, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite' (2017) 13 Journal of Private International Law 184.

Also, in China, as a typical jurisdiction requiring reciprocity, there is a new development regarding the application of reciprocity. In the context of the Belt and Road Initiative (BRI), China is expanding its overseas investment.[181] Accordingly, the judicial system is expected to handle more international commercial cases. The Supreme People's Court of China (SPC) emphasised in the Opinions of Providing Judicial Service and Guarantee for Belt and Road Initiative[182] that the courts may also consider giving judicial assistance first to other foreign jurisdictions and expand the scope of international judicial assistance. This indicates the possibility that a Chinese court may recognise foreign insolvency proceedings without requiring the other jurisdiction to have previously recognised a Chinese judgment or ruling.

6.4.2 How should jurisdiction be determined?

6.4.2.1 The shift to home/host distinction

As one of the three pillars of private international law, recognition and enforcement is closely related to the jurisdiction issue.[183] Rules for jurisdiction determine which country/jurisdiction has competent power to commence an international dispute. And when a judgment is rendered, it can only be recognised when the court in the receiving jurisdiction agrees that the foreign court from which the judgment is delivered has jurisdiction over the dispute.[184] Similarly, in cross-border corporate insolvency cases, jurisdiction is an essential factor. The CIWUD and the EIR make a distinction between COMI and establishment.[185]

In terms of cross-border bank resolution, the current laws in the selected jurisdictions differ. The EU and China do not make a clear distinction on jurisdiction. The US, adopting the MLCBI, continues to use COMI/establishment concepts. This chapter argues that, in cross-border resolution cases, a distinction should be made between home and host jurisdictions, and the home authority should be the primary authority to take resolution actions.[186] As defined in Chapter 1 at §1.3, home jurisdiction is where the consolidated supervision is conducted, and host jurisdiction is where subsidiaries, branches, assets are located, or the law of which is chosen

[181] For a more detail introduction of the BRI, please see the BRI official website <http://english.gov.cn/beltAndRoad/> accessed 25 February 2020.

[182] Several Opinions of the Supreme People's Court on the People's Courts Providing Judicial Service and Guarantee for Belt and Road Initiative, Fa Fa [2015] No.9.

[183] n 1.

[184] Dicey (n 1) para 14-055; Restatement (Third) of Foreign Relations Law §482 cmt. C.; Juenger (n 2) 13-30; Silberman (n 19) 245-259.

[185] See §6.2.2.1.1.

[186] Guo (n 111) 489-492. See also, e.g. Jonathan M Edwards, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122, 141-143; Jay L Westbrook, 'SIFIs and States' (2014) 49 Tex Int'l L J 329, 349-352; Mevorach (n 59) 252.

as the governing law.[187] The FSB also makes the distinction: '[t]he need to give cross-border effect to resolution actions may arise with respect to a firm undergoing resolution in its *home jurisdiction* that operates a branch or controls a subsidiary in a foreign jurisdiction; or a firm that holds assets, liabilities or contracts located or booked in, or subject to the law of, another jurisdiction in which the firm is not established'.[188]

Such home/host distinction is closely related to the special features of banks' authorisation and supervision models. At the international level, the Basel Committee on Banking Supervision (BCBS) formulated a series of documents on cross-border bank supervision.[189] The first BCBS guidance, the *Report on the Supervision of Bank's Foreign Establishments* (Basel Concordat 1975),[190] came into existence after the closure of a German bank – Bankhaus Herstatt, which subsequently disrupted the New York foreign exchange market.[191] The document established a general rule that 'no foreign establishment escapes supervision' and 'this supervision is adequate'.[192] And this document also distinguished home and host jurisdictions. In 1982, the Concordat 1975 was tested and proved to be insufficient in the course of resolution of the Italian bank Banco Ambrosiano.[193] Subsequently, in May 1983, the Concordat 1975 was replaced by the new *Principles for the Supervision of Bank's Foreign Establishments* (Basel Concordat 1983), accepting the principle that 'banking supervisory authorities cannot be fully satis-

[187] See Chapter 1 at §1.3.

[188] FSB Principles, 5.

[189] These documents are archived under the topic 'concordat and cross-border issues' in the BCBS publications, see BCBS <www.bis.org/bcbs> accessed 25 February 2020.

[190] BCBS, 'Report to the Governors on the supervision of bank's foreign establishments BS/75/44e' (26 September 1975).

[191] When the West German authorities closed Bankhaus Herstatt at 4 pm CET on 26 June 1974, they followed normal domestic procedures and waited until the end of the business day. But it was in the morning in New York, where the dollar leg of $625 million of Herstatt's foreign exchange contracts remained to be settled. The closure of Herstatt thus resulted in abrogation of these foreign exchange contacts in New York and caused a prolonged disruption in foreign exchange trading and dislocations in the market. See, e.g., Richard J. Herring, 'Conflicts Between Home and Host Country Prudential Supervisors' in Douglas D. Evanoff, George G. Kaufman and John R.; LaBrosse (eds), *International Financial Instability: Global Banking and National Regulation* (World Scientific Publishing 2007) 202; Charles Goodhart, 'Concordat' in *The Basel Committee on Banking Supervision: A History of the Early Years 1974-1997* (CUP 2011) 96; Katia D'hulster, 'Cross-border Banking Supervision: Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors' (2012) 13 Journal of Banking Regulation 300

[192] BCBS (n 190).

[193] The Italian authorities bailed out creditors of the parent bank, but declined to bail out the creditors of the Luxembourg subsidiary. The Luxembourg subsidiary, Banco Ambrosiano Holdings, was regarded as a non-bank holding company by the Luxembourg authority and therefore not subject to banking supervision. Moreover, Luxembourg corporate secrecy laws protected it from scrutiny by the Italian authorities. See Herring (n 191) 203; Goodhart (n 191) 104-105.

fied about the soundness of individual banks unless they can examine the totality of each bank's business worldwide through the technique of consolidation.'[194] The 1983 Concordat was tested in case, and again, problems arose in cross-border bank supervision. In 1992, in response to the collapse of the Bank of Credit and Commerce International (BCCI),[195] the BCBS updated the Concordat and issued the *Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishments* as a supplement to the Concordat, reinforcing the consolidated supervision of the home authorities.[196] In addition, the *Core Principles for Effective Banking Supervision* (the Basel Core Principles)[197] sets out guidance for both domestic and international supervision.[198] Regarding cross-border issues, the Core Principles require that 'an essential element of banking supervision is that the supervisor supervises the banking group on a consolidated basis, adequately monitoring and, as appropriate, applying prudential standards to all aspects of the business conducted by the banking group worldwide'[199] and 'home and host supervisors of cross-border banking groups share information and cooperate for effective supervision of the group and group entities, and effective handling of crisis situations. Supervisors require the local operations of foreign banks to be conducted to the same standards as those required of domestic banks.'[200] Accordingly, a 'home country control' model for international bank supervision was established, and home authorities mainly conduct consolidated supervision.[201]

[194] BCBS, 'Principles for the Supervision of Banks' Foreign Establishments' (May 1983). The principles of consolidated supervision is that parent banks and parent supervisory authorities monitor the risk exposure – including an overview of concentrations of risk and of the quality of assets – of the banks or banking groups for which they are responsible, as well as the adequacy of their capital, on the basis of the totality of their business where conducted.

[195] Similar to the Banco Ambrosiano, the BCCI escaped supervision by setting up separate non-bank holding companies in Luxembourg and Grand Cayman, with the result that no single supervisor had the capacity and the will to enforce effective consolidation. See Herring (n 191) 204-2015; Goodhart (n 191) 107-108.

[196] BCBS, 'Minimum Standards for the Supervision of International Banking Group and Their Cross-border Establishments' (July 1992).

[197] The Core Principles were first published in 1997, and was later amended in 2006 and 2012. The series of documents are archived under the topic 'Core Principles' in the BCBS publications.

[198] BCBS, 'Core Principles for Effective Banking Supervision' (September 2012).

[199] Principle 12 Consolidated supervision.

[200] Principle 13 Home-host relationships.

[201] See, e.g. Eva HG Hüpkes, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005); Michael Krimminger, 'Banking in a Changing World: Issues and Questions in the Resolution of Cross-Border Banks' in Douglas D Evanoff, George G Kaufman and John R LaBrosse (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007) 260; Federico Lupo-Pasini, 'The Perils of Home-Country Control' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

For cross-border bank resolution, the home-country control supervision model places the home resolution authority in a leading position to take resolution actions. As Edwards summarised, 'G-SIFIs [global systemically important financial institutions] are significantly regulated by one country on a consolidated basis, making it easier to design a rule that predictably identifies the home country of the corporate group', and this home country can designate a resolution authority to resolve failing banks.[202] Such quick identification forms the jurisdiction rule in cross-border bank resolution, that is, home resolution authority is the primary authority.

An existing example is the EU CIWUD mentioned in Chapter 3, where the home Member State authority is the sole authority to open insolvency proceedings for banks.[203] As explained in the Virgós-Schmit Report, this jurisdiction rule was formulated because of the 'home country control' supervision models.[204] This principle is clearly prescribed in the EU financial regulation,[205] namely, the home country – where authorisation is granted – conducts consolidated supervision.[206] This view is also accepted in the BRRD. Within the EU, the BRRD follows the mechanism prescribed under the CIWUD, adopting the home Member State jurisdiction in parent-branch cases.[207]

When a non-EU third country is involved, this situation becomes more complicated. It is reminded that the terminology used in the EU context and global context is different.[208] Nevertheless, terminology should not be an obstacle to applying the home/host distinction. Instead, one might argue that the EU adopts a 'passport' mechanism, which grants financial service providers access to the whole EU market; however, the 'passport' mechanism is only effective within the EU, but not outside.[209] In practice, the EU Commission may adopt an 'equivalence' test, sparing third-country institutions from additional compliance burden, as long as 'a third country's

[202] Edwards (n 186) 141-143. See also Mevorach (n 59) 252.

[203] Articles 3 and 9 CIWUD. See, e.g. Enrico Galanti, 'The New EC Law on Bank Crisis' (2002) 11 International Insolvency Review 49; Bob Wessels, 'Directive on the Reorganization and Winding-up of Credit Institutions' (2005) American Bankruptcy Institute Journal 34; Bob Wessels, 'Banks in Distress under Rules of European Insolvency Law' (2006) 21 Journal of International Banking Law and Regulation 301; Bob Wessels, 'Commentary on Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions' in Gabriel S. Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017).

[204] Virgós-Schmit Report, para 54.

[205] Recital (25) CRD IV.

[206] Matthias Haentjens and Pierre de Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2015) 101-108.

[207] Article 117 BRRD.

[208] See Chapter 1, §1.3.

[209] Haentjens and de Gioia-Carabellese (n 206) 98-100.

regulatory, supervisory and enforcement regime is equivalent to the corresponding EU framework'.[210] Most core retail banking activities, such as deposit-taking and lending, are not subject to the equivalence test.[211] A separate legal entity must be established for these services in an EU Member State unless national laws specify otherwise. On the other hand, wholesale businesses, such as alternative investment funds, clearing, and investment services for professional clients and eligible counterparts, can be conducted by a third-country institution without establishing a legal entity in the EU.[212] Such equivalence test is different from the passport mechanism within the EU.

The lack of a passport mechanism for non-EU countries does not undermine the application of home country control. The Underpinnings Contact Group in the Bank for International Settlements (BIS) specifically explained the underlying prudential supervision basis for insolvency issues under the CIWUD, in particular, the principle of home-country control, rather than the passport mechanism.[213] Given that the principle of home country control is more widely applicable globally, thanks to the above-mentioned BCBS's international standards,[214] this dissertation therefore argues that a home-country resolution authority should be the leading authority in deciding cross-border bank resolution cases. And host jurisdictions should allow courts or authorities to recognise actions taken by home resolution authorities.[215]

This section also argues that in cases where the COMI/establishment distinction still applies, for instance, in terms of bank holding companies or banks without branches or agencies in the US, the COMI can be interpreted as where home authority is located. Two factors are essential to the identification of COMI, namely: (i) 'where the central administration of the debtor takes place', and (ii) 'which is readily ascertainable by creditors'.[216] For an international bank, the home authority conducts consolidated supervision, the headquarter conducts central administration, and it is ascertainable by third parties – meeting all the requirements for COMI. The COMI identification, therefore, does not constitute an obstacle for identifying home resolution actions and recognising the effects thereof.

[210] See European Parliament, 'Third country equivalence in EU banking and financial regulation', 1 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614495/IPOL_IDA(2018)614495_EN.pdf> accessed 25 February 2020.

[211] Ibid, 3.

[212] Ibid, 3-4.

[213] BIS, 'Insolvency Arrangements and Contract Enforceability' (9 December 2002).

[214] See, e.g. Hüpkes (n 201); Krimminger (n 201) 260; Lupo-Pasini (n 201).

[215] n 186.

[216] MLCBI Guide, para 145. See also Article 3(2) EIR 2015 Recast.

6.4.2.2 Recognition of a secondary proceeding?

Under the CIWUD, insolvency proceedings for a European bank can only be opened in one home Member State; there is no possibility of opening secondary proceedings. At the global level, a single resolution authority is desirable for resolving large international banks, but sometimes a territorial action is inevitably preferred by host authorities. As explained in Chapters 4 and 5, national authorities in the US and China tend to take unilateral actions against branches, ring-fencing the local assets.[217] In the EU, EU authorities also have the power to resolve branches of third-country institutions when there is no third-country action imposed on the branches, or the EU authorities refuse to recognise third-country actions.[218] The question raised in this section is: can a host proceeding have extraterritorial effect by way of being recognised in a third country?

This is a rare case, but not impossible. In a hypothetical situation where a host authority in jurisdiction C takes actions, such as bail-in or temporary stay on early termination rights, on liabilities of the branch, governed by the law of a third jurisdiction (E), such actions need to be effective in this jurisdiction E.[219] Can the court or authority in jurisdiction E accept the effect of this action, even though it is not taken by the home authority in jurisdiction A?

In compliance with the general objective of this dissertation, that is, making resolution actions effective across borders, this dissertation argues that the dual proceedings mechanism in international insolvency law may also apply in cross-border bank resolution cases. As mentioned, allowing the co-existence of main and nonmain/secondary proceedings is the feature of the modified universalism principle, embedded in both the MLCBI and the EIR.[220] Secondary proceedings serve the purpose of balancing the conflict of interests in different jurisdictions, such as the different purposes of laws, for example, rankings of claims, or the different concerns of authorities, for instance, protection of local creditors.[221] A secondary proceeding is based on the concept of 'establishment', which refers to 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.[222] An operating banking branch in jurisdiction C can, therefore, be deemed as an establishment. The third jurisdic-

[217] See Chapter 4, §4.3.1.2.2 and Chapter 5, §5.3.1.2.2.

[218] See Chapter 3, §3.3.1.2.2.

[219] Figure 2.1.

[220] See §6.2.2.1.1. See Article 17 MLCBI; 11 US Code §1517. Also Article 34 EIR 2015 Recast.

[221] Guo (n 111) 492-496.

[222] Article 2(f) MLCBI; 11 US Code §1502(2). See also Article 2(10) EIR 2015 Recast.

tion E should not refuse to recognise the effects of actions in jurisdiction C simply because the parent is not in C. But when there are overlapping proceedings taken in both home and host jurisdictions, this section of this dissertation maintains the primary function of home authority, and third jurisdiction E should recognise home action with priority.

6.4.3 What are the conditions for and effects of recognition of a foreign resolution proceeding?

6.4.3.1 Conditions for recognition of a foreign resolution proceeding

Under the current international insolvency law framework, recognition of a foreign insolvency proceeding is not about recognising a final decision, as is usual case in judgment recognition proceedings. [223] As pointed out by UNCITRAL, this is partly why insolvency proceedings are excluded from judgment recognition regimes.[224] The purpose of recognising an insolvency proceeding is to 'admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down'.[225] The *res judicata* principle bars creditors from initiating repetitious proceedings.[226] Under this principle, a court may 'decline to exercise jurisdiction in favour of a pending foreign proceeding', where 'the foreign tribunal has taken jurisdiction but not yet issued a judgment'.[227] The MLCBI makes it clear that the cross-border insolvency mechanism under the MLCBI intends to 'provide[] the person administrating a foreign insolvency proceeding … with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space"', also it 'allow[s] the courts in the enacting State to determine what coordination among the jurisdictions or other reliefs is warranted for optimal disposition of the insolvency'.[228]

These purposes and effects should also apply to resolution proceedings. The EU and China do not have comprehensive rules on recognition of foreign resolution proceedings. The EU, although with a long Article 94 BRRD, does not provide the conditions for recognition nor the effects of recognition. Simply, Article 94 only touches upon the power allocation between resolution colleges and national resolution authorities. In China, Article 5 of the EBL only requires international agreements or reciprocity, without additional detailed rules. Under US law, Chapter 15 applies. However, certain

[223] For finality, see below §6.4.4.1.1.
[224] n 53.
[225] Virgós-Schmit Report, para 143.
[226] Text to n 102 and n 118.
[227] Dodge (n 100) 2106.
[228] MLCBI Guide, para 3(a).

technical issues need to be addressed. This chapter argues, in this §6.4.3 and the next §6.4.4, that a more comprehensive mechanism mirroring the MLCBI should be in place for cross-border bank resolution. In particular, recognition of a foreign resolution proceeding should allow foreign representatives to take reorganisation actions within the host territory and produce the effects, such as moratorium, in order to facilitate an orderly resolution.

6.4.3.1.1 Formality requirements

As a general rule, according to the MLCBI, an application for recognition made by a foreign representative[229] to a competent court (either judicial or administrative)[230] must be accompanied by (a) '[a] certified copy of the decision commencing the foreign proceedings and appointing the foreign representative'; or (b) '[a] certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative'; or (c) '[i]n the absence of evidence referred to in subparagraph (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative; an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative',[231] as well as 'a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative'.[232]

Similarly, in cross-border bank resolution, foreign representatives should be able to know which documents to file. Particularly, documents should be submitted demonstrating the identity of foreign representatives, either a foreign resolution authority or a foreign administrator appointed,[233] and the actions taken by foreign authorities and the actions sought to be recognised. Formality documents usually should be submitted when active recognition is needed. For passive recognition taking place in litigation, the standard court rules should apply.

6.4.3.1.2 Administrative recognition or judicial recognition?

As summarised in above Section 6.3.1, the administrative nature of resolution should not be an obstacle for recognition. In the EU, the BRRD and the SRMR adopt a special administrative recognition regime, which empowers resolution authorities to directly recognise foreign administrative resolution

[229] Articles 15(1) and 17(1)(b) MLCBI; 11 US Code §§1515(a) and 1517(a)(2).

[230] Article 17(1)(d) MLCBI.

[231] Article 15(2) and (3) MLCBI; 11 US Code §1515(b) and (c).

[232] Article 15(3) MLCBI; 11 US Code §1515(c).

[233] Text to n 241.

actions. While in the US, without such a special administrative mechanism, US judges take up the responsibility to recognise foreign resolution actions, in accordance with Chapter 15 US Bankruptcy Code, which applies to insolvency proceedings of both judicial and administrative nature, including resolution actions. The most uncertain jurisdiction is China, which does not have a comprehensive resolution law and does not have a clear reference on whether foreign resolution actions can be deemed as foreign insolvency proceedings or whether foreign resolution decisions can be deemed as foreign judgements. Without a substantive resolution law, this dissertation urges China to take the same position of the US and make traditional international insolvency law applicable by interpreting resolution under the general framework of insolvency.

Given the different approaches chosen by the three jurisdictions, this dissertation further raises the question of which approach should prevail. There is no concrete answer to this question, as the FSB stands, no preference is made in relation to either administrative recognition or judicial recognition.[234] As long as the approaches can produce the same effect, both administrative recognition and judicial recognition are acceptable. This is a choice that should be made by national legislators and thus are not further discussed in this dissertation.

Regardless of administrative authorities or courts, the principles proposed in this dissertation should be taken into account when making a decision. For administrative authorities, they should learn to weigh different values, such as the need for recognition vis-à-vis protection of local interests. For judges, they may be good at balancing different interests, but they also need additional training on the special characteristics of resolution to enhance their competence to handle financial cases.[235] For example, the US has been training judges with additional financial knowledge to decide on bank resolution actions.

[234] FSB Principles, 11.

[235] See, e.g. Mark Roe and Stephen Adams, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale Journal on Regulation 363; Bruce Grohsgal, 'Case in Brief Against "Chapter 14"' (2014) ABI Journal 44; Mark Roe, 'Don't Bank on Bankruptcy for Banks' (Project Syndicate, 18 October 2017) <https://www.project-syndicate.org/commentary/bank-bankruptcy-regulations-by-mark-roe-2017-10?barrier=accesspaylog> accessed 25 February 2020.

6.4.3.2 *Effects for recognition of a decision to commence a foreign resolution proceeding*

6.4.3.2.1 *The authority of foreign representatives*

Recognition of foreign insolvency proceedings concerns recognition of the authority of foreign representatives,[236] including participation in host proceedings,[237] initiating antecedent transaction avoidance proceedings,[238] and intervening in any proceedings in which the debtor is a party.[239] Comity, which is usually in conjunction with the cooperation principle, provides a legal basis to grant relief to foreign representatives, particularly in the US judicial practices.[240]

When a bank is put into resolution, as in general corporate insolvency proceedings, the previous legal representative no longer serves as the representative of the bank. Instead, a resolution authority could serve, or by appointing a staff, as the representative of the bank,[241] or a third person, a natural person or a legal entity could be appointed to administer the failing bank and thus serve as the new representative.[242] Therefore, these persons can be seen as foreign representatives and be allowed to participate in cross-border resolution cases. For instance, in a recent insurance company resolution case, although not for banks, the Central Bank of Curaçao and St. Maarten (CBCS) appointed a Dutch lawyer as a foreign representative to commence a Chapter 15 case in the US.[243] These foreign representatives are of great importance in bringing Chapter 15 cases and serving the functions mentioned above.[244]

Even in jurisdictions not adopting the MLCBI or other specific international insolvency instruments, foreign representatives can be recognised. A Chinese case, *Sino-Environment Technology Group v Thumb Env-Tech Group* case,[245] discussed above in Chapter 5, demonstrates that in China, a foreign insolvency practitioner can be treated as the representative of a foreign

[236] MLCBI Guide, 29. See also Dicey (n 1) para 30R-100.

[237] Article 13 MLCBI; 11 US Code §1513.

[238] Article 23 MLCBI; 11 US Code §1523.

[239] Article 24 MLCBI; 11 US Code §1524.

[240] *In re Ionica PLC*, 241 B.R. 829, 841 (Bankr. S.D.N.Y. 1999); *In re Arcapita Bank B.S.C. (c)*, 575 B.R. 229, 238 (Bankr. S.D.N.Y. 2007); *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114-115 (Bankr. S.D.N.Y. 2012); *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009); *In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014).

[241] For example, the FDIC as the receiver under Section 204(b) Dodd-Frank Act. 12 US Code §5384(b).

[242] For example, a special manager appointed by Article 35 BRRD.

[243] See the case *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 637 (Bankr. S.D.N.Y. 2018).

[244] Text to n 237 to 239.

[245] *Sino-Environment Technology Group Limited, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling.

company.[246] Similarly, in the *Yukos* case, the Dutch Supreme Court recognised a Russian insolvency practitioner as the representative of a Russian company, even though Dutch law does not have explicit authorisation for such 'recognition'.[247] Such recognition is of additional value when the host jurisdiction does not have a complete resolution law, especially when it lacks a legitimate transfer tool. By allowing the foreign representative to take the position of a company representative, the representative can take actions, such as transferring the assets to a third institution, without the need for a foreign resolution proceeding to be recognised, as long as the host law allows.

6.4.3.2.2 Reliefs (moratorium)

According to the MLCBI, recognition is granted when a court decides that a foreign proceeding is an insolvency proceeding and the foreign proceeding takes place in either the COMI jurisdiction or an establishment jurisdiction.[248] Upon recognition of a foreign main proceeding, (i) '[c]ommencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed'; (ii) '[e]xecution against the debtor's assets is stayed'; and '(iii) [t]he right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended'.[249] As further explained by UNCITRAL, these effects are to 'allow steps to be taken to organise an orderly and fair cross-border insolvency proceeding'.[250]

Additional relief is also provided in the MLCBI. For example, a court may discretionally grant relief of a provisional nature upon application for recognition of a foreign proceeding, including '[s]taying execution against the debtor's assets'; and '[e]ntrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court', for the purpose of 'protect[ing] and preserv[ing] the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation

[246] Tu and Li (n 166).

[247] See ECLI: NL: HR: 2013: BZ5668. See also e.g. Ilya Kokorin and Bob Wessels, 'Recognition of Foreign Insolvency Judgments: The Case of Yukos' (2017) 14 European Company Law 226; Bob Wessels, 'International Insolvency Law and EU Bank Resolution Rules' in M. Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019). It should be noted that in a later judgment in January 2019, the Dutch Supreme Court refused to recognise the Russian bankruptcy proceeding due to public policy exceptions; the latter judgment does not affect the recognition of a foreign representative. See ECLI:NL:HR:2019:54. See also an English summary at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Russian-courts-declaration-of-Yukos-Oil-bankruptcy-not-recognised-in-the-Netherlands--final-judgment.aspx?pk_campaign=rssfeed&pk_medium=rssfeed&pk_keyword=Nieuws-van-de-Hoge-Raad-der-Nederlanden> accessed 25 February 2020.

[248] Article 17 MLCBI; 11 US Code §1517.

[249] Article 20 MLCBI; 11 US Code §1520.

[250] MLCBI Guide, para 178.

or otherwise in jeopardy'.[251] This is because 'relief of a collective nature may be urgently needed before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors'.[252] Other reliefs can also be granted under Article 7 and Article 21, and are at the discretion of the courts.

These reliefs are also needed in resolution proceedings. In particular, stay of proceedings that can be automatically imposed upon recognition of a foreign main proceeding and be discretionally imposed in other situations is an important feature of cross-border insolvency law and fundamental to cross-border cooperation and coordination.[253] It is explained that a stay of proceedings is to 'prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.'[254] Resolution, as a special insolvency proceeding, is a collective proceeding, and therefore a stay of proceedings is essential to ensure a fair resolution by preventing individual debt-collecting actions outside the home resolution proceeding.

6.4.4 What are the conditions for and effects of recognition of a foreign resolution measure?

6.4.4.1 Conditions for recognition of a foreign resolution measure

As explained in Chapter 1 at §1.3, the difference between a resolution proceeding and a resolution measure is that a resolution proceeding refers to process that takes place over a period of time, while a resolution measure is a single decision. In this way, recognition of a resolution measure is more similar to the recognition of a foreign judgment, both of which have their purpose to recognise the effectiveness of a foreign decision that confirms a new creditor-debtor relationship.

6.4.4.1.1 Finality

In many jurisdictions, finality is a prerequisite for judgment recognition and enforcement, thus, in this part, the finality issue is first examined. The finality issue arises in the situation where a judgment 'is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired', and the Judgments Convention[255] of the Hague Conference

[251] Article 19 MLCBI; 11 US Code §1519.

[252] MLCBI Guide, para 172.

[253] See, e.g. *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36; [2015] A.C. 1675 at [54]; *In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr.E.D.N.Y. 2009).

[254] *Assoc. of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982).

[255] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters.

on Private International Law (HCCH) provides that '[r]ecognition or enforcement may be postponed or refused', although '[a] refusal does not prevent a subsequent application for recognition or enforcement of the judgments' .[256] This provision reflects the reality that different jurisdictions have different mechanisms for achieving this finality condition, and this is why the Draft Judgments Convention does provide different options.[257]

In common law jurisdictions, deriving from the English law tradition, the above-mentioned *res judicata* principle leads to a 'final and conclusive' prerequisite for recognition.[258] However, there are differences about whether a decision subject to additional review or appeal could be 'final and conclusive'. The leading English case, *Nouvion v Freeman,* makes the following illustration:

> In order to its receiving effect here, a foreign decree need not to be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the court which pronounced it; and if appealable the English court will only enforce it, subject to conditions which will save the interest of those who have the right of appeal.[259]

In short, in English law, a foreign judgment subject to appeal in the foreign jurisdiction can still be recognised.

However, this principle is interpreted differently in other common law jurisdictions, for example, Hong Kong, where the courts believe that a judgment that can be revisited by the original court rendering the judgment is not 'final and conclusive'.[260]

In China, only a legally effective judgment can be recognised and enforced.[261] There is an opinion stating that this condition is not clearly prescribed in the law.[262] However, it is argued in this Chapter that Article 155 of the Chinese Civil Procedural Law (CPL) stipulates that a judgment or ruling rendered

[256] Article 4(4) Judgments Convention.

[257] For further explanation, see Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018.

[258] Dicey Rule 42-(1)(b). See Dicey (n 1) paras 14-023 ff. See also S.1(2)(a) Foreign Judgments (Reciprocal Enforcement) Act 1933.

[259] *Nouvion v Freeman* (1889) 15 App. Cas. 1, 13. See also *Re McCartney* [1921] 1 Ch. 522, 531-532; *Westfal-Larsen AS v Ikerigi Naviera SA* [1983] 1 All E.R. 382, 389.

[260] See *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*, [1996] S H.K.L.R. 395, 399 (H.C.). See a critical analysis of this approach, Jie Huang, 'Conflicts between Civil Law and Common Law in Judgment Recognition and Enforcement: When is the Finality Dispute Final' (2011) 29 Wis Int'l LJ 70.

[261] Articles 281-282 CPL.

[262] See, e.g. Xiongbing Qiao, 'On the Finality Problems in the Recognition and Enforcement of Foreign Judgments' (2017) Wuhan University International Law Review 70.

by the Supreme Court, a judgment or ruling that cannot be appealed or has not been appealed within the prescribed time limit, shall be considered as a 'legally effective judgment'.[263] Following this definition, judgments subject to appeal cannot be recognised, which is the same position as in Hong Kong.

The EU, consisting of many civil law jurisdictions, does not include a finality test in the Brussels Regulation, although '[t]he court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if …the judgment is challenged in the Member State of origin'.[264] This at least confirms that a judgment under appeal can be stayed from a recognition proceeding.[265]

Another approach is in the United States, where the determination of finality is, as confirmed in the leading case *Paine v Schenectady Insurance*, based on the law of the judgment-rendering state.[266] Put differently, the US law does not explicitly make a choice about finality. As can be seen, although finality is recognised on a wide basis, the determination of finality is quite different around the world.

In terms of insolvency-related judgments, the new MLJ allows a recognition request to be refused on the condition that the judgment is 'the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired'.[267] Judges also have discretionary authority to continue to recognise and enforce the insolvency-related judgments.[268] In short, the MLJ does not restrict recognition simply because a judgment is under review.

This section does not further examine the finality test in judgment recognition, which is beyond the scope of this dissertation. Instead, the following part continues with the discussion of resolution finality. A special feature of resolution, as has been emphasised repetitively throughout this dissertation, is its administrative nature. From an administrative law point of view, resolution decisions rendered by resolution authorities are subject to judicial

[263] Article 155 CPL. See also similar opinion, Huang (n 260).

[264] Article 38(a) Brussels Regulation 2012 Recast.

[265] See more analysis of the law of European countries, see, e.g. Baumgartner (n 13); Tanja Domej, 'Chapter R. 3: Recognition and Enforcement of Judgments (Civil Law)' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

[266] Paine v Schenectady Ins. Co., 11 R.I. 411, 412 (R.I. Sup. Ct. 1876).

[267] Article 10 MLJ.

[268] MLJ Guide, 45.

review.[269] In addition, there may be an administrative review. A particular mechanism under the EU bank resolution regime is the establishment of the Single Resolution Board (SRB) Appeal Panel,[270] which is responsible for reviewing appealable decisions,[271] including assessment of the resolvability and impediments to resolvability of a failing institution,[272] applying simplified obligations in relation to the drafting of resolution plans,[273] determination of the minimum requirement for own funds and eligible liabilities,[274] relevant penalties,[275] determination of the contributions to the administrative expenditure of the Board[276] and extraordinary ex-post contributions,[277] and decisions regarding access to documents in the context of processing of confirmatory applications.[278] Applying resolution tools is not subject to an administrative appeal review.

Whether a resolution measure subject to an appeal review is recognisable is the central question in this part. The UK Supreme Court, in the case *Goldman Sachs v Novo Banco*, expressed the view that the existence of an administrative proceeding against the debtor in Portugal (the jurisdiction where the resolution decision was made) 'does not matter for [recognition in the UK] whether its factual premise was right or wrong'.[279] The judge further explained the rationale underlying Article 85(4) of the BRRD, namely, 'the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision'.[280] As Lord Sumption SCJ states:

[269] Article 85 BRRD; Article 86 SRMR. See, e.g. Jouke T Tegelaar and Matthias Haentjens, 'Judicial Protection in Cross-border Bank Resolution' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019); Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M. Haentjens, Qingjiang Kong and B. Wessels eds, Eleven International Publishing 2017) Chapter 8; Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) Chapter 8.

[270] Article 85 SRMR.

[271] See a general description, Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming) chapter 8.

[272] Article 10(10) SRMR.

[273] Article 11 SRMR.

[274] Article 12(1) SRMR.

[275] Articles 38-41 SRMR.

[276] Article 65(3) SRMR.

[277] Article 71 SRMR.

[278] Article 90(3) SRMR; Article 8 Regulation (EC) No 1049/2001.

[279] *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 [33], on appeal from [2016] EWCA Civ 1092.

[280] Article 84(4)(a) BRRD.

> This is because a banking reconstruction under the [BRRD] requires decisive steps to be taken, often as a matter of urgency, which the authorities in other member states can act on. The scheme of the Directives would be undermined if the acts of a designated national Resolution Authority were open to challenge in every other member state simply because they were open to challenge in the home state.[281]

This chapter argues for the same position. As identified by Lord Sumption in the above citation, one vital feature of resolution is the swift action taken by resolution authorities. A concern related to not recognising a judgment that is not final or conclusive is that the receiving court fears that *res judicata* has not been established and it is not appropriate and efficient to recognise the creditor-debtor relationship that could be altered later. In resolution, it is clearly established that public interest overrides private rights and the creditor-debtor relationship is not the priority concern. The main objective of resolution, instead, is to ensure the implementation of resolution decisions. An example is the EU review system. Resolution measures discussed in the EU context are not subject to administrative appeal but only judicial review. The commencement of a judicial review proceeding does not affect the implementation of resolution measures, namely, 'the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision', and 'the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be agiant public interest'.[282] An appeal process is only an *ex-post* remedy for infringement of private rights, which cannot impede the implementation of resolution actions with a more prominent public interest purpose. In conclusion, host jurisdictions should not refuse to hold home resolution measures effective merely because a proceeding against the decision is brought in the home jurisdiction. Otherwise, it would largely hamper a smooth and expedited resolution.

6.4.4.1.2 Debt discharge

A typical result of insolvency (liquidation and reorganisation) is the reformulation of creditors' rights, mostly in the form of debt discharge. Debt discharge also exists in resolution proceedings, especially in the case of exercising bail-in, where the creditors' rights are affected. As mentioned in Chapter 3, a controversial principle is the English *Gibbs* rule, which stated that '[a] party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled'.[283] The question raised here is whether a foreign court can use foreign law to discharge an English-law-governed debt.

[281] *Goldman Sachs* (n 279) [34].

[282] Article 85(4) BRRD.

[283] Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399 (CA).

Actually, for over a century, the *Gibbs* rule was heavily debated by judges, lawyers and academics. For instance, Fletcher criticised this rule as '[a] doctrine [that] belongs to an age of Anglocentric reasoning which should be consigned to history'.[284] He pointed out 'the contrast between the narrow limits within which a foreign bankruptcy is held to give rise to a discharge of liability, and the unconfined claims made by English law for the effects of a discharge under English bankruptcy proceedings', the latter of which 'is considered to release all liabilities which qualify as bankruptcy debts, irrespective of their applicable law.'[285] Also, Look Chan Ho criticised the *Gibbs* rule as 'philosophically incompatible and practically irreconcilable'.[286] As he noted, debt discharge is a judgment *in rem*, and the original contractual characterisation is changed.[287] He further explained that 'the common law rule hinges on characterising bankruptcy discharge solely as a contractual matter which is thus logically within the scope of the governing law',[288] but he questioned this basis and contended that 'the contractual characterisation of bankruptcy discharge is highly suspect';[289] instead, '[b]ankruptcy discharge is about the post-insolvency treatment of the claimants' pre-insolvency entitlement',[290] and thus 'bankruptcy law is not and cannot be a consensual matter' as the feature of a contract.[291]

In the recent *Re OJSC International Bank of Azerbaijan* case, Henderson LJ maintained the application of the *Gibbs* rule, on the basis that 'it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far.'[292] However, Henderson LJ also acknowledged that, first, 'the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much cross-border cooperation in insolvency matters', and second, 'the rule may be thought to sit rather uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders'.[293]

[284] Fletcher (n 54) para 2.129.

[285] Ibid para 2.127.

[286] Ho (n 54) 169.

[287] Ibid 224-225. See also cases cited, *Local Loan Co v Hunt*, 292 U.S. 234, 241; *Tennessee Student Assistance Corp v Hood*, 541 U.S. 440, 447-448 (2004); *In re Cordray*, 347 B.R. 827, 837 (Bankr. N.D. Tex. 2006).

[288] Ho (n 54) 217.

[289] Ibid.

[290] Ibid 223.

[291] Iibid 224.

[292] *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2018] 12 WLK 286 [29], on appeal from [2018] EWHC 59 (Ch).

[293] Ibid [31].

For debt discharge governed by foreign law, the EU and US take different approaches from the English tradition. In the EIR, 'the effects of insolvency proceedings on current contracts to which the debtor is a party' should be governed by the law of the State of the opening of proceedings (*lex concursus*).[294] The Virgós-Schmit Report explains that

> Insolvency law may have an impact on current contracts. Thus … the liquidator may be empowered to decide either on the performance or termination of the contract. The aim of rules of this kind is to protect the estate from the obligation to perform contracts which may be disadvantageous in these new circumstances.[295]

The US courts have a long-established the history of recognising foreign bankruptcy proceedings related to US-law-governed contracts.[296] It is held by the US courts that '[a] debtor-in-possession or trustee, or by implication a committee whose authority derives from them, is not bound by a forum selection clause'.[297] Moreover, 'every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation of which he voluntarily contracts'.[298]

In the *Goldman Sachs v Novo Banco* case, the issue of the *Gibbs* rule was also examined in resolution proceedings. Lord Sumption JSC considered the *Gibbs* rule applicable to debt discharge in resolution proceedings, although in this particular case, the *Gibbs* rule cannot impede recognition because of the special arrangement of cross-border resolution within the EU under the CIWUD and the BRRD. [299]

This chapter argues, concurring with most academic opinions but contrary to Lord Sumption JSC, that the Gibbs rule should no longer be a guiding principle in insolvency, including resolution, proceedings. Entering into contracts with a foreign bank entails the acknowledgement that the foreign party might enter into resolution that might not be governed by the mutually chosen law. And placing a bank in resolution alteres the previous private contractual relationship. Furthermore, in cross-border resolution cases, only a swift and expedited recognition can facilitate a successful

[294] Article 7(2)(e) EIR.

[295] Virgós-Schmit Report, para 116.

[296] See, e.g. *Canada Southern Railway Co v Gebhard*, 109 U.S. 527 (1883). For cases relating to debt discharge, see, e.g., *Qui Financing LLC v Dellar*, 2013 WL 5568732 (S.D.N.Y.2013).

[297] *In re* Commodore International, Ltd, 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999). See also, e.g. *In re* Iridium Operating LLC, 285 B.R. 822, 837 (S.D.N.Y. 2002); *In re* Brown, 354 B.R. 591, 602 (D.R.I. 2006).

[298] *Canada Southern Railway Co v Gebhard*, 109 U.S. at 537. See also, e.g., *In re Board of Directors of Multicanal SA*, 314 B.R. 486, 501-502 (Bankr. S.D.N.Y. 2004).

[299] *Goldman Sachs* (n 279) [12] (citing *Adams v National Bank of Greece SA* [1961] AC 255).

international resolution, and the application of the *Gibbs* rule obviously would hamper the effectiveness of a home resolution measure abroad, particularly in the UK. Further analysis of the *Gibbs* rule is also provided in Chapter 8 regarding creditors' positions.

6.4.4.2 Effects for recognition of a foreign resolution measure

§2.2.3 in Chapter 2 categorises two types of recognition: active recognition and passive recognition. This section discusses the effects of recognition of foreign resolution measures based on these two different types of recognition. In passive recognition, exemplified by the case where a bail-in tool is applied, a foreign resolution measure does not need to be enforced in the host jurisdiction. Instead, only when a party challenges the resolution measure before a court in the host jurisdiction, would the measure be reviewed by the court. And if the court accepts the decision made by the foreign authority, the court would recognise the effect of the foreign measure. similar situations also exist in normal judgment recognition proceedings. For instance, recognition might be requested by a party to which the foreign judgment is in favour, with the aim of resisting the same proceeding brought by the other party in the receiving jurisdiction.[300] Also, recognition might be requested by a party the foreign judgment is against, with the aim of resisting further claims by the other party brought in a proceeding in the receiving jurisdiction.[301] In passive recognition, most commonly in litigation proceedings, recognition of a foreign resolution measure would confirm the status of the debtor-creditor relationship as a result of the foreign resolution measure.

What is more complicated is the active recognition, exemplified by the case where a transfer tool is applied, where a foreign resolution measure needs to be enforced in the host jurisdiction to be effective, such as transferring the shares of a subsidiary, or transferring the branch, to a third institution or a bridge institution. On the basis that resolution is a type of insolvency proceedings, enforcement of a resolution measure should be under the framework of granting reliefs to foreign insolvency proceedings, especially, recognising and enforcing foreign judgments related to insolvency proceedings. However, recognition of foreign judgments related to insolvency proceedings is a controversial issue in the insolvency field.[302] This is why UNCITRAL has formulated the new MLJ, with the concern that 'inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effec-

[300] Dicey (n 1) para 14-005.

[301] Ibid, para 14-006.

[302] See, e.g. *Rubin v. Eurofinance* (n 98).

tive administration of cross-border insolvencies…'.[303] However, the MLJ is only an international model law and does not prescribe specific enforcement procedures for national legislators.

Before further analysis, different types of enforcement proceedings are summarised. First, a foreign judgment can be enforced as a foreign judgment without additional domestic proceedings. Usually, such enforcement is accompanied by an enforcement order.[304] In many civil law jurisdictions, this is the exequatur procedure;[305] 'exequatur' refers to 'the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad'.[306] Within the EU, there was pressure to abolish this type of exequatur requirement, for the purposes of improving economic efficiency and reducing intermediate costs, and facilitating the free movement of judgments within a single market.[307] The 2012 Brussels I Regulation Recast has officially abolished the exequatur procedure within the Member States.

Second, a foreign judgment must be re-litigated in order to be enforced. For example, Article 431 of the Dutch Civil Procedure Code prescribes that judgments of a foreign court may not be executed within the Netherlands except for the circumstances where there exist international treaties or conventions. [308] Without an international agreement, a claim must be re-litigated to be enforced.[309] Under the English common law rules, the doctrine of obligation also requires the claimant to bring a new action in order to enforce the obligation confirmed in the foreign judgments.[310] The English statutory regimes

[303] Decision of the United Nations Commission on International Trade Law (UNCITRAL), 1080th meeting, 2 July 2018.

[304] For example, China, Article 282 CPL. See also Articles 985-994 Dutch Civil Procedure Code.

[305] See Wessels (n 247). See also MLCBI Guide, paras 7-8; Domej (n 265) 1478; Adrian Briggs, 'Chapter R. 4: Recognition and Enforcement of Judgments (Common Law)' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1483..

[306] European Commission, European Judicial Network in civil and commercial matters, 'Glossary' <http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Exequatur> accessed 25 February 2020.

[307] Gilles Cuniberti and Isabelle Rueda, 'Abolition of Exequatur: Addressing the Commission's Concerns' (2011) 75 Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 286.

[308] D Kokkini-Iatridou and JP Verheul, 'Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' (1987) Netherlands Reports to the Twelfth International Congress of Comparative Law 189.

[309] Ibid. See also 'Enforcement of Foreign Judgments in the Netherlands' (Houthoff) <https://www.houthoff.com/-/media/Houthoff/Publications/mkoppenol/Lexology.pdf?la=en&hash=0BE9FD8030DB73924655928DFD2210607FDFFB0A> accessed 25 February 2020.

[310] Hartley (n 25) 396-397. See also Dicey (n 1) para 14-011; Briggs, *Private International Law in English Courts* (n 1) para 6.209 ff.

adopt a special procedure, that is, a foreign judgment is registered under a national judgment registration system and subsequently enforced as if it were rendered in the receiving jurisdiction.[311]

Back to resolution, similarly, there could be two types of enforcement of foreign resolution measures: direct enforcement, or a supportive measure conducted by host authorities to produce the same effect of the resolution action taken by the home resolution authority.[312] Direct enforcement parallels enforcing foreign judgments without transforming them into domestic judgments; supportive measures mirror enforcing foreign judgments by transforming them into domestic judgments. This dissertation does not favour either approaches, as the choice should be based on national laws.[313] For instance, when transfer tools are applied, national laws are usually applicable because they involve specific arrangements under company law or contract law.

Both approaches should respect the principle that '[p]rocesses for giving effect to foreign resolution actions should be expedited',[314] and should not constitute a major impediment for recognition. Here, both direct enforcement and supportive measures are different from automatic enforcement, as the former two require time. Automatic enforcement is currently only available under the BRRD. There is no substantive data about how long it takes for a foreign resolution action to be effective in the host jurisdiction. Yet, when it is a corporate insolvency proceeding, for instance under Chapter 15, the decision can take months. A potential concern is that this lengthy proceeding may jeopardise the cross-border implementation of resolution actions. Therefore, it is suggested that a more limited timeline should be in place for resolution recognition.

An additional concern is, in the absence of a national resolution regime in the host jurisdiction, how a home resolution measure should be enforced. First, in this situation, it is impossible for host authorities to take supportive measures. Supportive measures are 'conditional on the commencement of domestic resolution proceedings and the resolution authority would be limited to the measures that are available under the domestic regime'.[315] Without a domestic resolution regime, it is impracticable for a host authority to take resolution measures.

[311] 1920 Act, s 9(1); 1933 Act, s 2(1).

[312] The concept of 'supportive measures' is explained by the FSB, see FSB Principles, 6.

[313] See the same position taken in FSB Principles. See also MLJ.

[314] FSB Principles, Principle 5.

[315] Ibid, 6.

Second, whether a relief, in the form of enforcement, could be granted in a direct enforcement proceeding depends on the court's discretion. The US case law confirms that the absence of a domestic rule on a certain relief request is not an obstacle for recognition. The discussion of this issue leads back to the comity principle. Section 1507 of the Bankruptcy Code 'grants the bankruptcy court authority to "provide additional assistance to a foreign representative under this title or under other laws of the United States" provided that such assistance is "consistent with the principles of comity" and satisfies the fairness considerations set forth in subsection (b) thereof'.[316] Based on the comity principle, '[t]he relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical'.[317] In the *Metcalfe and Mansfield* case, a US court granted relief to a Canadian third-party release, even though such relief is not available under the US Bankruptcy Code.[318] However, this kind of relief is not unconditional, as there are other provisions that protect local interest, such as the public policies,[319] and the interests of creditors,[320] and can overrise the relief.

A third solution depends on recognition of the actions taken by the foreign representatives. As long as a foreign representative can be recognised as a legal representative of the debtor, even in jurisdictions having not adopted the MLCBI,[321] the host authority should be able to recognise the legitimacy of these representatives, as well as the actions taken by this representative, on the conditions that local laws in the host jurisdictions are obeyed.

6.5 Concluding remarks

To conclude, this chapter discussed the grounds for recognition of foreign resolution actions. It has been argued that despite usually being excluded from the general framework of judgments recognition and insolvency recognition, resolution, as a special insolvency proceeding, shares the theoretical rationale for recognition of foreign judgment and foreign insolvency proceedings. Specifically, the comity and reciprocity principles pave the road for sovereign compromise and allow a foreign administrative act to be recognised, while the obligation doctrine and *res judicata* theory furthermore provide the basis for barring the initiation of local/host proceedings.

[316] 11 US Code §1507(a) and (b); *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 308, 810 (Bankr. S.D.N.Y. 2018), also *In Re Bear Sterns High-Grande Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

[317] *Metcalfe & Mansfield*, 421 B.R. at 697. See also case cited *In re Bd. of Dirs. of Multicanal S.A.*, 307 B.R. 384, 391 (Bankr. S.D.N.Y. 2004).

[318] *Metcalfe & Mansfiled*, 421 B.R. at 685.

[319] Article 6 MLCBI; 11 US Code §1506. See also below Chapter 7.

[320] Article 22(a) MLCBI; 11 US Code §1522(a). See also below Chapter 8.

[321] See the cases in China and the Netherlands, text to n 245 to 247.

In addition, the (modified) universalism doctrine prevails in international insolvency law and supports making resolution actions effective across borders.

The examination of the selected jurisdictions leads to the conclusion that the recognition procedures in different jurisdictions are quite distinct and overly simplistic. First, reciprocity exists in China but not in the EU and US, and it is argued that reciprocity requirement should be abolished. Second, recognition in the US still relies on Chapter 15 and requires the identification of COMI/establishment, while in the EU and China, the jurisdiction rule is not clear. This chapter argues that jurisdiction should be determined on the basis of home/host distinction. Third, conditions for and effects of recognising continuous resolution proceeding are not clearly prescribed in the selected jurisdictions. This Chapter proposes that formality requirements should be provided; a competent authority, either administrative or judicial, should be designated to process a recognition request; recognition of foreign resolution proceedings should lead to the effects of recognition of foreign representatives and granting of certain reliefs such as moratorium. Fourth, conditions for and effects of recognising immediate resolution measures are not clear either. This chapter continues to propose that a recognition request should not be refused merely because a resolution measure is subject to judicial review, or a resolution measure affects a contract governed by host law; and a recognised foreign resolution measure can be enforced either directly or by taking domestic supportive measures.

7 Financial Stability and Resolution Objectives

7.1 Introduction

This chapter examines financial stability and resolution objectives in cross-border bank resolution. As the Financial Stability Board (FSB) highlighted, '[t]he objectives of an effective resolution regime is to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claim in liquidation'.[1] In cross-border cases, resolution authorities are supposed to 'duly consider the potential impact of its resolution actions on financial stability in other jurisdictions'.[2] In reality, however, national authorities dominate the resolution decision-making process, and thus foreign interests can be overlooked. The same applies to the recognition process in which host authorities are inclined to only consider host interests and decide to refuse to recognise foreign resolution actions. This chapter thus examines, in the context of recognition of foreign resolution actions, how to interpret financial stability and other resolution objectives in the global context.

§7.2 starts with the general theoretical framework discussing financial stability from both domestic and international dimensions. It illustrates the *status quo* of the concept of financial stability, which is a legal objective under national laws but only a 'soft law' goal in international financial regulation. §7.3 compares the financial stability in the selected jurisdictions and generalises that financial stability is a resolution objective in the European Union (EU), the United States (US) and China. None of the jurisdictions takes into account foreign interests. §7.4 further evaluates several critical questions: (i) Why should financial stability be invoked as a reason not to recognise foreign resolution actions? (§7.4.1) (ii) How should local financial stability (and local critical functions) be interpreted? (§7.4.2) (iii) How should national fiscal policies be evaluated? (§7.4.3) National fiscal policies in this section is understood as government spending, especially bail-out measures for saving banks. Finally, §7.5 concludes. The discussion in this chapter applies to all scenarios listed in Figure 2.1.

[1] FSB KA Preamble.

[2] KA 2.3 (iii) and (iv). Also, FSB KA Preamble (v) and (vii).

7.2 Theoretical framework

7.2.1 Financial stability as an overarching objective of international financial regulation

7.2.1.1 Financial stability and rule of law

Financial stability is an overarching objective of financial regulation.[3] From an economic policy perspective, financial stability is a main policy goal. In the selected jurisdictions, financial stability forms a core work theme among the financial regulatory and supervisory authorities and is a key indicator for the health of the whole economy. In 1996, the Bank of England (BOE) took the lead in conducting an overall assessment of the stability of the financial system and issued a Financial Stability Review (FSR).[4] As of 2004, the European Central Bank (ECB) publishes a Financial Stability Review twice a year.[5] The European Commission (EC) also publishes an annual European Financial Stability and Integration Review, as it has done since 2010.[6] In the US, the Dodd-Frank Act established the Financial Stability Oversight Council (FSOC),[7] which monitors the stability of the US financial system and has published an annual report since 2011,[8] and the Office of Financial Research (OFR)[9] has published a Financial Stability Report since 2015.[10] In China, the People's Republic of China (PBOC) has published a Financial Stability Report every year since 2005.[11]

Authorities have also been endeavouring to define financial stability. The World Bank, for example, provides that financial stability is the 'absence of system-wide episodes in which the financial system fails to function

[3] John Armour and others, *Principles of Financial Regulation* (OUP 2016) 64-66, 608-614.

[4] Appearing twice a year, the FSR highlights developments affecting stability of the financial system, and promote the latest thinking on risk, regulation and market institutions. In 2006, to reflect a change in content and aims, the name was changed to the Financial Stability Report. See BOE, 'Historical Financial Stability Report' <http://www.bankofengland.co.uk/archive/Pages/digitalcontent/historicpubs/fsr.aspx> accessed 25 February 2020.

[5] ECB, 'Financial Stability Review' <https://www.ecb.europa.eu/pub/fsr/html/index.en.html> accessed 25 February 2020.

[6] European Commission, 'European Financial Stability and Integration Review (EFSIR)' <https://ec.europa.eu/info/publications/european-financial-stability-and-integration-report-efsir_en> accessed 25 February 2020.

[7] 12 US Code §§5321-5333.

[8] FSOC, 'Studies and Reports' <https://www.treasury.gov/initiatives/fsoc/studies-reports/Pages/default.aspx> accessed 25 February 2020.

[9] 12 US Code §§5341-5346.

[10] OFR, 'Reports' <https://www.financialresearch.gov/reports/> accessed 25 February 2020.

[11] PBOC, 'Financial Stability' <http://www.pbc.gov.cn/english/130736/index.html> accessed 25 February 2020.

(crisis)'.[12] The ECB interprets financial stability as 'a state whereby the build-up of systemic risk is prevented', and 'systemic risk' is described as 'the risk that the provision of necessary financial products and services by the financial system will be impaired to a point where economic growth and welfare may be materially affected.'[13] The PBOC describes financial stability as

> a condition in which the financial system is able to function effectively in all key aspects. Under such a condition, the macro economy operates soundly, monetary and fiscal policies remain prudent and effective, financial ecosystem continues to improve, financial institutions, market and infrastructure are able to fulfil their functions such as resources allocation, risk management and payment and settlement, and more importantly, the financial system is able to function smoothly while facing internal and external shocks.[14]

In the US, there is no one accepted definition of financial stability. However, the FSOC, in the document 'Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies',[15] defines a relevant concept, 'threat to the financial stability of the United States', as 'an impairment of financial intermediation or of financial functioning that would be sufficiently severe to inflict significant damage on the broader economy'.[16] Although without a consensus on its definition, financial stability is usually used to describe a state where the financial system is stable and is resilient enough to withstand market failures or economic turbulences.[17] Looking at financial stability intuitively, Andrew Crockett made the following observation:

> There can be little doubt that financial stability, properly defined, is a 'good thing.' It creates a more favorable environment for savers and investors to make intertemporal contracts, enhances the efficiency of financial intermediation, and helps improve allocation of real resources. It provides a better environment for

[12] World Bank, 'Financial Stability' <http://www.worldbank.org/en/publication/gfdr/gfdr-2016/background/financial-stability> accessed 25 February 2020.

[13] ECB, 'Financial Stability Review' <https://www.ecb.europa.eu/pub/fsr/html/index.en.html> accessed 25 February 2020.

[14] PBOC, *China Financial Stability Report* (2005) 3.

[15] 77 Fed. Reg. 21637.

[16] 12 CFR Part 1310, Appendix A to Part 1310 - Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations, II(a).

[17] Hilary J Allen, 'What Is Financial Stability - The Need for Some Common Language in International Financial Regulation' (2014) 45 Geo J Int'l L 929. For different definitions, see, e.g. Garry J Schinsi, 'Defining Financial Stability' (2004) IMF Working Paper WP/04/187; Oriol Aspachs and others, 'Searching for A Metric for Financial Stability' (2006) LSE Financial Markets Group Special Paper Series No 167; William A Allen and Geoffrey Wood, 'Defining and Achieving Financial Stability' (2006) 2 Journal of Financial Stability 152; Michael D Bordo, 'An Historical Perspective on the Quest for Financial Stability and the Monetary Policy Regime' (2018) Hoover Institution Economics Working Paper 17108.

> the implementation of macroeconomic policy. Instability, on the other hand, can have damaging consequences, from the fiscal costs of bailing out troubled institutions to the real GNP losses associated with banking and currency crises.[18]

The policy goal of financial stability can be understood from two correlated perspectives. On the one hand, financial stability is a public good essential to economic growth.[19] The financial sector plays a fundamental role as an intermediary between borrowers and lenders, which is critical to the modern economy. Financial stability is thus necessary for the continuity of the provision of financial services. Banks, for example, as the primary provider of the payment system – a public good service,[20] can only function properly in a stable financial system. Similarly, financial markets also depend on a stable financial environment in order to deliver services like intermediation as well as risk assessment and management.

On the other hand, financial instability has adverse external effects that would impede the smooth and healthy operation of the financial system or even the whole society. Financial instability is associated with systemic risks and financial crisis,[21] which is detrimental to the financial system and to the fundamental role the financial sector plays in the welfare of the whole society. Disruption to the financial services and financial system would lead to economic decline, including massive insolvencies.

In terms of financial stability and the rule of law, two main generalisations are summarised: (i)financial stability justifies financial regulation, and (ii) financial stability constitutes one of the main objectives of financial law.

First, in relation to the justification of financial regulation, economic analysis regarding government regulation is examined. One lasting debate in the economics literature is about to what extent the governments/central banks should interfere with the economic activities. Starting from Adam Smith and his The Wealth of Nations,[22] it was generally believed that the intervention into economic activities should be restricted, which is the main argument of the classical and neoclassical economists.[23] At the time

[18] Andrew D Crockett, 'Why is Financial Stability a Goal of Public Policy?' (1997) 82 Economic Review 5, 14.

[19] See, e.g. Robert G King and Ross Levine, 'Finance and Growth: Schumpeter Might Be Right' (1993) 108 The Quarterly Journal of Economics 717; Robert G King and Ross Levine, 'Finance, Entrepreneurship and Growth' (1993) 32 Journal of Monetary Economics 513.

[20] See Armour and others (n 3) 59-60.

[21] See Steven L Schwarcz, 'Systemic Risk' (2008) 97 Geo LJ 193.

[22] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Рипол Классик 1817).

[23] See, e.g. Alfred Marshall, *Principles of Economics* (Macmillan 1890); Friedrich A Hayek, *The Road to Serfdom* (The University of Chicago Press 1944); Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press 1962).

of the financial crisis in the 1930s, John Maynard Keynes challenged the traditional view and proposed the new Keynesian Economics, which laid the foundation for government intervention.[24] The debate has been ongoing since then and is expected to continue.

A similar debate exists in the financial sector. A fundamental theory for modern finance is the efficient market hypothesis (EMH), which believes that prices fully reflect available information.[25] In other words, investors can rely on the prices to make reasonable decisions, and regulatory intervention should be limited. However, the EMH is only a hypothetical economic model. A relevant critique is that the underlying assumption of the EMH cannot reflect the reality of financial activities because of the asymmetric information available in the market, and this is when lawyers come into play and make sure there is a legal obligation to disclose valuable information in order to achieve 'relative efficiency'.[26] It should be noted that this does not refute the EMH. Instead, the EMH forms the economic basis for the view that regulatory intervention into the market should be limited, because the market, with sufficient disclosed information guaranteed by supervision, can maintain in an efficient and stable status.

An opposite theory is Minsky's financial instability hypothesis (FIH) based on the Keynes' view and the heterodox assumption that the financial market is inherently unstable.[27] The fundamental propositions of the FIH are: (i) '[c] apitalist market mechanisms cannot lead to a sustained, stable-price, full-equilibrium' and (ii) '[s]erious business cycles are due to financial attributes that are essential to capitalism'.[28] According to Minsky, 'business cycles of history are compounded out of (i) the internal dynamics of capitalist economies, and (ii) the system of interventions and regulations that are designed to keep the economy operating within reasonable bounds'.[29] This theory explicitly mentions government intervention in financial activities.

Another view about the nature of the financial market is that of imperfect knowledge economics (IKE), which considers the financial market as inherently unstable, and investors can only conduct transactions with 'imper-

[24] John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Palgrave Macmilan 1936).

[25] Burton G Malkiel and Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 The Journal of Finance 383.

[26] Ronald J Gilson and Reinier H Kraakman, 'The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549.

[27] Hyman P. Minsky, *Stabilizing an Unstable Economy* (Yale University Press 1986); Hyman P Minsky, 'The Financial Instability Hypothesis' (1992) The Jerome Levy Economics Institute of Bard College Working Paper No 74.

[28] Minsky, *Stabilizing an Unstable Economy* (n 27) 173.

[29] Minsky, 'The Financial Instability Hypothesis' (n 27) 8.

fect knowledge'.[30] Given that 'profit-seeking market participants do not internalize the huge social costs associated with excessive upswings and downswings in these markets', regulation is necessary.[31]

These theories are based on opposite perspectives about whether the financial system is inherently stable. However, they share a common notion that the financial sector needs regulation, pursuing the same policy goal of maintaining a stable financial system. Financial stability concern exists in almost every field of financial regulation. The International Monetary Fund (IMF), for example, organised the 'Law and Financial Stability' conference in 2016, during which a variety of topics were discussed such as bank resolution, central clearing counterparties (CCPs) resolution, macroprudential policy, and corporate debt restructuring and economic recovery.[32] Simply put, financial regulation, as an interference in the free market, is justified on the basis that market failure is inevitable and the maintenance of financial stability needs government intervention.

Second, with regard to the objectives of financial law, financial stability is one of many financial regulation goals, for instance, protection of investors and other users of the financial system, consumer protection in retail finance, market efficiency, competition as well as preventing financial crime.[33] The previous part illustrates that financial stability is a policy goal, and it exists in various policy documents. The economic rationale behind the policy choice, namely, financial stability is a public good, also applies to the law-making process. The lessons learned from the latest crisis even make some scholars set financial stability as a primary goal of financial regulation, which 'is understood to be capable of taking precedence over the others'.[34] The post-crisis financial regulation regime puts financial stability in a higher hierarchy as the response to global crisis prevention. A typical example is the post-crisis establishment of the resolution regime.

[30] Roman Frydman, Ian Duncan and Michael D Goldberg, *Imperfect Knowledge Economics: Exchange Rates and Risk* (Princeton University Press 2007); Roman Frydman and Michael D Goldberg, *Beyond Mechanical Markets: Asset Price Swings, Risk, and the Role of the State* (Princeton University Press 2011).

[31] Frydman and Goldberg (n 30) Chapter 12.

[32] Sean Hagen and Ross Leckow, 'The Role of Law in Preserving Financial Stability' (*IMF Blog*, 1 July 2016). <https://blogs.imf.org/2016/07/01/the-role-of-law-in-preserving-financial-stability/> accessed 25 February 2020. In the following years, the IMF continues to focus on financial stability and rule of law. See IMF, '2018 Law and Financial Stability High-Level Seminar' <https://www.imf.org/en/News/Seminars/Conferences/2018/07/24/2018-seminar-on-law-and-financial-stability> accessed 25 February 2020(titled 'the Rule of Law in a Digital World').

[33] Armour and others (n 3) 61-72.

[34] Armour and others (n 3) 608-609. see also Michael W Taylor, 'Regulatory Reform After the Financial Crisis: Twin Peak Revisited' in Robin Hui Huang and Dirk Schoenmaker (eds), *Institutional Structure of Financial Regulation: Theories and International Experiences* (Routledge 2015) 24-26.

The objective of resolution is mainly financial stability. More importantly, the recent global financial crisis (GFC) demonstrated how the failure of the banking system in one jurisdiction could lead to massive disruption in the global economy. The international dimension of financial stability is thus worth more attention, and is examined below.

7.2.1.2 Financial stability and international financial regulation

Financial stability is not only a national financial regulation objective but also an objective for international financial regulation. Like domestic financial stability, international financial stability is an international or global public good.[35] In other words, 'the benefits of stability are available to all states, and the enjoyment of stability by one state does not reduce its availability to others'.[36] On the one hand, international financial stability provides a stable environment for global economic growth.[37] On the other hand, international financial instability would cause damages to all the nations as a result of contagious effects across borders, exemplified by several banking crises such as Lehman Brothers.[38] In this chapter, international stability refers to the stability of more than one jurisdiction, which includes both regional stability of several countries, and global stability of all the countries across the world.

At the earliest, after the establishment of the Bretton Woods system, the IMF and the World Bank were the primary international financial organisations. However, at that time, financial stability was not a major concern. In the IMF Agreement,[39] only 'exchange stability' is mentioned, which is listed as one of the IMF purposes: 'to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation'.[40] Similarly, Section 1 of Article IV prescribes that 'each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system

[35] See, e.g. Charles Wyplosz, 'International Financial Stability' in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999); Armour and others (n 3) 616; Stephany Griffith-Jones, 'International Financial Stability and Market Efficiency as a Global Public Good' in Inge Kaul and others (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003).

[36] Joel P Trachtman, 'The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Coordination' (2010) 13 Journal of International Economic Law 719, 721; Joel P Trachtman, 'Global Regulation of Finance' in *The Future of International Law Global Government* (CUP 2013) 170.

[37] Ibid.

[38] Ibid. See also, e.g. Barry Eichengreen and Richard Portes, *The Anatomy of Financial Crises* (1987) 2; Hervé Hannoun, *Towards a Global Financial Stability Framework* (BIS 2010); JR Barth, DG Mayes and MW Taylor, 'Safeguarding Global Financial Stability, Overview' in *Handbook of Safeguarding Global Financial Stability* (Elsevier 2013) 226.

[39] Articles of Agreement of the International Monetary Fund.

[40] Article I (iii) of the IMF Agreement.

of exchange rates'.[41] It is understandable that the IMF was established in 1946 with the aim of maintaining a stable exchange/monetary market, without additional consideration of financial stability issues at that time.[42] The World Bank, established in 1944, aims to promote economic growth and end poverty, and there were no stability purposes in any of its sub-organisations' Articles of Agreement, including those of the International Bank For Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).[43] Later, the IMF and World Bank expanded their mandates and jointly initiated the Financial Sector Assessment Program (FSAP) in 1999 to assess financial stability.[44]

The international financial stability discussion emerged alongside the expansion of the international financing system and came to attention against the background of the outburst of financial crises.[45] The leading organisation is the Bank for International Settlements (BIS), which aims to promote global monetary and financial stability,[46] and the Basel Committee on Banking Supervision (BCBS), which is 'the primary standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters' and empowered with a financial stability mandate.[47] The BCBS specifically conducts activities including 'addressing regulatory and supervisory gaps that pose risks to financial stability' as well as 'coordinating and cooperating with other financial sector setters and international bodies, particularly those involved in promoting financial stability'.[48] 'BCBS members are committed to … promote the interests of global financial stability and not solely national interests'.[49] As introduced in the previous chapters, Basel Accord and Basel Concordat are major

[41] Article IV Section 1 of the IMF Agreement.

[42] See, e.g. Douglas W Arner, 'Law, Financial Stability and the International Financial Architecture' in Douglas W Arner (ed), *Financial Stability, Economic Growth, and the Role of Law* (CUP 2009) 54-56; Cornelia Manger-Nestler, 'Impacts of International Law on the Restructuring of the Global Financial System' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 15 (Brill 2011) 178-183.

[43] For all these organizations' Articles of Agreements, see WB, 'Articles of Agreement' <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> accessed 25 February 2020.

[44] IMF, 'Financial Sector Assessment Program (FSAP)' (8 March 2018) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program> accessed 25 February 2020.

[45] See, e.g. Roger Walton Ferguson and others, *International Financial Stability* (Centre for Economic Policy Research 2007) 57-75; Hannoun (n 38) 25; Barth and others (n 38) 226.

[46] BIS, 'The BIS: Promoting Global Monetary and Financial Stability' <https://www.bis.org/about/profile_en.pdf> accessed 25 February 2020.

[47] Article 1 BCBS Charter.

[48] Article 2 BCBS Charter.

[49] Article 5 BCBS Charter.

international standards with a international financial stability objective.[50] The BIS and BCBS jointly created the Financial Stability Institute (FSI) in 2008 to assist supervisors around the world to improve and strengthen their financial systems.[51]

The latest GFC in 2007/2008 led to the creation of the FSB as the successor of the Financial Stability Forum (FSF), which is an enhanced approach to directly regulate financial stability issues. The general task of the FSB is to '[promote] global financial stability by coordinating the development of regulatory, supervisory and other financial sector policies and conducts outreach to non-member countries.'[52] The objectives of the FSB include: '[i]n collaboration with the international financial institutions, the FSB will address vulnerabilities affecting financial systems in the interest of global financial stability';[53] also, '[t]he Association shall have its purpose to promote international financial stability. In particular, it has the purpose to further the objectives stipulated in the FSB Charter in its respective current version'.[54] Based on these statements, the FSB is supposed to be the guardian of 'global financial stability', a term repeated several times in the FSB's mandates.

Despite the continuous emphasis of its importance, international financial stability does not create a mandate for (national) financial regulators, in a way domestic financial stability does. A comprehensive international financial regulation framework is missing, [55] and the present international financial regulation is of 'soft law' nature and cannot impose compulsory obligations on national authorities.[56] This reality makes the regulation of international financial activities, such as cross-border bank resolution, unpredictable.

For one thing, compared to other international regulatory regimes such as international trade law or international investment law, international financial regulation 'does not provide a dispute settlement mechanism, is not administered by international organisations with a specific mandate, does

[50] See also BCBS, 'History of the Basel Committee' (14 April 2018) <https://www.bis.org/bcbs/history.htm?m=3%7C14%7C573%7C76> accessed 25 February 2020.

[51] BIS, 'About the FSI' <https://www.bis.org/fsi/index.htm?m=3%7C17%7C629> accessed 25 February 2020.

[52] FSB, 'What We Do' <http://www.fsb.org/what-we-do/> accessed 25 February 2020.

[53] Article 1 of the Charter of the FSB.

[54] Article 2 of the Articles of Association of the FSB.

[55] See, e.g. Thomas Cottier and Rosa M Lastra, 'The Quest for International Law in Financial Regulation and Monetary Affairs' (2010) 13 Journal of International Economic Law 527; Rosa M Lastra, 'Do We Need a World Financial Organization?' (2014) 17 Journal of International Economic Law 787.

[56] See, e.g. Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (CUP 2015).

not rest on international treaties, or provides a global regulator'.[57] This is because, first, financial regulation is mostly about the exercise of sovereign powers, such as regulation and supervision of financial institutions, which a nation can hardly give to an international organisation; and second, financial matters are mostly national, and it is only until recently that financial matters have become international and increasingly so.[58]

In addition, international financial regulation is mostly 'soft law', for example, the Basel standards[59] and the FSB Key Attributes.[60] 'Soft law' is used to describe 'norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties'.[61] Soft law is the dominant approach for international financial regulation, which may be because of its flexibility and effectiveness. Simply put, jurisdictions are more willing to reach consensus and to follow international recommendations with adequate discretion, rather than being bound by 'hard law' from formal international law sources such as treaties or conventions.[62] National authorities cannot concede their sovereign rights to regulate their national financial institutions and financial market, which are critical to the domestic governance.

[57] Carlo de Stefano, 'Reforming the Governance of International Financial Law in the Era of Post-Globalization' (2017) 20 Journal of International Economic Law 509, 518-519.

[58] For international financial regulation vis-à-vis other fields of international economic law, see, e.g. R Michael Gadbaw, 'Systemic Regulation of Global Trade and Finance: A Tale of Two Systems' (2010) 13 Journal of International Economic Law 551; Chris Brummer, 'Why Soft Law Dominates International Finance - And Not Trade' (2010) 13 Journal of International Economic Law 623; Andrew D Mitchell, Jennifer K Hawkins and Neha Mishra, 'Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 Journal of International Economic Law 787.

[59] See, e.g. Lawrence LC Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision' (1998) 39 Va J int'l L 1; Patrick Van Roy, 'The Impact of the 1988 Basel Accord on Banks' Capital Ratios and Credit Risk-taking: An International Study' (2005) EFMA 2004 Basel Meetings; Daniel K Tarullo, *Banking on Basel: The Future of International Financial Regulation* (Peterson Institute 2008); David S Bieri, 'Financial Stability, the Basel Process and the New Geography of Regulation' (2009) 2 Cambridge Journal of Regions, Economy and Society 303; Thomas Cosimano and Dalia Hakura, 'Bank Behavior in Response to Basel III: A Cross-Country Analysis' (2011) IMF Working Papers 2011/119; Cottier and Lastra (n 55).

[60] Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302, 309-311.

[61] RR Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 The International and Comparative Law Quarterly 549, 549. See also, e.g., Charles Lipson, 'Why are Some International Agreements Informal?' (1991) 45 International Organization 495; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421; Andrew T Guzman and Timothy Meyer, 'Soft Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar 2016)

[62] Crespo (n 60) 309-311. See also Brummer (n 58) 631-632.

However, without an international organisation that can exercise global financial governance and binding hard law international treaties, national financial authorities are inclined to take into account only national interests and not international financial stability.[63] This is particularly the case in financial crisis times as shown in below §7.2.2.2, where national authorities only intend to orderly resolve national banks but often neglect foreign ones. This problem can be explained from the perspective of domestic government accountability. Financial regulators and supervisors are part of national governments and, according to each jurisdiction's constitution, are only accountable to national constituencies.[64] Domestic financial authorities usually have the mandate to be accountable to the legislature/parliament as the elected delegating principal, to the executive branch that appoints and dismisses (head of) financial authorities, to domestic constituencies including financial institutions and financial consumers like investors or depositors; they are also subject to national judicial review which determines their legal liability of their wrongdoings.[65] However, without a clear reference in national law, national financial regulators and supervisors are not burdened with the obligation to duly consider international or foreign financial stability.

The EU is an exception, which has a hard-law supranational 'financial stability' objective. [66] Around two decades ago, the ECB started to realise that '[t]he institutional framework for financial stability in the EU and in the euro area is based on national competence and international co-operation'.[67] This statement was made when national banks dominated financial market, and '[i]n the decentralized financial safety net, each member country's national authorities remain responsible for supervising financial institutions …'.[68] Article 127(5) of the Treaty on the Functioning of the European Union (TFEU) prescribes the financial stability mandate:

> The ESCB [European System of Central Banks] shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.[69]

[63] See §7.2.2.2.

[64] See, e.g. Adam Przeworski, Susan C Stokes and Bernard Manin (eds) *Democracy, Accountability, and Representation* (CUP 1999); Mark Bovens, Robert E Goodin and Thomas Schillemans (eds) *The Oxford Handbook of Public Accountability* (OUP 2014).

[65] See, e.g. Eva Hüpkes, Marc Quintyn, and Michael W. Taylor, 'The Accountability of Financial Sector Supervisors: Principles and Practice' (2005) IMF Working Paper WP/05/51; Julia Black and Stéphane Jacobzone, 'Tools for Regulatory Quality and Financial Sector Regulation: A Cross-Country Perspective' (2009) OECD Working Papers on Public Governance No.16.

[66] See Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer 2017).

[67] ECB, 'Annual Report' (1999) 98. <https://www.ecb.europa.eu/pub/pdf/annrep/ar1999en.pdf?94f617e383ca3cf41a839372bf8c8bb3> accessed 25 February 2020.

[68] Gillian G Garcia and Maria J Nieto, 'Preserving Financial Stability: A Dilemma for the European Union' (2007) 25 Contemporary Economic Policy 444, 446.

[69] Article 127(5) TFEU.

Similarly, the ESCB and ECB Statute[70] echoes Article 127(5) and restates the financial stability purpose of the ESCB.[71] This financial stability mandate is imposed upon the ESCB, which consists of the ECB at the Union level and the central banks at the national level. It is acknowledged, however, that '[a]t the time the Treaties were drafted, financial stability and the potential differences between financial and business cycles were not a primary consideration'.[72] Yves Mersch also explained that the ECB only has a 'price stability' mandate, but not a 'financial stability' mandate; the ECB only has a contributory role in maintaining financial stability.[73] However, these statements do not undermine the objective of financial stability at the European level. In fact, the ECB has constantly put emphasis on the importance of financial stability.[74] The establishment of the Banking Union reinforced the European financial stability objective. The Single Supervisory Mechanism (SSM), as the first pillar,[75] is 'with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member States'.[76] Also, the Capital Requirements Directive (CRD IV) package within the Single Rulebook explicitly repeats the financial stability objective.[77] As shown below, the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR) also contain a European stability objective as well as Member State stability.

Other evidence is a new paragraph added to Article 136 TFEU in 2011, which reads:

> The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.[78]

[70] PROTOCOL (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, OJ C 326/230.

[71] Article 3.3 the ESCB and the ECB Statute.

[72] Yves Mersch, 'Financial Stability and the ECB' (6 September 2018) <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180906.en.html> accessed 25 February 2020.

[73] Ibid.

[74] 'Financial stability and macro-prudential supervision: objectives, instruments and the role of the ECB: Speech by Lucas Papademos, Vice-President of the ECB at the conference "The ECB and Its Watchers XI" Frankfurt' (4 September 2009) <https://www.ecb.europa.eu/press/key/date/2009/html/sp090904_3.en.html> accessed 25 February 2020.

[75] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[76] Article 1 SSMR.

[77] Recitals (50) and (67) CRD IV; Recitals (3), (7), (14), (16), (20), (31), (51), (76) and (123) CRR.

[78] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91/1; Article 136(3) TFEU.

The wording 'to safeguard the stability of the euro area as a whole' confirms the financial stability objective. A direct action related to this Article is the establishment of the European Stability Mechanism (ESM).[79] The purpose of the ESM is 'to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[80] According to this statement, financial stability is the ultimate goal for both the Euro Area as a whole and the Member States. A relevant judgment regarding the legitimacy of such action also states that '… a higher objective, namely maintaining the financial stability of the monetary union' exists.[81] This statement reaffirms the financial stability objective at the Union level.

The EU financial stability objective is based on common constitutional documents and the existence of the internal market, which form both legal and economic foundation for a supranational regulatory approach. Other parts of the world, however, do not share such a close relationship, and it is questionable whether international financial stability can be a common legal term for all the jurisdictions.

7.2.2 Financial stability and resolution objectives

7.2.2.1 Financial stability: an orderly resolution objective

Financial stability is one of the main objectives of the resolution process. According to the FSB, the resolution authority should 'pursue financial stability and ensure continuity of systemically important financial services, and payment, clearing and settlement functions'.[82] The understanding of financial stability in bank resolution cases goes back to the discussions in Chapter 2 on the special treatment of banks under the insolvency law regime. In short, banks differ from other enterprises in that they take upon social functions such as payment and settlement, and the failure of banks

[79] Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the federal Republic of Germany, The Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (ESM Treaty).

[80] Article 3 ESM Treaty.

[81] Judgement of 27 November 2012, *Thomas Pringle v Government of Ireland and others*, C-370/12 EU:C:2012:765, para 135. This case decides on the validity and legitimacy of the above-mentioned Council decision.

[82] KA 2.3(i).

would cause contagion effects such as bank runs.[83] Financial stability, therefore, in the resolution context, aims to act as a guiding objective to avoid contagion effects.[84]

In particular, in terms of the social functions that banks perform, it is important to 'ensure continuity of systemically important financial services, and payment, clearing, and settlement functions'.[85] In 2013, the FSB published the *Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services* (Critical Function Guidance).[86] Critical functions are defined as 'activities performed for third parties where failure would lead to the disruption of services that are vital for the functioning of the real economy and for financial stability due to the banking group's size or market share, external and internal interconnectedness, complexity and cross-border activities'.[87] Accordingly, preserving critical functions is necessary to preserve financial stability. The FSB continued to adopt a three-step assessment for critical functions: (i) 'analysis of the impact of the sudden discontinuance of the function' (impact assessment); (ii) 'evaluation of the market for that function' (supply side analysis); and (iii) 'assessment of the impact of a failure of a specific G-SIFI [globally systemically important financial institution] that performs that function' (firm-specific test).[88] Functions that could be critical are, for example, deposit-taking, lending and loan services, payment, clearing, custody and settlement, wholesale funding markets, and capital markets and investment activities.[89] A relevant term is 'critical shared services', which is defined as 'activities performed within the firm or outsourced to third parties where failure would lead to the inability to perform critical functions and, therefore, to the disruption of functions vital for the functioning of the real economy or for financial stability'.[90] Critical shared services can be finance-related shared services, and operational shared services.[91]

[83] See Chapter 2, §2.1.1.

[84] See, e.g. Michael Schillig, 'Financial Stability, Systemic Risk, and Taxpayers' Money - The Rationale for a Special Resolution Regime' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016); Nikoletta Kleftouri, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017) 18 ERA Forum 263.

[85] FSB KA Preamble (i).

[86] FSB, 'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services' (16 July 2013).

[87] Ibid, 7.

[88] Ibid, 8.

[89] Ibid, 14-30.

[90] Ibid, 7.

[91] Ibid, 31-32.

In addition, resolution is supposed 'not [to] rely on public solvency support and not [to] create an expectation that such support will be available'.[92] This is to avoid bail-out, or 'too-big-to-fail' situations.[93] In order to ensure that the financial system is stable and banks can perform critical functions properly, states have incentives to prevent banks from entering into insolvency proceedings and to provide loans or direct capital injections to failing banks. In other words, bail-out also pursues the financial stability objective. However, this usually leads to moral hazard problems because the bank would reply on national bailout instead of effectively managing risks.[94] Resolution, as a coping mechanism for this phenomenon, requires that losses are allocated to 'firm owners (shareholders) and unsecured and uninsured creditors in a manner that respects the hierarchy of claims'.[95] In general, '[j]urisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms'.[96] However, funding in resolution is not completely prohibited; industry resolution funds, deposit insurance funds, temporary state loan or public ownership is still allowed, under the strict condition that shareholders and creditors have absorbed the losses first.[97]

[92] FSB KA Preamble (iv).

[93] See, e.g. Andrew Ross Sorkin, *Too big to fail: the inside story of how Wall Street and Washington fought to save the financial system--and themselves* (Penguin 2010); David Skeel, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (John Wiley & Sons 2010); Todd A Gormley, Simon Johnson and Changyong Rhee, *Ending "Too Big To Fail" Government Promises vs. Investor Perceptions* (National Bureau of Economic Research 2011); Viral V Acharya, *The Social Value of the Financial Sector Too Big to Fail or Just Too Big?* (Thorsten Beck and Douglas D Evanoff eds, World Scientific Publishing 2013); Andreas Dombret, *Too Big to Fail III Should We Break Up the Banks?* (Patrick S Kenadjian ed, De Gruyter 2015).

[94] FSB, 'Reducing the moral hazard posed by systemically important financial institutions FSB Recommendations and Time Lines' (20 October 2010). See also Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009); Kenneth Scott, George Shultz and John Taylor, *Ending Government Bailouts As We Know Them* (Hoover Institute 2010); Thomas F Huertas, *Safe to Fail* (Palgrave Macmillan 2014); Thomas F Huertas, 'Too Big to Fail: A Policy's Beginning, Middle and End (?)' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015); Franklin Allen and others, 'Moral Hazard and Government Guarantees in the Banking Industry' (2015) 1 Journal of Financial Regulation 30.

[95] FSB KA Preamble (iii).

[96] FSB KA 6.1.

[97] FSB KA 6. See Matthias Haentjens, Bob Wessels and Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming) section 2.3.4.

7.2.2.2 Cross-border resolution context

Resolution is a restructuring process applied to a failing bank's business, and any measure imposed on the bank's foreign establishments is likely to have an impact on foreign jurisdictions.[98] The FSB requires that a resolution authority should 'duly consider the potential impact of its resolution actions on financial stability in other jurisdictions'.[99] Similarly, when it comes to critical functions, '[h]ome supervisors should communicate with relevant host authorities so that the assessment considers all relevant jurisdictions and markets where a G-SIFI is active. The assessments should take into account those functions and services deemed to be critical in host jurisdictions.'[100]

These are two-fold requirements. On the one hand, a home authority, as the active resolution decision-maker, should consider the interests of the other jurisdictions when the resolution actions may have an external effect on those jurisdictions. On the other hand, a host authority, as the passive resolution decision-taker, when deciding not to recognise home resolution actions, should also take into account the negative effects on the home jurisdiction's financial stability, or even global financial stability.

However, as discussed above in §7.2.1.2, the FSB only publishes international recommendations, and the Key Attributes are soft laws that do not have binding effects on national authorities. Also, as specifically shown below in §7.3.2, the selected jurisdictions do not impose legal obligations on their national authorities to consider foreign interests, except for intra-EU situations, and national authorities are only accountable to their domestic public.

Additional two theories can help explain the situation and why national authorities do not have incentives to take into account foreign interests, in particular, foreign financial stability. The first one is Dirk Schoenmaker's 'financial trilemma' theory. Accordingly, three financial policies, namely, financial stability, financial integration and national financial policies, are incompatible: 'any two of the three objectives can be combined but not all three; one has to give'.[101] For instance, national financial policies need to be compromised to preserve financial stability and financial integration,

[98] See, e.g. Federico Lupo-Pasini and Ross P. Buckley, 'International Coordination in Cross-Border Bank Bail-ins: Problems and Prospects' (2015) 16 European Business Organization Law Review 203; Federico Lupo-Pasini, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

[99] KA 2.3(iv).

[100] FSB Critical Functions Guidance, 8.

[101] Dirk Schoenmaker, 'The Financial Trilemma' (2011) 111 Economics Letters 57, 57. See also Dirk Schoenmaker, *Governance of International Banking: The Financial Trilemma* (OUP 2013).

by way of, for example, establishing a supranational regulatory body[102] or concluding a binding burden-sharing agreement.[103] For another example, reversing international banks can be the counter measure in response to the integration of financial markets and the merger of financial institutions.[104] As Schoenmaker identified, the EU has formed joint and shared regulation by establishing the Banking Union (giving up national financial policies), while the UK and Switzerland are downsizing their banks (giving up financial integration).[105] Between the two, empirical research shows that coordination among governments is more efficient, while breaking up international banks might not be feasible.[106] However, it cannot be overlooked that another solution to address the financial trilemma is the sacrifice of financial stability.[107] In other words, when banks want to stay international and national authorities do not waive their authority, inevitably, (international) financial stability is at stake.

Another theory is the financial nationalism doctrine put forward by Lupo-Pasini, who explained why national authorities would opt to maintain current regulatory policies and international banking operations, at the expense of sacrificing international financial stability.[108] Accordingly, contemporary financial regulators are still dominated by national authorities, which are accountable to domestic stability but not international stability.[109] Besides, national regulators only have powers delegated by national laws, but limited influence over international affairs.[110] He also points out the inherent conflict between national financial stability and international financial stability.[111] And, according to his financial nationalism doctrine, international financial stability is in a subordinated position. Both theories can help illustrate why national authorities would put domestic policy goals over international financial stability.

[102] An extreme hypothesis is establishing a global federalism. See Dani Rodrik, 'How Far Will International Economic Integration Go?' (2000) 14 The Journal of Economic Perspectives 177.

[103] Dirk Schoenmaker, 'Is Burden Sharing Needed for International Financial Stability' in Philipp Hartmann, Haizhou Huang and Dirk Schoenmaker (eds), *The Changing Fortunes of Central Banking* (CUP 2018).

[104] Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 90-114.

[105] Dirk Schoenmaker, 'Resolution of International Banks: Can Smaller Countries Cope?' (2018) 21 International Finance 39.

[106] Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 113.

[107] Michael Schillig, 'Global Solutions' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019).

[108] Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

[109] Ibid 41 ff.

[110] Ibid.

[111] See, e.g. Dirk Schoenmaker, 'Firmer Foundations for A Stronger European Banking Union' (2015) Breugel Working Paper 2015/13; Federico Lupo-Pasini, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45.

7.3 Financial stability in the selected jurisdictions

7.3.1 Resolution objectives in domestic resolution

7.3.1.1 Resolution objectives stated in the law

In the EU, the BRRD clearly lists five resolution objectives: (a) 'to ensure the continuity of critical functions'; (b) 'to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline'; (c) 'to protect public funds by minimising reliance on extraordinary public financial support'; (d) 'to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC'; (e) 'to protect client funds and client assets'.[112] The objectives (a)-(c), namely, ensuring the continuity of critical functions, avoiding adverse effect on the financial system, and protecting public funds, all reflect different aspects of the financial stability requirement. The SRMR contains similar resolution objectives, with point (b) clearly stated as 'to avoid significant adverse effects on financial stability'.[113]

In the US, the Dodd-Frank Act is the coping mechanism for the latest GFC. The full title of the Dodd-Frank Act reflects resolution objectives, and it is stated as 'An Act To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.'[114] In addition, Title I of the Dodd-Frank Act is named as 'Financial Stability',[115] with the establishment of the FSOC to monitor the overall financial stability in the US.[116] In relation to Title II Orderly Liquidation Authority, which regulates resolution process in the US, section 204 states that the purpose of the Orderly Liquidation Authority (OLA) is 'to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.'[117] Additional purposes include: (a) 'creditors and shareholders will bear the losses of the financial company'; (b) 'management responsible for the condition of the financial company will not be retained'; and (c) 'the [Federal Deposit Insurance Corporation (FDIC)] and other appropriate agencies will take all steps necessary and appropriate to assure that all parties, including management,

[112] Article 31(2) BRRD.

[113] Article 14(2) SRMR.

[114] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173.

[115] 12 US Code §5311 et seq.

[116] 12 US Code §5321 et seq.

[117] 12 US Code §5384(a).

directors, and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility'.[118]

In China, the current legal regime lacks specific resolution laws. The existing legislation is only about the assumption of control proceedings that can be taken when a bank is in a credit crisis and seriously jeopardises the interests of depositors and other clients.[119] However, a new bank resolution regulation is in the legislative process, and it is expected that the new regulation would follow the FSB's Key Attributes and pursue similar resolution objectives.[120] In addition, the Deposit Insurance Regulation (DIR) in 2015, which closely relates to resolution, also states in the first Article that the purpose of the DIR includes preventing and resolving finance risks and maintaining financial stability.[121] Most recently, the SIFI Guiding Opinions list the resolution objectives, including ensuring a safe, swift and effective resolution, preserving critical businesses and services, and avoiding too-big-to-fail risks.[122] Notably, the SIFI Guiding Opinions emphasise that central banks can only act as lender of last resort, and bail-in and recourse to industry resolution funding should be in a priority position.[123]

As a brief summary, all these jurisdictions acknowledge the importance of resolution, and particularly, its role in preserving financial stability, including safeguarding critical functions; also, these jurisdictions intend to minimise recourse to bailout and to make shareholders and creditors absorb the losses first.

7.3.1.2 Resolution assessment

In the EU, three conditions have to be met in order to take a resolution action:

> (a) the determination that the institution is failing or is likely to fail has been made by the competent authority, after consulting the resolution authority or; subject to the conditions laid down in paragraph 2, by the resolution authority after consulting the competent authority;
> (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the

[118] Ibid.

[119] Article 64 CBL; Article 38 RSBIL.

[120] CBRC, Responses to the Fifth Meeting of the Twelfth NPC Recommendation No 2691 （《对十二届全国人大五次会议第2691号建议答复的函》）, Yin Jian Shen Han [2017] No 105.

[121] Article 1 DIR.

[122] Article 3(2) SIFI Guiding Opinions.

[123] Article 29 SIFI Guiding Opinions.

> write down or conversion of relevant capital instruments in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;
> (c) a resolution action is necessary in the public interest pursuant to paragraph 5.[124]

In sum, in order to put an institution into resolution, (i) the institution has to be failing or likely to fail; (2) there is no alternative solution to prevent the failure; and (3) resolution has to be in the public interest. The third criterion – the public interest test – is further explained in the same provision that

> a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.[125]

In addition, another resolution objective – continuity of critical functions – is also correlated with financial stability consideration. 'Critical functions' is defined as

> activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations.[126]

Drawn from this definition, critical functions reflect the requirements of financial stability. In other words, discontinuity of a financial institution's critical functions may lead to negative effect on the overall financial stability.

The European Banking Authority (EBA) published Guidelines on factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of business tool under Article 39 (4) of Directive 2015/59/EU, which identifies several circumstances where financial stability is at risk, such as the risk of systemic crisis based on the number, size or significance of institutions, or the risk

[124] Article 32(1) BRRD; see also Article 18(1) SRMR.
[125] Article 32(5) BRRD; see also Article 18(2) SRMR.
[126] Article (2)(1)(35) BRRD.

of discontinuance of critical functions.[127] This document is not direct guidance for resolution assessment, although it does help clarify what financial stability is.

The SRMR further elaborates the meaning of 'significant adverse consequence for the financial system' or 'threat to financial stability', which refers to 'a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardise the orderly functioning, efficiency and integrity of the internal market or the economy or the financial system of one or more Member States'.[128] The Single Resolution Board (SRB) published a guiding document on public interest assessment in 2019.[129] This document built on the cases decided by the SRB before, namely, Banco Popular, Banca Popolare di Vicenza and Veneto Banca, and ABLV Group.[130]

Among the four banks which were all determined to be 'failing or likely to fail' and there were no alternative measures to prevent bank failures, only Banco Popular was put into resolution because the resolution was determined to be in the public interest.[131] The public interest test took several steps. The SRB determined that Banco Popular had critical functions including deposit taking, lending to SMEs, and payment and cash services. [132] In addition, resolution could 'avoid significant adverse effects on financial stability' based on the considerations like the size and relevance of the institution – for example, if it is classified as a significant institution of a systemic nature, and the nature of the business, basic financial services provided to individuals and companies as well as potential contagion effects on other banks.[133]

[127] EBA, Guidelines on factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of business tool under Article 39(4) of Directive 2014/59/EU, EBA/GL/2015/04 (7 August 2015).

[128] Article 10(5) SRMR.

[129] SRB, 'SRB Publishes Paper on Public Interest Assessment' (3 July 2019) <https://srb.europa.eu/en/node/799> accessed 25 February 2020.

[130] The information is accessible on the SRB website. See SRB, 'Resolution Cases' <https://srb.europa.eu/en/content/resolution-cases> accessed 25 February 2020.

[131] SRB, 'Banco Popular' <https://srb.europa.eu/en/content/banco-popular> accessed 25 February 2020.

[132] Decision of the Single Resolution Board in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (the "Institutions") with a Legal Entity Identifier: 80H66LPTVDLM0P28XF25, Addressed to FROB (SRB/EES/2017/08), Title 1 (Placing the Institution under Resolution and Conditions for Resolution) Article 4 (Public Interest).

[133] Ibid.

By contrast, the SRB decided that resolution was not warranted for Banca Popolare di Vicenza and Veneto Banca, which were later placed under normal insolvency proceedings.[134] For Banca Popolare di Vicenza, the SRB deemed that the bank did not provide critical functions. [135] Also, the failure of the bank was not considered to 'result in significant adverse effects on financial stability in Italy' on the basis of its relatively small business size, low financial and operational interconnections with other financial institutions as well as its regional, but not national, impact on retail customers and SMEs.[136] In particular, when taking into account the simultaneous failure of Veneto Banca, the SRB further examined the potential effects and concluded that the impact on financial stability would not be significant as a result of low contagion risk, state funding and limited impact on the economy.[137] Similarly, the SRB made the decision that Veneto Banca would not enter into resolution proceedings on the basis of its non-critical function provided to the financial market and the unlikely adverse effect on financial stability given its small size and complexity and low interconnectedness to other financial institutions.[138] For the ABLV Group, including banks in Latvia and Luxembourg, the SRB also found that the banks did not provide critical functions, and their failure would not have a significant adverse impact on financial stability.[139]

Based on these cases, although there is no direct guidance on what should be considered when determining the financial stability status, several factors can be generalised in such determination: size, complexity, interconnectedness with other institutions, financial services provided in relation to deposit-taking, lending and payment and cash services, potential contagion effects and potential areas and number of clients affected, etc. All these factors are correlated and need to be assessed in a holistic way. Only massive disruption to the whole financial system can be deemed as having 'adverse effect on financial stability'.

[134] SRB, 'Banca Popolare di Vicenza and Veneto Banca' <https://srb.europa.eu/en/content/banca-popolare-di-vicenza-veneto-banca> accessed 25 February 2020.

[135] Decision of the Single Resolution Board in its Executive Session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A. (the "Institutions"), with the Legal Entity Identifier V3AFM0G2D3A6E-0QWDG59, addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/12) Article 4 (Public Interest).

[136] Ibid.

[137] Ibid.

[138] Decision of the Single Resolution Board in its Executive Session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A (the "Institutions"), with the Legal Entity Identifier 549300W9STRUCJ2DLU64, addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/11) Article 4 (Public Interest).

[139] Decision of the Single Resolution Board of 23 February 2019 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS (SRB/EES/2018/09); Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank Luxembourg S.A (SRB/EES/2018/10).

In the US, a similar pre-condition test, the so-called 'systemic risk determination', exists, which must be applied in order to commence a resolution proceeding.[140] The Secretary of the Treasury, in consultation with the President, shall take action on the basis of 'systemic risk determination' prescribed in Section 203 of the Dodd-Frank Act:

> (1) the financial company is in default or in danger of default;
> (2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability;
> (3) no viable private sector alternative is available to prevent the default of the financial company;
> (4) any effect on the claims or interest of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action take under this title would have on financial stability in the United States;
> (5) any action under section 5384 of this title would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company;
> (6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and
> (7) the company satisfies the definition of a financial company under section 5381.[141]

The US adopts a similar test to the three-steps test in the BRRD and SRMR,[142] namely, (i) failing or likely to fail, (ii) no alternative option, and (iii) public interest test, only with the exception that the US law requires that convertible debt instruments must be converted first before the commencement of resolution.

Prior to the decision of the Secretary, the FDIC and the Federal Reserve Board (FRB) shall make a written recommendation to the Secretary, which should take into acount similar considerations as thosed mentioned above should be taken into account. [143] After the determination by the Secretary, written notice of recommendations and determinations should be submitted, no later than 24 hours, to 'the Majority Leader and Minority Leader of the Senate, the Speaker and the Minority Leader of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives'.[144] The written notice 'shall consist of a summary of the basis for

[140] 12 US Code §5383.
[141] 12 US Code §5383(b).
[142] Text to n 124.
[143] 12 US Code §5383(a).
[144] 12 US Code §5383(c)(2).

the determination', including: (A) 'the size and financial condition of the covered financial company'; (B) 'the sources of capital and credit support that were available to the covered financial company'; (C) 'the operations of the covered financial company that could have had a significant impact on financial stability, markets, or both'; (D) 'identification of the banks and financial companies which may be able to provide the services offered by the covered financial company'; (E) 'any potential international ramifications of resolution of the covered financial company under other applicable insolvency law'; (F) 'an estimate of the potential effect of the resolution of the covered financial company under other applicable insolvency law on the financial stability of the United States'; (G) 'the potential effect of the appointment of a receiver by the Secretary on consumers'; (H) 'the potential effect of the appointment of a receiver by the Secretary on the financial system, financial markets, and banks and other financial companies'; and (I) 'whether resolution of the covered financial company under other applicable insolvency law would cause banks or other financial companies to experience severe liquidity distress'.[145]

Section 203 on systemic risk determination does not provide further detailed analysis of what constitutes a systemic risk.[146] Other provisions in the same Act may help in understanding the meaning of this term. For example, when the FSOC decides that a nonbank financial company is of systemic risk and thus subject to FRB's prudential supervision, it should consider that 'material financial distress … or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the [company] could pose a threat to the financial stability of the United States'.[147] In addition, the FSOC 'may provide for more stringent regulation of a financial activity', taking into consideration 'the conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice'.[148] These specific factors may help determine the financial stability status of an institution or the potential effect that may be the result from a resolution proceeding.

In sum, both the EU and the US have a similar test as a pre-condition for resolution, and only massive disruption to the whole financial system can be deemed as a necessary criterion for entering into a resolution action. Although neither of the jurisdictions provides a concrete financial stability/ public interest test, it can be inferred that several factors need to be considered, including size, scale, complexity, nature, interconnectedness, etc. Only when the potential impact exceeds a certain level can the authority determine that financial stability is at stake. Given that China does not have

[145] 12 US Code §5383(c)(2).

[146] 12 US Code §5383.

[147] 12 US Code §5323(a)(1) and (b)(1).

[148] 12 US Code §5330(a).

a comprehensive resolution law, at least for now, there is no concrete resolution assessment under Chinese law, only with an abstract provision that resolution takes place when a financial institution is at significant risk.[149]

7.3.2 Foreign interest consideration in cross-border cases

As mentioned above, the current international financial organisations cannot impose hard-law international legal obligations on a resolution authority to duly take into account foreign interests. This is an issue that purely relies on national laws. This section continues to study each jurisdiction's national laws with regard to foreign interests and foreign financial stability when making resolution decisions.

The EU legal framework is quite complicated because of the dual EU/ Member State relationship. The intra-EU relationship can be divided into three different levels. First, the Union resolution authority, the SRB, should consider the financial stability of the Member States when making decisions.[150] Second, the national resolution authority needs to take into consideration the financial stability of the Union as a whole.[151] Third, the national resolution authority needs to consider the financial stability of the other Member States. For instance, in the group resolution, group-level authority should take into account the financial stability of the other Member States concerned,[152] and the dissenting Member State departing from the group resolution plan should duly consider the financial stability in the other Member States.[153] Although financial stability in the EU has supranational dimensions, the BRRD and SRMR only regulate the inter-Member States relationship and Member State-Union relationship. In other words, outside the EU when third countries like the US and China are involved, there is no legal obligation or legal liability for either the Union or the national (Member State) authorities to duly consider the financial stability of third countries.

In the US, financial stability is a major concern for US resolution authorities, but only limited to the territory of the United States. The purpose of the OLA is clearly stated as that it only addresses the significant risk to 'the financial stability of the United States'.[154] The systemic risk determination prescribed in Section 203 of the Dodd-Frank Act also makes this point

[149] Article 29 SIFI Guiding Opinions.

[150] Recitals (39) and (55); Article 6(3) SRMR.

[151] Effective resolution is considered to be an essential element of completing the internal market, and Member States are required to contribute to the financial stability of the whole Union financial market. Recital (108) BRRD.

[152] Recitals (97) (132) BRRD; Articles 87(e) -(g) and (k), 88(5)(e) and 92(2)(b) BRRD.

[153] Recitals (99), Articles 91(8) and 92(4) BRRD.

[154] See text to n 117.

clear,[155] that is, among the conditions the Secretary must consider, the financial stability test appearing in conditions (2) and (4) is limited to 'financial stability in the United States'.[156]

Another scenario relates to funding in resolution. When the FDIC deems necessary, it can make available of resolution funds, subject to the conditions listed in Section 206 of the Dodd-Frank Act,[157] which reads that the FDIC shall (i) 'determine that such action is necessary for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company'; (ii) 'ensure that the shareholders of a covered financial company do not receive payment until after all other claims and the Fund are fully paid'; (iii) ensure that unsecured creditors bear losses in accordance with the priority of claim provisions in section 5390 of this title'; (iv) 'ensure that management responsible for the failed condition of the covered financial company is removed (if such management has not already been removed at the time at which the Corporation is appointed receiver)'; (v) 'ensure that the members of the board of directors (or body performing similar functions) responsible for the failed condition of the covered financial company are removed, if such members have not already been removed at the time the Corporation is appointed as receiver'; and (vi) 'not take an equity interest in or become a shareholder of any covered financial company or any covered subsidiary'.[158] As can be seen, condition (i) makes it explicit that the consideration of financial stability is limited to that of the US but not foreign jurisdictions, and the intention of providing government funding is only to protect US interests.

Among the duties and powers of the FDIC as receiver, two provisions relate to international cooperation. For one, the FDIC should 'coordinate, to the maximum extent possible, with the appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations in a country other than the United States'.[159] For another, the FDIC may request assistance from foreign financial authorities and provide assistance to foreign financial authorities, or 'maintain an office to coordinate foreign investigations or investigations on behalf of foreign financial authorities'.[160] The wording, however, does not show any intent of the legislators to impose legal responsibilities on the FDIC to duly consider foreign interests when making resolution decisions, let alone foreign financial stability.

[155] See text to n 141.

[156] 12 US Code §5383(b)(2) and (4).

[157] 12 US Code §5384(d).

[158] 12 US Code §5386.

[159] 12 US Code §5390(a)(1)(N).

[160] 12 US Code §5390(k).

In China, when an assumption of control – the Chinese version of resolution – is taken, there is no mention of the stability of the Chinese market, let alone foreign financial stability.[161] The SIFI Guiding Opinions, nevertheless, mention maintaining financial stability and preserving critical functions, but only in the domestic context and without considering foreign interest. The latest DIR is presumed to focus solely on Chinese financial stability, as indicated by the scope of the Regulation, which is limited to covered financial institutions within the territory of China, excluding foreign branches of Chinese institutions and Chinese branches of foreign institutions.[162]

An interesting exception is the UK, where the resolution authority, the Bank of England (BOE), is required to 'have regard to … the potential effect … on the financial stability of third countries (particularly those third countries in which any member of that group is operating)'.[163] However, for other jurisdictions, no legal responsibility is imposed on home authorities to take into account host interests.

7.4 Comparison and evaluation

7.4.1 Why should financial stability be invoked as a reason not to recognise foreign resolution actions?

The FSB considers any adverse effect on local financial stability as one of the reasons not to recognise foreign resolution actions.[164] The FSB further enumerates several circumstances that can be considered as having adverse effect on local financial stability, such as 'the measure would affect the continuity of economic functions that are critical to the local financial system' or ' inconsistent with or undermine the implementation of local resolution actions undertaken or planned by the host authority'.[165] Similarly, the BRRD and SRMR make it explicit that recognition of third-country resolution actions cannot have adverse effect on EU financial stability.[166] In relation to the US and China, even if there is no specific mention of financial stability as a reason for refusal of recognition, there is the public policy exception embedded in the legislation.[167] This first question attempts to explore the rationale behind such a mechanism. The answer seems to be straightforward. A simple logic follows that the home authority does not need to take

[161] See text to n 119.

[162] Article 3 DIR.

[163] S. 7A(2)(c) Banking Act 2009 (Effect on other group members, financial stability in EU etc). Kleftouri (n 84) 206.

[164] FSB Principles, 12.

[165] Ibid.

[166] Article 95(a) BRRD; Article 33(3)(a) SRMR.

[167] 11 US CODE §1506; Article 5 EBL.

into account the host jurisdiction's interest, thus the host authority should be able to invoke the financial stability exception in a case where the host interest is at stake.

It is desirable in cross-border bank resolution that home authorities should have regard to foreign stability. The FSB also emphasised that '[w]here a resolution authority takes discretionary national action it should consider the impact on *financial stability in other jurisdictions*.'[168] However, as stated above, the present international financial regulation does not prescribe international financial stability obligations. This is because, simply put, for one thing, a comprehensive international financial regulation framework is missing, and there is no internatioanl financial organisation that conducts global financial governance. For another, the current international financial regulation is of a 'soft law' nature and cannot impose compulsory obligations on national authorities.

One may argue that even if there is no international obligation for national authorities to duly consider international financial stability, there is no legal obstacle to incorporate international financial stability into national laws. Jurisdictions can still choose to impose obligations to consider foreign interests. For example, as mentioned above, the UK legislation – the Banking Act 2009 duly considers financial stability of other jurisdictions, including the EU, the European Economic Area (EEA) and third countries. However, such an approach is not widely taken in other countries. Even the EU Member States, which are burdened with the obligation to consider the financial staiblity of other EU Member States, do not need to consider that of non-EU third-countries. Similarly, the US and China do not concern themselves about foreign jurisdictions. [169] From the legal liability perspective, national resolution authorities are only accountable to domestic constituencies, and they have no incentives to take into account foreign interests.

A few cases also demonstrated that in the times of crisis, national authorities would not consider foreign interests. A representative example is the insolvency of Lehman Brothers. In this process, the US authorities decided to put the global holding company (Lehman Brothers Holding Inc, LBH) under the Bankruptcy Code, leading to the follow-up crisis, including the failure of its subsidiary in the UK (Lehman Brothers International Europe, LBIE), although the US authorities did support the US broker-dealer subsidiary

[168] FSB KA 7.2 (emphasis added).

[169] US-China hegemony, see John Eatwell, Jean-Baptiste Gossé and Kern Alexander, 'Financial Markets and International Regulation' in John Eatwell, Terry McKinley and Pascal Petit (eds), *Challenges for Europe in the World, 2030* (Routledge). See also Schoenmaker (n 103) 213.

(Lehman Brothers Inc) before it was acquired by Barclays.[170] It is suspected that US authorities did not intend to save Lehman's businesses outside the US.

Another case is the failure of several Icelandic banks. In this process, only the deposits of local Icelandic depositors were transferred to a new bank and fully covered by state funding when the Icelandic national deposit insurance scheme was not sufficient; depositors in the UK and the Netherlands were not reimbursed by the Iceland government.[171] A case, *The European Free Trade Area (EFTA) Surveillance Authority v Iceland*, was later brought before the EFTA Court, and the court concurred with Iceland and maintained that Iceland did not have a legal obligation to pay to foreign depositors.[172] Similarly, in the process of resolving the Fortis Group, a financial conglomerate with presence in Belgium, the Netherlands and Luxembourg, national authorities took unilateral actions within national borders, including nationalisation measures, even though authorities in these three jurisdictions initially had a joint plan.[173] As the BCBS concluded, '[t]he Fortis case illustrates the tension between the cross-border nature of a group and the domestic focus of national frameworks and responsibilities for crisis management'.[174]

The above-mentioned financial trilemma and financial nationalism theories explain why authorities do not have incentives to consider foreign interests. And when the host jurisdiction is required to recognise foreign resolution actions and its own interest is not adequately protected, it seems reasonable that it should have the authority to refuse to recognise foreign resolution actions.

[170] Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 263-264.

[171] Regarding the Icelandic financial crisis, see, e.g. BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010) 12-14; Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010) 51-53; IMF, 'Cross-border Bank Resolution: Recent Developments' (June 2014) 30-31.

[172] Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013, paras 117-185.

[173] See, e.g. BCBS (n 171) 10-11; Claessens and others (n 171) 49-50; IMF (n 171) 27-29; Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 156.

[174] BCBS, ibid, 11.

7.4.2 How should local financial stability (and local critical functions) be interpreted?

The next question examines the method used to interpret financial stability, as well as critical functions. As shown in §7.2.1.1, financial stability is a complex term without a consensus definition. The analysis is usually conducted on a case-by-case analysis. Bornemann pointed out that any guideline for identifying circumstances where financial stability is at risk should be supplemented by a 'broad, open and unspecific catch-all provision' in preparation for various situations and possibly unprecedented cases.[175] Given the complexity in interpreting financial stability, this section only proposes a general principle that should be applied: a narrow interpretation method.

There are three reasons. First, the financial stability exception falls under the public policy exception, which should be narrowly interpreted under international insolvency law. Article 6 of the Model Law on Cross-border Insolvency (MLCBI) states that '[n]othing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State'.[176] The MLCBI Guide further explains that 'the public policy exception is construed as being restricted to fundamental principles of law, in particular, constitutional guarantees', and it 'should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State'.[177] This narrow interpretation has been applied across the world.[178]

The selected jurisdictions all accept that the public policy exception can only be invoked under exceptional circumstances. For example, in the EU, Article 33 of the European Insolvency Regulation (EIR) prescribes the public policy exception.[179] The Virgós-Schmit Report explains that '[p]ublic policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.'[180] The *Eurofood* case extensively analysed the application of this Article, and stated that recourse to the public policy exception should be 'reserved for exceptional cases', only when recognition and enforcement 'would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle'.[181]

[175] Alexander Bornemann, 'Resolution Regimes for Financial Institutions and the Rule of Law' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution A Conference Book* (Eleven International Publishing 2014), 100.

[176] Article 6 MLCBI.

[177] MLCBI, paras 102 and 104.

[178] See H.R.Rep. No. 109-31, at 109 (2005), as *reprinted in* 2005 U.S.C.C.A.N. 88, 172.

[179] Article 33 EIR 2015 Recast. Also Article 26 EIR 2000.

[180] Virgós-Schmit Report, para 206.

[181] Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, paras 62-63.

In the US, after the adoption the MLCBI in its Bankruptcy Code Chapter 15, the narrow interpretation method advocated was acknowledged and confirmed in various cases.[182] The *Qimonda* case extensively analyses the application of this public policy exception and generalises three principles: (1) '[t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception'; (2) '[d]eference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections'; (3) [a]n action should not be taken in Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding'.[183]

In China, recognition could be refused based on 'sovereignty and security of the State or public interest', and 'the legitimate rights and interests of the creditors'.[184] These are believed to be the Chinese version of the illustration of the public policy exception.[185] However, no case can indicate Chinese courts' attitude towards the interpretation of public policy in international insolvency cases, as the request is often denied as a result of lack of international agreement or reciprocity. In a broader area of recognition of foreign civil and commercial judgements, no case was found that refused a

[182] See, e.g., *In re* Tri-Cont'l Exch. Ltd. 349 B.R. 627 (Bankr. E.D. Cal. 2006); *In re* Ran, 607 F.3d 1017 (5th Cir. 2010); *In re* British American Isle of Venice (BVI), Ltd., 441 B.R. 317 (Bankr. S.D. Fla. 2010); *In re* Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88 (S.D. N.Y. 2012); *In re Vitro SAB de CV*, 701 F.3d 1031 (5th Cir. 2012); *In re* Irish Bank Resolution Corporation Ltd., 538 B.R. 692 (D. Del. 2015); *In re* Petroforte Brasileiro de Petroleo Ltda., 542 B.R. 899 (Bankr. S.D. Fla. 2015); *In re* Creative Finance Ltd., 543 B.R. 498 (Bankr. S.D. N.Y. 2016); *In re* Oi Brasil Holdings Coöperatief U.A., 578 B.R. 169 (Bankr. S.D. N.Y. 2017). For literature, see, e.g. Scott C Mund, '11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 Wisconsin International Law Journal 325; Elizabeth Buckel, 'Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 Georgetown Journal of International Law 1281; Michael A Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38 Fordham International Law Journal 1587.

[183] *In re* Qimonda AG, 433 B.R. 547 (E.D.Va. 2010), 570. Regarding the first principle, see also, e.g. *In re* British American Isle of Venice (BVI), Ltd., 441 B.R. 317 (Bankr.S.D.Fla. 2010); *In re* Qimonda AG, 462 B.R. 165 (Bankr.E.D.Va. 2011); *In re* Rede Energia S.A., 515 B.R. 69 (Bankr.S.D.N.Y. 2014). Regarding the second and third principle, see also, e.g., *In re* Qimonda AG, 462 B.R. 165 (Bankr.E.D.Va. 2011); *In re* ABC Learning Ctrs., 728 F.3d (3d Cir. 2013); *In re* Ashapura Minechem Ltd., 480 B.R. 129 (S.D.N.Y. 2012); *In re* Manley Toys Limited, 580 B.R. 632 (Bankr.D.N.J. 2018).

[184] Article 5 EBL.

[185] See, e.g. X Gong, 'A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation' (Leiden University 2016).

recognition request by invoking public policy as of March 2018.[186] However, the academic community generally confirms that public policy should be narrowly applied only in exceptional cases.[187]

Second, various researchers show that a global resolution is needed to achieve the optimal goal of maintaining financial stability.[188] Therefore, resolution actions should be effective across borders, and host authorities should recognise home resolution actions. In this context, financial stability should not be an obstacle to a global resolution strategy, at least financial stability should not be interpreted in a way of impeding the implementation of global resolution. Local financial stability, including local critical functions, in host jurisdictions, should be interpreted narrowly. This corresponds to the second layer of the FSB's requirement, as explained in §7.2.2.2, that host authorities should take into account foreign stability and uphold a global resolution.

Some might ask, why, since home authorities do not consider host interests, should host authorities consider home interests? There are three different perspectives. For one, a home jurisdiction's law that does not impose legal obligations for home authorities to take into account foreign interests does not mean that home authorities are prohibited from doing so, and there is no legal liablity for home authorities when they also protect host interests unless such actions infringe home jurisdictions' domestic interests. It is still possible that a home authority does consider host interests, and host stability is protected by home resolution actions. Under this circumstance, host authorities do not need to invoke public policy exceptions. In other words, public policy exceptions do not need to be invoked whenever host interests are missing in the home jurisdictions' black-letter laws.

[186] Li Liu, 'The Reason and Rule for Recognition and Enforcement of Court Judgments among the 'One Belt and One Road' Countries "一带一路" 国家间法院判决承认与执行的理据与规则' (2018) Journal of Law Application 40, 45.

[187] See, e.g. Xiaoli Gao, 'On the Application of Public Policy in Private International Law 论国际私法上的公共政策之运用' (University of International Business and Economics 2005); Decai Ma, 'A Study of the Order Public in Private International Law 国际私法中的公共秩序研究' (Wuhan University 2010); Dan Ye, *On the Public Policy in Chinese Foreign Judicial Practice Relating to Civil and Commercial Matters* (Law Press 2012).

[188] See Chapter 6 at §6.2.3.1. See, e.g. Thomas F Huertas, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series; Simon Gleeson, 'The Importance of Group Resolution' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Charles Randell, 'Group Resolution under the EU Resolution Directive' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Thomas F Huertas, 'Safe to Fail' in *Safe to Fail* (Palgrave Macmillan 2014).

For another, the new resolution regime has the unintended external effects of protecting foreign host stability, and the need to invoke the host stability exception to protect host interest is minimised. In the traditional corporate insolvency law proceedings, national authorities intend to take unilateral actions for the maximisation of debtors' assets within national borders; while in the traditional bail-out cases, national authorities intend to take unilateral actions for the minimisation of government spending.[189] Under the new resolution regime, however, losses are borne by shareholders and creditors first, instead of by recourse to taxpayers' money, and resolution authorities would have fewer political costs of putting forward a global resolution strategy.[190] The loss absorption at the parent level would benefit both home and host entities, even if home authorities do not have incentives to protect host entities, and the maintenance of host financial systems is only a manifest of (unintended) externalities of home resolution actions.[191] In other words, host financial stability may also be preserved despite the lack of incentives of home authorities in resolution, which helps reinforce the argument that the financial stability exception should be limited.

Last but not least, the intentions and actions of home resolution authorities should not affect the will and action of host resolution authorities. Even though home resolution authorities may have no incentives to protect host interests, it does not mean that host resolution authorities should take retaliatory actions to actively hamper a global resolution. Narrow interpretation does not equal to prohibition. Local interest can always be protected by invoking public policy exceptions where the interest would otherwise be severely undermined.

The narrow interpretation of financial stability also exists in the public interest test when authorities are deciding to put a bank under resolution. This is the third argument that financial stability should apply a narrow interpretation, and only when massive disruption to the whole financial system occurs. As confirmed in §7.3.1.2, the public interest test is required in the EU and US resolution decisions, and resolution decisions only take effect when massive disruption to the financial system is threatened, namely, public interest is at stake.[192] Following a consistent interpretation method, invoking financial stability to refuse to recognise foreign resolution actions can only occur when massive disruption to the financial system is at risk. This also reflects the narrow interpretation principle.

[189] Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 492-493. See also below §7.4.3.1.

[190] Lupo-Pasini (n 108) 109-111. See also Lupo-Pasini and Buckley (n 98). Lupo-Pasini also acknowledges that other problems may exist in cross-border bail-in, for example, incoherence with national insolvency law. These problems are discussed in Chapter 8.

[191] Ibid.

[192] See §7.3.1.2.

A specific example concerns safe harbour provisions, which allow financial counterparties to exercise early termination rights in normal company insolvency proceedings.[193] The rationale behind such a mechanism is that, without legitimate tools to exercise early termination rights, financial counterparties are vulnerable to financial risks, which may lead to larger contagious effects on markets.[194] However, in the new resolution regime, financial counterparties are also restricted to early termination rights, namely, disapplying safe harbour provisions.[195] A hypothetical scenario is: if a home resolution authority adopts actions to restrict early termination rights, can a host authority refuse to recognise home actions on the mere basis that such action is contradictory to safe harbour provisions and thus jeopardises host financial stability, provided safe harbour provisions are available in the host law? Following the reasons listed above, this dissertation proposes that the financial stability exception should not be invoked simply because of the legal text differences; instead, a detailed analysis for the impact on the host jurisdiction should be conducted. An additional argument is provided in this specific situation: the GFC led to questions about the financial stability objective of safe harbour provisions, and new observation showed that massive termination of financial contracts disrupts an orderly resolution of a bank and can adversely destabilise the market.[196] Restrictions of safe harbour provisions, along with other resolution actions, are for the purpose of financial stability, and it would be absurd to invoke the financial stability exception to undermine a stability-oriented resolution action.

7.4.3 How should national fiscal policies be evaluated?

Both the FSB and the EU list material fiscal policies as a reason to refuse to recognise foreign resolution actions.[197] What are national fiscal policies? As Kleftouri identified, '[t]he fiscal impact and systemic implications will potentially be caused by the need to use public funds in the form of the resolution and deposit guarantee funds, and even as a backstop for those funds.'[198] This dissertation refers to national fiscal policies as government spending. This section discusses two scenarios: national bail-out and funding in resolution.

[193] See, for example, sections 362, 365(e) and 547 of the US Bankruptcy Code. See Chapter 4 n 87 to n 89.

[194] For literature, see Chapter 2 n 103.

[195] For example, in the EU, Articles 69-71 BRRD; in the US, Dodd-Frank Act, 12 US Code §5390(c)(10)(B)(i), also 12 US Code §1821(e)(10)(B)(i). See also Chapter 8, §8.4.2.3.

[196] See Chapter 2, text to n 105 to n 108.

[197] FSB Principles, 12. Article 95(d) BRRD; Article 33(3)(c) SRMR.

[198] Kleftouri (n 84) 268.

7.4.3.1 National bail-out

A premise is first clarified: national bailout is not entirely prohibited in resolution. Although the previous illustrations demonstrate that the new resolution regime intends to minimise the usage of taxpayers' money and attempts to resolve the moral hazard problem, the FSB acknowledges the legitimacy of using temporary public ownership by the government,[199] commonly known as nationalisation, or in industry-jargon, 'bail-out', which was a frequently applied tool during the period where no resolution powers were in place.[200] In the EU, for example, there are two government financial stabilisation tools:[201] (i) public equity support tool;[202] and (ii) temporary public ownership tool.[203] As the relevant BRRD provision says: 'The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability'. [204] To be more specific, the public equity support tool enables a Member State to participate in the recapitalisation by providing capital in exchange for capital instruments.[205] The temporary public ownership tool empowers a Member State to transfer shares to 'a nominee of the Member State' or 'a company wholly owned by the Member State'.[206] By comparison, the US Dodd-Frank prohibits the FDIC to take an equity interest in or become a shareholder of a failing bank.[207] In China, given most Chinese banks are state-owned, national bail-out in the form of equity holding is not a controversial issue.

In cross-border cases, national authorities prefer a territorial approach in national bail-out. Home authorities generally lack incentives to cooperate with host authorities, given that they are only accountable for their domestic financial stability.[208] A typical example is the resolution of an Icelandic bank – Landsbanki. As mentioned above, in this process, only the deposits of local Icelandic depositors were transferred to a new bank and fully covered by state funding when the Icelandic national deposit insurance scheme was not sufficient; depositors in the UK and the Netherlands

[199] KA 6.5.

[200] See, e.g. Čihák and Nier (n 94).

[201] Article 56 BRRD.

[202] Article 57 BRRD.

[203] Article 58 BRRD.

[204] Article 56(3) BRRD.

[205] Article 57(1) BRRD.

[206] Article 58(2) BRRD.

[207] 12 US Code §5386(6).

[208] See, e.g. Zdenek Kudrna, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283, 283-299; Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 27-33; Lupo-Pasini (n 108) 105-108.

were not reimbursed by the Iceland government.[209] In the dispute *EFTA Surveillance Authority v Iceland*,[210] the EFTA court ruled that Iceland did not have a legal obligation to repay foreign depositors.[211] Iceland submitted that 'the domestic branches of Landsbanki were essential to the rescue of the Icelandic financial system',[212] and 'any difference in treatment between the two groups would be objectively justified'.[213] Iceland emphasised that '[a]lthough pure economic aims cannot constitute a sufficient justification, clear public interest objectives may constitute a legitimate aim even where that public interest has economic ends'.[214] In other words, Iceland believed, which the court agreed, that only providing domestic depositors with state funding was justified by the aim of preserving Iceland's financial stability.

However, national bail-out usually does not lead to recognition issues, given that there is no action imposed on host entities. No additional recognition is needed.

7.4.3.2 Funding in resolution

One of the conditions of recourse to national bail-out is that other funding channels have been exhausted. The first funding strategy is bail-in, which requires shareholders and creditors to absorb the losses, namely, internal funding. A second strategy is industry funding, which is a privately-collected source of funding contributed by financial industries. The Key Attributes state that recourse to this type of funding is limited to the purposes of maintaining essential functions necessary to achieve an orderly resolution, including: (i) making up losses suffered by shareholders and unsecured creditors in resolution where the losses are larger than what they would have suffered in normal liquidation proceedings, and (ii) other necessary recovery purposes.[215] The sources of such funding can be from one or combination of the following: (i) 'a privately funded resolution fund'; (ii) 'a privately funded deposit protection scheme'; and (iii) 'a privately funded fund with combined deposit protection and resolution functions'.[216]

[209] n 171.

[210] Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013. See comments, e.g. Valia Babis, 'Abandoning Foreign Depositors in a Bank Failure? The EFTA Court Judgment in EFTA Surveillance Authority v. Iceland' (2013) 2 Global Markets Law Journal 1; M Elvira Méndez-Pinedo, 'The Icesave Saga: Iceland Wins Battle Before the EFTA Court' (2013) 1 MJIL Emerging Scholarship Project 101; Lupo-Pasini (n 108) 84-89.

[211] Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013, paras 117-185.

[212] Ibid, para 195.

[213] Ibid, para 201.

[214] Ibid.

[215] FSB KA 6.2

[216] FSB KA 6.3; KA EC 6.1(i)-(iii).

In the EU, the Single Resolution Fund (SFR) under the Single Resolution Mechanism (SRM) is raised at national level in accordance with agreements on the transfer and mutualisation of contributions to the SRF,[217] which can either be *ex ante* contributed by individual institutions, or by extraordinary *ex post* contributions when the funds are not sufficient.[218] The establishment of the SRF serves several objectives: (a) 'to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle'; (b) 'to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle'; (c) 'to purchase assets of the institution under resolution'; (d) 'to make contributions to a bridge institution and an asset management vehicle'; (e) 'to pay compensation to shareholders or creditors if … they have incurred greater losses that they would have incurred … in a winding up under normal insolvency proceedings'; (f) 'to make a contribution to the institution under resolution in lieu of the write-down or conversion of liabilities of certain creditors, when the bail-in tool is applied and the decision is made to exclude certain creditors from the scope of bail-in';[219] (g) 'to take any combination of the actions referred to in points (a) to (f)';[220] and additionally 'with respect to the purchaser in the context of the sale of business tool'.[221]

At the national level, EU Member States are also required to establish financing arrangements for the purpose of facilitating resolution.[222] These national financing arrangements can only be used for purposes similar to those of the SRF.[223] In particular, national deposit guarantee schemes (DGSs) can also be used for the purposes of covering losses that would have been borne by covered depositors without a DGS (i) should the deposits be written down by a bail-in tool, and (ii) should the depositors suffer losses because of other resolution tools.[224] National DGSs also apply in an SRB-led resolution case under the SRM.[225]

[217] Articles 3(1)(36) and 67(1) SRMR.

[218] Article 70 SRMR.

[219] This action is subject to the condition that shareholders and creditors have to bear losses and costs first with the amount no less than 8% of the total liabilities; and SRF's contribution shall not exceed 5% of the total liabilities. Article 27(7) SRMR.

[220] Article 76(1)(a)-(g) SRMR.

[221] Article 76(2) SRMR.

[222] Article 100 BRRD. For example, in the Netherlands, the National Resolution Fund (NRF) is established. See DNB, 'Resolution Funds' <https://www.dnb.nl/en/resolution/resolutiefonds/index.jsp> accessed 25 February 2020.

[223] Article 101(1) BRRD.

[224] Article 109 BRRD.

[225] Article 79 SRMR.

In the US, there is the Orderly Liquidation Fund (OLF), which should be 'available to the Corporation to carry out the authorities …, for the cost of actions …, including the orderly liquidation of covered financial companies, payment of administrative expenses, the payment of principal and interest by the Corporation on obligations issued …, and the exercise of the authorities of the Corporation'.[226] Specifically, the fund should be used for (1) 'making loans to, or purchasing any debt obligation of, the covered financial company or any covered subsidiary'; (2) 'purchasing or guaranteeing against loss the assets of the covered financial company or any covered subsidiary, directly or through an entity established by the Corporation for such purpose'; (3) 'assuming or guaranteeing the obligations of the covered financial company or any covered subsidiary to 1 or more third parties'; (4) 'taking a lien on any or all assets of the covered financial company or any covered subsidiary, including a first priority lien on all unencumbered assets of the covered financial company or any covered subsidiary to secure repayment of any transactions conducted under this subsection, except that, if the covered financial company or covered subsidiary is an insurance company or a subsidiary of an insurance company, the Corporation (A) shall promptly notify the State insurance authority for the insurance company of the intention to take such lien; and (B) may only take such lien (i) to secure repayment of funds made available to such covered financial company or covered subsidiary; and (ii) if the Corporation determines, after consultation with the State insurance authority, that such lien will not unduly impede or delay the liquidation or rehabilitation of the insurance company, or the recovery by its policyholders'; (5) 'selling or transferring all, or any part, of such acquired assets, liabilities, or obligations of the covered financial company or any covered subsidiary'; and (6) 'making payments pursuant to subsections (b)(4), (d)(4), and (h)(5)(E) of section 5390 of this title'.[227]

In China, the SIFI Guiding Opinions confirmed the possibility of utilising 'industry funds' provision as a secondary step for liquidity support and assistance after exhausting the private funds of the failing institution.[228] However, no additional conditions are specified. One particular funding source might be the deposit insurance fund (DIF) established by the 2015 DIR. Accordingly, the DIF can be used to provide a guarantee, loss-sharing or capital support for qualified institutions, in order to facilitate the institutions to acquire or assume all or part of the business, assets and liabilities of an insured institution that is under the assumption of control, cancellation, or application for bankruptcy.[229] The use of DIF must obey the minimum cost principle.[230]

[226] 12 US Code §5390(n).

[227] 12 US Code §5384(d).

[228] Article 29 SIFI Guiding Opinions.

[229] Article 18 DIR.

[230] Article 18 DIR.

The funding in resolution, similar to the analysis of bail-out in the previous section, is only intended to cover national losses and to maintain national financial stability. An example of showing such a territorial approach is the debate about establishing a European single deposit guarantee scheme as a third pillar of the Banking Union. The political obstacle of establishing such a European centralised fund is the concern that economic resilient Member States may have to pay for the consequences of riskier Member States actions.[231] A state has no incentives or obligations to care for other state's stability.

In a hypothetical situation, to enforce a foreign resolution action, host authorities might need to have recourse to resolution funding resources, for example, when a host branch is transferred to a bridge institution but home authorities do not cover the costs. In this circumstance, host authorities might refuse to recognise foreign resolution actions upon the invocation of the material fiscal policies exception. However, in line with the restricted interpretation of public policy exceptions, such exception should not be arbitrarily invoked. Also explained in §7.4.2, a successful resolution in the home jurisdiction has unintended positive external effects which also benefit host authorities. Even though the coverage of resolution funding does not extend to host authorities, resolution actions taken in home jurisdictions alone might be able to manage the risks. Therefore, host authorities should have fewer incentives to blockage the effects of home resolution actions.

7.5 Concluding remarks

To conclude, financial stability is a global policy goal, and resolution objectives require that both home and host authorities consider foreign financial stability. Home authorities, when deciding resolution actions, should take in to account host interests; host authorities, when deciding not to recognise home resolution actions, should consider the potential adverse impact on the home financial market. Yet, the current regime lacks a mandatory legal requirement for national authorities to consider foreign financial stability. There is the possibility that a host financial stability interest might be jeopardised because of the home resolution actions. Therefore, a cross-border recognition framework should allow the host authorities to refuse to recognise home resolution actions if they forecast the measures would cause massive disruption to the host financial system. However, in order to effectuate a global resolution strategy, a public policy exception should be narrowly interpreted. As a matter of fact, the new resolution regime has an unintended positive external effect of maintaining global financial stability even when home authorities do not intentionally consider this factor. This reduces the need to invoke public policies to protect local interests.

[231] ECB, 'Interview with Der Tagesspiegel' (1 October 2018) <https://www.ecb.europa.eu/press/inter/date/2018/html/ecb.in181001.en.html> accessed 25 February 2020.

8 Creditors' Position

8.1 Introduction

This chapter examines the creditors' position in recognition of foreign resolution actions. The last sentence of Financial Stability Board (FSB) Key Attribute 7.5 states: '[r]ecognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceedings'.[1] The FSB further explains: '[a]ny perception that creditors may be discriminated against, whether based on their nationality, residence, or the location of their claim or other factors (and whether de facto or de jure) may affect authorities' incentives to cooperate in the implementation of an agreed resolution strategy and give rise to risk of litigation'.[2] This Chapter therefore investigates the non-discrimination treatment principle between domestic and foreign creditors in cross-border bank resolution. The analysis is conducted based on the doctrines of traditional insolvency law.

This chapter first lays out the theoretical framework (§8.2) under international insolvency law, particularly the trade-off between protection of local interest and equal treatment of foreign creditors. §8.3 compares the creditors' position in the selected jurisdictions. Next, §8.4 examines three questions: (i) How circumstances should be interpreted as discriminatory against local creditors? (§8.4.1) (ii) Should the difference in laws be a reason to refuse to recognise or support foreign resolution actions? (§8.4.2) (iii) Should governing law provisions be the reason to refuse to recognise or support foreign resolution actions? (§8.4.3) The final section, §8.5, concludes. The discussion in this chapter applies to all scenarios listed in Figure 2.1.

[1] FSB KA 7.5.

[2] FSB Principles, 13.

8.2 Theoretical framework

8.2.1 Creditors in recognition of foreign corporate insolvency proceedings

8.2.1.1 Creditors in domestic corporate insolvency proceedings

Creditors are significant participants in normal corporate insolvency proceedings.[3] Insolvency proceedings have a collective nature, namely, 'the interests of individual creditors, and in particular their rights to collect in the debts due to them by one or other of the methods of enforcing payment of judgment debts, must give way to the collective interest of the general body of creditors'.[4] Creditors are protected as a group instead of as individuals. Within the group of creditors, it is required that similarly situated creditors are treated equally.[5] This basic rule is commonly referred to as equal treatment of creditors or equitable treatment of creditors, which, as Bork pointed out, is 'the first and most important principle of insolvency law'.[6]

This principle encompasses two dimensions: substantive dimension and procedural dimension. The substantive aspect of the equal treatment principle is reflected in the well-known *pari passu* principle, a fundamental rule in the insolvency law. [7] The World Bank (WB) specifically regulates the *pari passu* rule in the 'Principles for Effective Insolvency and Creditor/Debtor Regimes':

[3] Bob Wessels, Hon Bruce A Markell and Jason Kilborn, 'Prominent Principles of Domestic Law' in *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009) 14-16. See also generally, e.g. Philip Wood, *Principles of International Insolvency* (Sweet & Maxwell 2007); Roy M Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2011); Reinhard Bork, *Principles of Cross-border Insolvency Law* (Intersentia 2017).

[4] Goode (n 3) para 2-04. See also Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986); Michael Bridge, 'Collectivity, Management of Estates and the *Pari Passu* Rule in Winding-up' in John Armour and Howard Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003).

[5] See generally, e.g. UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law (2004), Recommendation 1(d) and (f); WB, World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2015), Principle No.12.3; Rizwaan J Mokal, 'The *Pari Passu* Principle and its Relationship with Other Methods of Insolvency Distribution' in *Corporate Insolvency Law: Theory and Application* (OUP 2005) 92-132; Wessels, Markell and Kilborn (n 3) 16-17; Goode (n 3) para 3-07.

[6] Bork (n 3) para 4.6. See also Andrew Keay and Peter Walton, 'The Preferential Debts Regime in Liquidation Law: In the Public Interest?' (1999) 3 Company Financial and Insolvency Law Review 84, 85.

[7] Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, CUP 2009) 599. Almost any discussion on the principles of insolvency law and international insolvency law would list the *pari passu* principle as a basic principle. See, e.g. Ian F Fletcher, *Insolvency in Private International Law* (OUP 2005) para 1.08; Rizwaan J Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 92ff; Wessels, Markell and Kilborn (n 3) 16-17; Goode (n 3) para 3-07. Criticism see, e.g. Rizwaan J Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60 The Cambridge Law Journal 581; Mokal (n 5); David Skeel, 'The Empty Idea of 'Equality of Creditors'' (2017) 166 University of Pennsylvania Law Review 699.

> Following distributions to secured creditors from their collateral and the payment of claims related to the costs and expenses of administration, proceeds available for distribution should be distributed *pari passu* to the remaining general unsecured creditors.[8]

The *pari passu* principle originated from the notion of equal distribution of the debtor's assets in the liquidation proceedings, which dates back to a Henry VIII Statute in 1542 in the English common law history.[9] The *pari passu* principle refers to the *pro rata* distribution of debtors' assets in the liquidation/ winding-up proceedings. To be understood more accurately, the *pari passu* principle only applies to 'similarly situated creditors', who should be treated equally. For example, secured creditors have priority of repayment from value of the assets secured.[10] For other unsecured creditors' claims, some claims are supposed to be treated as priority claims, such as administrative costs and expenses, and employee and tax claims. [11] Other exceptions include set-off [12] and netting,[13] which put some creditors in an advantageous position. These exceptions are allowed under the *pari passu* principle with 'compelling reasons to justify giving priority status to a particular class of claims',[14]

[8] WB, World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, Principle No.12.3.

[9] Statute of Bankrupts 1542 (34 & 35 Hen. VIII, c.4). See Goode (n 3) para 7-03.

[10] Regarding the priority for secured creditors, see, e.g. Thomas H Jackson and Anthony T Kronman, 'Secured Financing and Priorities Among Creditors' (1979) 88 Yale Law Journal 1143; Alan Schwartz, 'Security Interests and Bankruptcy Priorities: A review of Current Theories' (1981) 10 The Journal of Legal Studies 1; Roy M Goode, 'Is the Law Too Favourable to Secured Creditors' (1983) 8 Can Bus LJ 53; Vanessa Finch, 'Security, Insolvency and Risk: Who Pays the Price?' (1999) 62 The Modern Law Review 633.

[11] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, 269-274. See also Mokal (n 5) 96-98; Finch (n 7) 599-674; Goode (n 3) para 8-05 ff; Dennis Faber and others, *Ranking and Priority of Creditors* (Dennis Faber and others eds, OUP 2016).

[12] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, 155-156. (The enforcement under insolvency law of rights of set-off of mutual obligations arising out of pre-commencement transactions or activities of the debtor is important not only to commercial predictability and the availability of credit, but also because it avoids the strategic misuse of insolvency proceedings. For these reasons, it is highly desirable that an insolvency law afford protection to such set-off rights.)

[13] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, 156-159. (Permitting "close-out netting" after the commencement of insolvency proceedings is an important factor in mitigating systemic risks that could threaten the stability of financial markets. The value of or exposure under a financial contract may vary significantly from day to day (and sometimes from hour to hour) depending on conditions in the financial markets. Accordingly, the value of these contracts can be highly volatile. Counterparties typically mitigate or hedge the risks associated with these contracts by entering into one or more "matching" or "hedge" contracts with third parties, the value of which fluctuates inversely with the value of the debtor's contract.)

[14] WB, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2015), C12.13. See, e.g. Keay and Walton (n 6); Andrew Keay, Andre Boraine and David Burdette, 'Preferential Debts in Corporate Insolvency: A Comparative Study' (2001) 10 International Insolvency Review 167.

which reflects the legislators' intention to classify different sub-groups of similarly situated creditors.

With the development of the rescue culture and the later statutory reorganisation scheme or out-of-court restructuring process, the *pari passu* principle extended to non-liquidation insolvency proceedings like reorganisation and restructuring proceedings. However, the function of the *pari passu* principle is limited in those reorganisation proceedings since the final reorganisation decision is reached through the negotiation of the debtor and creditors rather than following the statutory liquidation rules.[15]

Apart from the distribution equality, equal treatment of creditors principle exists in almost every aspect of insolvency law, including 'the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanism'.[16] These requirements reflect procedural equality, namely, similarly situated creditors should be able to participate in the insolvency proceedings on an equal basis. A manifestation of procedural equality is the 'equality of arms' rule, which requires that (i) '[e]ach party in interest in an insolvency proceeding case shall be given a full and fair opportunity to present both the facts and the laws on its side'; and (ii) '[e]ach party shall be given a full and fair opportunity to comment on the evidence and legal arguments of an opponent'.[17] In other words, this includes 'the rights to be notified of procedural documents and, more generally, the right to be heard, with adequate time and opportunity to arrange for representation at any hearing'.[18] The equality of arms principle also reflects the need for unprejudiced usage of language[19] and sufficient notice to foreign creditors.[20]

8.2.1.2 Creditors in cross-border corporate insolvency proceedings

In cross-border corporate insolvency cases, equal treatment of creditors is also a leading rule.[21] Regardless of their location, creditors are supposed to be treated equally on a global basis. In other words, foreign creditors should not be discriminated against merely because of their nationalities.

[15] Goode (n 3) 238.

[16] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, Recommendation 1(d).

[17] Principle 5.1 (Equality of Arms) ALI-III Global Principles and Guidelines 2012; Principle 6.1 (Equality of Arms) JudgeCo Principles and Guidelines. See also, e.g. Bork (n 3) para 3.55.

[18] Comment to Global Principle 5.

[19] Principle 21 (Language) ALI-III Global Principles and Guidelines 2012.

[20] Principle 25 (Notice) ALI-III Global Principles and Guidelines 2012.

[21] Bork (n 3) para 2.62; Goode (n 3) para 16-09.

This position evolved over time. Before the 1900s, national authorities preferred to protect their local creditors. [22] Usually, domestic creditors were in an advantageous position.[23] The practice, however, was criticised by judges and academics. For example, Jabez Henry, a 19th-century British judge, pointed out that 'the principle of equality of distribution among the general creditors who have no special lien' is 'the essence of all bankrupt laws'.[24] Also, as Lord Hoffmann explained in his often-cited *Cambridge Gas* case,

> fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.[25]

Several international organisations also advocate for such an equal treatment principle. The Model Law on Cross-border Insolvency (MLCBI) requires that 'foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding … as creditors in this State'.[26] The MLCBI Guide also emphasises that this Article 'embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors'.[27]

It is also confirmed in the ALI-III Global Principles for Cooperation in International Insolvency Cases (ALI-III Global Principles and Guidelines 2012) that 'due regard should be given to the interests of creditors, including the need to ensure similarly ranked creditors are treated equally',[28] and '[e]

[22] See Kurt H Nadelmann, 'Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?' (1943) 91 University of Pennsylvania Law Review and American Law Register 601; Kurt H Nadelmann, 'Revision of Conflicts Provisions in the American Bankruptcy Act' (1952) 1 The International and Comparative Law Quarterly 484; Kurt H Nadelmann, 'Bankruptcy Reform Act and Conflict of Laws: Trial-and-Error' (1988) 29 Harv Int'l LJ 27; John Honsberger, 'Conflict of laws and the Bankruptcy Reform Act of 1978' (1980) 30 Case Western Reserve Law Review 631; Stephen B James, 'International Bankruptcy: Limited Recognition in the New U.S. Bankruptcy Code' (1980) 3 Hous J Int'l L 241; Donald Trautman, 'Foreign Creditors in American Bankruptcy Proceedings' (1988) 29 Harvard International Law Journal 49.

[23] For the history of the (in)equality of foreign and domestic creditors, see Kurt H Nadelmann, 'Legal Treatment of Foreign and Domestic Creditors' (1946) 11 Law and Contemporary Problems 696.

[24] Regarding the work and opinions of Jabez Henry, see Kurt H Nadelmann, 'An International Bankruptcy Code: New Thoughts on an Old Idea' (1961) 10 The International and Comparative Law Quarterly 70.

[25] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508 (PC, IoM), para 16.

[26] Article 13(1) MLCBI; 11 US Code §1513(1).

[27] MLCBI Guide, para 118.

[28] Principle 1 (Overriding objective) ALI-III Global Principles and Guidelines 2012.

nsuring that creditors' interests are respected and that creditors are treated equally' is one of the aims.[29] The European Union (EU) Cross-Border Insolvency Court-to-Court Cooperation Principles (JudgeCo Principles and Guidelines) also contain similar provisions.[30] The ALI-III Global Principles and Guidelines Comment[31] further explains that equal treatment is interpreted as 'treatment of the same class of creditors in a similar way and without discrimination as worded in Principle 11'.[32] Principle 11 states the non-discriminatory treatment: 'a court should not discriminate against creditors or claimants based on nationality, residence, registered seat or domicile of the claimant, or the nature of the claim'.[33]

As mentioned above, equal treatment only applies to similarly situated creditors. Classification of different sub-groups of differently situated creditors can be regulated in the national laws. However, based on the opinions expressed by the above judges and international standards, different nationalities should not be treated as differently situated creditors. In other words, domestic and foreign creditors cannot be treated in different situations merely because of their nationalities.

Similar to the principle in the domestic context, equal treatment of creditors encompasses both substantive and procedural dimensions. Regarding the substantive dimension, the *pari passu* principle applies, and the insolvency law should be applied equally to all the domestic and foreign creditors.[34] An explicit example is the hotchpot rule, which aims to ensure that domestic and foreign creditors should receive repayment on a *pro rata* basis.[35] The MLCBI requires that

> Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a

[29] Principle 2 (Aim) ALI-III Global Principles and Guidelines 2012.

[30] Principles 3 and 4 JudgeCo Principles and Guidelines.

[31] Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases, Report to ALI (30 March 2012).

[32] Comment to Global Principle 1.

[33] Principle 11 (Nondiscriminatory Treatment) ALI-III Global Principles and Guidelines 2012. See also Principle 10 (Nondiscriminatory Treatment) JudgeCo Principles and Guidelines.

[34] Comment to Global Principle 11. Recital (63) EIR 2015 Recast. See also, e.g. Bork (n 3) para 2.62ff.

[35] See, e.g. H Hanisch, 'Crediting a Creditor with Proceeds Recovered Abroad out of the Debtor's Assets Recovered Abroad in Domestic Insolvency Proceedings' in Ian F Fletcher (ed), *Cross-border Insolvency: Comparative Dimensions, The Aberystwyth Insolvency Papers*, vol 12 (United Kingdom National Committee of Comparative Law 1990); Look Chan Ho, 'On Pari Passu, Equality and Hotchpot in Cross-Border Insolvency' (2003) Lloyd's Maritime and Commercial Law Quarterly 95.

> proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.[36]

The hotchpot rule is intended to 'avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions';[37] the rule's sole purpose is to 'establish the equal treatment of creditors of the same class'.[38] The United States (US) Bankruptcy Code Chapter 15 mirrors the MLCBI and adopts this rule.[39] This rule is also referred to as 'Adjustment of Distributions' in the ALI-III Global Principles.[40] The European Insolvency Regulation (EIR) 2015 Recast also contains the same rule. Article 23(2) EIR prescribes that '[i]n order to ensure the equal treatment of creditors, a creditor which has, in the course of insolvency proceedings, obtained a dividend on its claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend'.[41]

The procedural dimension of the equal treatment ensures the procedural rights of the creditors in different jurisdictions. As mentioned in the domestic context, a manifestation is the 'equality of arms' rule. This principle is also confirmed in the *Eurofood* judgment, a landmarking case that deals with international insolvency disputes:

> Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, …., these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the rights of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance.[42]

[36] Article 32 MLCBI; 11 US Code §1532.

[37] MLCBI Guide, para 239.

[38] MLCBI Guide, para 240.

[39] 11 US Code §1532.

[40] Principle 12 (Adjustment of Distribution) ALI-III Global Principles and Guidelines 2012. See, e.g, Bork (n 3) para 2.65.

[41] Article 23(2) EIR. See also, e.g. Virgós-Schmit Report, para 117; Gabriel Moss, Daniel Bayfield and Georgina Peters, 'Recognition and Enforcement' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) para 5.161ff; Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015) para 10348ff; Bork (n 3) para 4.9.

[42] Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, para.66. See also Samuel L Bufford, 'Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice' (2007) 27 Northwestern Journal of International Law & Business 351.

In reality, complete equality is difficult to reach across different jurisdictions. This is not because laws explicitly discriminate against foreign creditors. Instead, the unequal outcome usually comes from different laws that are also applicable. A distinct manifestation is the possibility of opening secondary proceedings, which is the main feature of the current modified universalism principle.[43] For example, in the EIR, the jurisdictions where the centre of main interest (COMI) of a debtor is situated can open main insolvency proceedings, while the jurisdictions where a debtor has an establishment can open secondary proceedings.[44] Due to the application of the law of the 'State of the opening of proceedings' (*lex concursus*),[45] which 'should be valid both for the main insolvency proceedings and for local proceedings',[46] the creditors in the COMI jurisdiction and establishment jurisdiction might be treated differently because of the different applicable laws.

A likely result is that creditors from establishment jurisdictions or third jurisdictions are treated advantageously. The intention of having secondary proceedings is to protect creditors from discriminatory main proceedings. However, this is hardly the case in the modern world since almost every insolvency law *de jure* ensures that domestic and foreign creditors should have equal rights when they participate in insolvency proceedings.[47] More commonly, local courts, where secondary proceedings are commenced and foreign main proceedings are sought to be recognised, would prefer to apply the local laws, for the purpose of protecting local interests.[48] Such 'local interests' include local creditors' expectation of applying a law they are familiar with or the interests of local policies.

In extreme cases, foreign creditors may leverage their position as foreigners to obtain more repayment in a main proceeding, especially in reorganisation proceedings where negotiations could happen. For example, in the 2006 *Collins & Aikman* case, the administrator in the debtor's COMI jurisdiction

[43] See Chapter 6, §6.2.2.1.1. See also, e.g. Jay L Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276, 299ff; Miguel Virgós and Francisco J Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 17; Westbrook (n 41) para 10025; Bork (n 3) para 2.11.

[44] Article 3 EIR 2015 Recast. See, e.g. Fletcher (n 7) para 7.39ff; Gabriel Moss, Ian F Fletcher and Stuart Isaacs, *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (Gabriel Moss, Ian F Fletcher and Stuart Isaacs eds, 3rd edn, OUP 2016) para 3.09ff, 08.60ff, 08.555ff; Bob Wessels, *International Insolvency Law Part II: European Insolvency Law* (4th edn, Kluwer 2017) para 10540ff.

[45] Article 7 EIR 2015 Recast.

[46] Recital (66) EIR.

[47] See, e.g. Article 13(1) MLCBI; Recital (63) EIR.

[48] Recital (40) EIR 2015 Recast. See also the *Notel* case, Judgment of 11 June 2015, *Comité d'entreprise de Nortel Networks SA and Others v Cosme Rogeau liquidator of Nortel Networks SA and Cosme Rogeau liquidator of Nortel Networks SA v Alan Robert Bloom and Others*, C-649/13 EU:C:2015:384, para 36.

(UK) promised to provide foreign creditors from Spain and Germany better treatment than they would receive under the UK law, with the aim of avoiding secondary proceedings.[49] It is confirmed in the EIR 2015 Recast that 'this Regulation confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened'.[50] With or without the opening of secondary proceedings, there is a possibility that domestic and foreign creditors are treated differently.

8.2.1.3 Creditors in recognition proceedings

8.2.1.3.1 Recognition v relief

A distinction is made between recognition and 'relief', in the words of the MLCBI,[51] or 'enforcement', in the EIR.[52] This distinction parallels judgment recognition and enforcement under the framework of private international law. Recognition refers to the action that the recognising jurisdiction accepts the validity of foreign insolvency proceedings or foreign representatives, without additional assistance. In contrast, relief and enforcement may need local courts' assistance to achieve specific objectives. Recognition is the precondition for relief or enforcement.

In the MLCBI context, courts can grant automatic reliefs after recognising a foreign main proceeding,[53] and discretionary reliefs upon receiving a recognition request[54] and after recognising a foreign main/non main proceeding,[55] as well as additional assistance.[56] As explained in Chapter 4 of this dissertation, which discussed Chapter 15 of US Bankruptcy Code that incorporated the MLCBI, automatic relief generally restricts the actions against assets within the receiving jurisdictions' territory, such as automatic stay; and discretionary relief is in the sole power of courts and can be granted in cases of, for instance, 'entrust[ing] the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court', which is the turnover power.[57]

[49] *Re Collins & Aikman Europe SA*, [2006] EWCH 1343 (Ch); [2006] B.C.C. 861. See the comments from the administrator of this case, Gabriel Moss, 'Group Insolvency - Choice of Forum and Law: the European Experience under the Influence of English Pragmatism' (2007) 32 Brooklyn Journal of International Law 1005.

[50] Recital (42) EIR 2015 Recast.

[51] Articles 19 to 21 MLCBI; 11 US Code §§1519 to 1521.

[52] Articles 19-33 EIR 2015 Recast.

[53] Article 20 MLCBI; 11 US Code §1520.

[54] Article 19 MLCBI; 11 US Code §1519.

[55] Article 21 MLCBI; 11 US Code §1521.

[56] Article 7 MLCBI; 11 US Code §1507.

[57] See Chapter 4, §4.3.1.2.1. See also Article 21(2) MLCBI; 11 US Code §1521(2); MLCBI Guide, para 192.

The EIR establishes an automatic recognition mechanism within the EU,[58] giving immediate effect to insolvency proceedings across the Member States.[59] The Virgós-Schmit Report explains:

> The divestment of the debtor, the appointment of the liquidator, the prohibition on individual executions, the inclusion of the debtor's assets in the estate regardless of the State in which they are situated, the obligation to return what has been obtained by individual creditors after opening, etc., are all effects laid down by the law of the State of the opening which are simultaneously applicable in all [Member] States.[60]

Insolvency practitioners as qualified foreign representatives can act accordingly without the need to obtain additional reliefs.[61] Following the automatic recognition, enforcement procedures are governed by Regulation (EU) No 1215/2012 (Brussels I Recast).[62] Both recognition and enforcement are subject to public policy exceptions.[63] Similarly, the EU Directive on Reorganisation and Winding-up of Credit Institutions (CIWUD) also contains such an automatic recognition mechanism.[64] The CIWUD, different from the EIR and the Brussels I Recast, does not allow public policy exceptions. It is because, as explained in Chapter 3 of this dissertation, the EU financial regulation adopted the home-country control principle, and the reorganisation and liquidation proceedings are required to take effect within the EU without further obstacles.[65] The EIR and CIWUD are special arrangements within the EU, based on the foundation of strong political and economic ties.

Recognition of foreign insolvency proceedings does not necessarily ensure that subsequent relief requests would be granted. Empirical research on US Chapter 15 cases between 17 October 2005 and 8 June 2009 shows that

> while U.S. Courts recognised foreign proceedings in almost every Chapter 15 case, courts entrusted U.S assets to foreign proceedings for distribution in only 45.5 percent of cases where foreign proceedings were recognized. When such entrustment was granted, 31.8 percent of cases were accompanied by qualifying

[58] Article 19 EIR 2015 Recast.

[59] Article 20 EIR 2015 Recast.

[60] Virgós-Schmit Report, para 154.

[61] Article 20 EIR 2015 Recast.

[62] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Article 32 EIR 2015 Recast.

[63] Article 33 EIR 2015 Recast.

[64] Articles 3(2) and 9(1) CIWUD.

[65] See Chapter 3, §3.3.2. See also, e.g. Gabriel Moss, Bob Wessels and Matthias Haentjens, 'Principles for Cross-border Financial Institution Insolvencies' in Gabriel S. Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) para.2.26.

> factors including orders that protected U.S. creditors by allowing them to be paid according to the priority scheme under U.S. bankruptcy law or assurances that certain U.S. creditors would be paid in full or in priority.[66]

These findings show that recognition is the premise for enforcement, but not vice versa, similar to the doctrines of private international law.

8.2.1.3.2 Public policy exception

Public policies can be invoked as reasons to refuse to recognise foreign insolvency proceedings. There are several public policies that may be relevant for creditors. First, any insolvency proceedings should respect the *pari passu* rule, which ensures similarly situated creditors receive the same treatment.[67] In a cross-border context, foreign creditors cannot be treated in a discriminatory fashion that is different from the treatment of domestic creditors.[68] Second, creditors are protected through various fundamental procedural rights, such as the right to be notified, or more generally, the right to be heard.[69] Infringing creditors' rights may be considered as violation of these principles of public policy and result in refusual of recognition.

Interpretation of public policies should follow a narrow interpretation method, as explained in Chapter 7 at §7.4.2. As the MLCBI Guide explicitly states, 'the public policy exception is construed as being restricted to fundamental principles of law, in particular, constitutional guarantees', and it 'should be interpreted restrictively and that [public policy] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State'.[70]

8.2.1.3.3 Other safeguard measures

Creditors are protected by other safeguard measures. A receiving jurisdiction may decide to refuse to grant reliefs because creditors' rights are infringed, even after the receiving jurisdiction has decided to recognise a foreign insolvency proceeding. This is the mechanism of the MLCBI, which has been adopted by the US. As a general rule, in order to protect the host creditors,[71]

[66] Jeremy Leong, 'Is Chapter 15 Universalist or Territorialist-Empirical Evidence from United States Bankruptcy Court Cases' (2011) 29 Wis Int'l LJ 110.

[67] See, e.g. *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21; Richard Sheldon, *Cross-border Insolvency* (Bloomsbury 2015) para 3.70; Neil Hannan, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017) 86.

[68] Moss, Bayfield and Peters (n 41) para 5.72.

[69] See, e.g. Judgment of 2 May 2006, *Eurofood IFSC Ltd* C-341/04 EU:C:2006:281, paras 65-66; *In re* Sivec SRL, 2011 WL 3651250, 3 (Bankr. E. D. Okla. 2011); *In re* Ashapura Minechem Ltd., 480 B.R. 129, 139 (S.D.N.Y. 2012).

[70] MLCBI Guide, paras 102 and 104.

[71] MLCBI Guide, para 192. See e.g. *In re* Tri-Cont'l Exch. Ltd., 349 B.R. 627 (Bankr.E.D.Cal. 2006); *In re* Atlas Shipping A/S, 404 B.R. 726 (Bankr.S.D.N.Y. 2009); *In re* International Banking Corp. B.S.C., 439 B.R.614 (Bankr.S.D.N.Y. 2010).

'[t]he court may grant relief under §1519 or §1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interest entities, including the debtor, are sufficiently protected'.[72] In addition, 'the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person designated, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected'.[73] In determining the 'sufficient protection' criterion, the *Artimm* case confirmed that three factors listed in the previous §304 Bankruptcy Code can still apply: (i) 'the just treatment of all holders of claims against the bankruptcy estate'; (ii) 'the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding'; and (iii) 'the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law'.[74] One judge even concluded that 'before assets are transferred out of the United States for distribution in a foreign case, priority claims will likely have to be paid or satisfied, or at least provision will have to be made for their payment in the foreign proceeding.'[75] Empirical research also showed that courts often hold the view that US secured and priority creditors should be satisfied first.[76]

This chapter brings attention to a discrepancy in the texts of Chapter 15. §1522(a) Bankruptcy Code requires the protection of the interests of the creditors and other interested persons. The US *SPhinX* case confirmed that the intention of §1522(a) is to protect all creditors, not just US parties.[77] However, §1521 (b) only emphasises the interests of creditors in 'this State'. Judges might invoke §1521(b) to protect US creditors' rights only, instead of considering the balance of interests of all the creditors in different jurisdictions.

[72] Article 22 MLCBI; 11 US Code §1522.

[73] Article 21(2) MLCBI; 11 US Code §1521(b).

[74] *In re* Artimm, S.R.L, 335 B.R. 149, 160 (Bankr.C.D.Cal.2005). See also *In re* Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr.S.D.N.Y. 2009).

[75] Allan L Gropper, 'The Payment of Priority Claims in Cross-Border Insolvency Cases' (2010) 46 Tex Int'l L J 559, 568.

[76] Leong (n 66) 123-125.

[77] *In re* SPhinX, Ltd., 351 B.R. 103, 113 (Bankr.S.D.N.Y.2006). However, the *Lida* case might mistakenly expand this equal protection notion to the foreign creditors under §1521 (b). See *In re Lida*, 377 B.R. 243, 259 (9th Cir.BAP 2007).

The EIR established a set of private international law rules, covering jurisdiction and applicable laws,[78] to protect the interests of the receiving jurisdictions.[79] A particular example is, after recognition of a foreign insolvency practitioner (IP), the IP 'shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets'.[80] There are different understandings of this clause. It is acknowledged that the manner in which an IP can exercise power should comply with local law, while it is unclear whether the nature, content or extent of an IP's powers are determined by the law of the State where the main proceedings are opened or the local law.[81] The *Aria* case interprets that local law only refers to procedural issues.[82] This rule helps ensure that the host procedural rights are guaranteed even after receiving courts recognise home proceedings.

In China, the legal text of Article 5 of the Enterprise Bankruptcy Law (EBL), as well as the case law, does not provide enough guidance on interpreting local creditors' interests. As implicitly indicated by the Lehman Brothers' case discussed in Chapter 5, in which the court refused to recognise the UK insolvency proceeding and required that local creditors' claims should be satisfied first, it is assumed that local Chinese creditors' claims are treated in an advantageous position.[83]

In sum, other safeguard measures may help to ensure that receiving jurisdictions' creditors' claims are satisfied first before the receiving jurisdictions turn over remaining assets to a foreign representative, or the receiving jurisdictions' law applies so that creditors are protected according to their own laws.

[78] Articles 8(third parties' rights *in rem*), 9 (set-off), 10 (reservation of title), 11 (contracts relating to immoveable property), 12 (payment system and financial markets), 13 (contracts of employment), 14 (effects on rights subject to registration), 15 (European patents with unitary effect and Community trade marks), 16 (detrimental acts), 17 (protection of third-party purchasers), 18 (effects of insolvency proceedings on pending lawsuits or arbitral proceedings) EIR 2015 Recast.

[79] Gabriel Moss and Tom Smith, 'Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) para 8.303.

[80] Article 21(3) EIR 2015 Recast.

[81] Moss and Smith (n 79) paras 8.316-8.318.

[82] Aria Inc v Credit Agricole Corporate and Investment Bank [2014] EWHC 872, para 60.

[83] Since the Conciliation Statement is confidential, the opinion stated here is a reflection of a judge from the Shanghai High People's Court, who heard the Lehman Brothers case. See F Zhang, 'The Needs for Improvement of Relevant Laws Arising from the Financial Derivative Products Cooperative Disputes between Hua An Funds and Lehman Brothers International Europe' (2012) <http://old.ccmt.org.cn/showexplore.php?id=4148> accessed 25 February 2020. See also, e.g. X Gong, 'To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan' (2013) 10 International Corporate Rescue 240; X Gong, 'A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation' (Leiden University 2016) para 3.55.

8.2.1.4 Local interest v equal treatment

Receiving jurisdictions might refuse to recognise foreign insolvency proceedings when the foreign insolvency proceedings discriminate against receiving jurisdictions' creditors. This refusal would be for the purpose of protecting the local creditors. However, probably more commonly, receiving jurisdictions may refuse to recognise foreign insolvency proceedings or refuse to grant reliefs because the laws of the receiving jurisdictions were not applied in foreign insolvency proceedings. Subsequently, receiving jurisdictions would apply their local laws, which might result in a different treatment of domestic and foreign creditors.

One example is the different priority rules in distribution, which 'leaves open the question of discrimination'.[84] The different priority rules stem from the national legislators' different perceptions towards the classification of sub-groups within the general body of creditors, that is, how to define 'similarly situated creditors'. If priority rules are applied in each different jurisdiction, similarly situated creditors in these different jurisdictions might be subject to different distribution rules. Therefore, some creditors might be in a better position while some others might be worse off, thus infringing the general fairness rule in international insolvency.[85]

To address this, Lord Hoffman, as an advocate of universalism, emphasised the non-discrimination rule in the *HIH* case and argued for a universal application of one priority rule across borders:

> Almost all countries have their own lists of preferential creditors. These lists reflect legislative decisions for the protection of local interest, which is why the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the retention of funds to pay English preferential creditors. But the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal. I think that the judge was inclined to regard these differences as de minimis variations which did not prevent the foreign rules from being in substantial compliance with the pari passu principle. But they are nevertheless foreign rules. The fact that the differences were minor might be relevant to the question of whether a court should exercise its discretion to order remittal. But any differences in the English and foreign systems of distribution must destroy the argument that an English court has absolutely no jurisdiction to order remittal because it cannot give effect to anything other than the English statutory scheme.[86]

[84] Jay L Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation' (2002) 76 American Bankruptcy Law Journal 1, 16. See also Jay L Westbrook, 'Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies' (2009) 27 Penn St Int'l L Rev 869.

[85] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508 (PC, IoM), para 16.

[86] *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; [2008] 1 W.L.R. 852 (HL), para 21.

Another example is the set-off rule. As Lord Scott repeatedly emphasised, '[t]he English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have … no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme'.[87] Notably, in the often-cited *Bank of Credit and Commerce International* (BCCI) case, he considered set-off as a public policy and refused to transmit the entire English assets to the Luxembourg main proceeding on the basis that Luxembourg does not have statutory set-off in insolvency proceedings, and he further directed the English liquidators to 'retain sufficient funds to make provision for the dividend that net creditors entitled to take advantage of the English insolvency rules of set-off would receive in the English liquidation'.[88] Sticking to the set-off rule puts English creditors in a better position than non-English creditors, because English creditors would *de facto* have priority access to debtors' assets, limited to the amount of claims that can be set-off.

Lord Hoffmann disapproved of Lord Scott's position: '[i]f the country of principal liquidation does not recognise bankruptcy set off and the mutual debts arise out of transactions in that country, it is hard to see why an English court should insist on rights of set off being preserved in respect of claims by the foreign creditors against assets which happen to be in England'.[89] Rather, in most civil law jurisdictions, set-off is regarded as a violation of the *pari passu* principle.[90]

The EIR does not harmonise national policies towards set-off; instead, it regulates the applicable laws and stipulates, for set-off, that 'the conditions under which set-offs may be invoked' are determined by the law of the State of the opening of proceedings,[91] and '[t]he opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim'.[92] Receiving Member States cannot refuse to recognise or to grant reliefs to home main proceed-

[87] Ibid para 59.

[88] *In re Bank of Credit and Commerce International S.A. (No.10)* [1997] Ch. 213. See also *Stein v Blake* [1996] A.C. 243 (HL); *Secretary of State for Trade and Industry v Frid* [2004] 2 A.C. 506 (HL). For literature, see, e.g. Sandy Shandro, 'Judicial Co-operation in Cross-border Insolvency - The English Court Takes a Step Backwards in BCCI (No. 10)' (1998) 7 International Insolvency Review 63.

[89] *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; [2008] 1 W.L.R. 852 (HL), para.25.

[90] See Ian F Fletcher, 'Choice of Law Rules' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) para 4.22.For more analysis on the set-off vis-à-vis *pari passu*, see In re Bank of Credit and Commerce International S.A. (No.10) [1997] Ch. 213, 252.

[91] Article 7(2)(d) EIR 2015 Recast.

[92] Article 9(1) EIR 2015 Recast.

ings on the basis of different rules towards set-off. However, outside the EU where no applicable laws are widely accepted, receiving courts have the power not to grant reliefs on the basis that the local law, such as the set-off rule, is not respected.

The above two examples show differences in laws. Another example is about the *Gibbs* rule mentioned in Chapter 3 at §3.3.1.2.4. This rule originates from the English common law tradition and ensures that any debt governed by English law cannot be discharged by foreign insolvency proceedings.[93] Apart from the analysis listed in Chapter 6 at §6.4.4.1.2, this Chapter 8 provides additional insights from the view of creditors' position: applying the *Gibbs* rule would lead to different treatment between creditors in different jurisdictions. The receiving jurisdiction (in this circumstance, the UK) would not accept foreign debt alteration or discharge, thus creditors governed by English law would be treated differently from other creditors. To address this, Bork assumes a hierarchy of principles of international insolvency law and holds that equal treatment of creditors is among the highest-ranking principles.[94] He further maintains that 'the idea of protecting "local creditors" must be rejected as displaying a confusing and erroneous emphasis on domestic creditors, where what is actually required is the equal treatment of local and foreign creditors'.[95] A simple direct application of national statutory rules might be questionable on the basis of possible unequal treatment outcomes between domestic and foreign creditors. It can be seen that the legal community has debated about the competing principles, that is, pure and complete equal treatment across the world and the application of national laws.

8.2.2 Creditors in recognition of foreign resolution measures

8.2.2.1 Creditors in resolution

Unlike the traditional insolvency regime in which creditors are major stakeholders and have deciding powers in pursuing insolvency procedures, one of the most distinctive features of bank resolution is the shift from individual to public interest,[96] where creditors are subject to the concept of greater good, such as financial stability. In resolution, the creditors' position is subordinated to public policy considerations, and creditors are supposed to absorb the losses after the shareholders during resolution proceedings.[97]

[93] Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399 (CA).

[94] Bork (n 3) para 5.4.

[95] Ibid para 6.9.

[96] Matthias Haentjens and Bob Wessels, 'Three Paradigm Shifts in Recent Bank Insolvency Law' (2016) 31 Journal of International Banking Law and Regulation 396.

[97] See FSB Key Attributes, Preamble.

As explained in Chapter 2 at §2.1.4, one of the most representative resolution tools is the bail-in tool, which would substantively alter creditors' positions by either writing down their claims or converting their claims into equity.[98] Another common resolution tool is the transfer tool, which collectively refers to those measures transferring assets and liabilities of the debtor to other entities, including to a solvent third party, a bridge institution, or a separate asset management vehicle, without the need of obtaining any consent from the shareholders or creditors.[99] A full transfer of liabilities to a third institution might not materially affect the creditors' rights; however, the transfer tool is usually implemented through a partial transfer of assets and liabilities, in which circumstance some creditors' claims are transferred to a new solvent institution and are not affected, while some other remaining liabilities would enter liquidation proceedings and those creditors left behind might suffer losses.[100] These two major resolution powers largely affect the creditors' rights in the way that they are statutory powers and can be exercised without obtaining the creditors' consent.[101]

Another resolution tool is restriction on early termination rights. Upon entering into resolution, a temporary stay on early termination rights is exercised, 'to allow a short period of time for the resolution authority to make a determination on the treatment of the contracts'.[102] After the temporary stay time, some contracts may remain in the bad bank and be subject to loss absorption. The counterparties can still exercise the early termination rights, however, due to the volatility of these instruments, the value of these

[98] See, e.g. Chris Bates and Simon Gleeson, 'Legal Aspects of Bank Bail-ins' (2011) 5 Law and Financial Markets Review 264; Victor de Serière, 'Bail-in: Some Fundamental Questions' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014); Joseph H Sommer, 'Why Bail-in? And How?' (2014) December Federal Reserve Bank of New York Economic Policy Review 207; Bart PM Joosen, 'Regulatory Capital Requirements and Bail in Mechanisms' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015); Michael Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016) 279-310.

[99] KAs 3.2 (vi)-(viii), 3.3 and 3.4. See literature, e.g. Stephan Madaus, 'Bank Failure and Preemptive Planning' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014); Michael Schillig, 'The EU Resolution Toolbox' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015); Michael Schillig, 'Private Sector Transfer, Bridge Bank, and Asset Separation' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016).

[100] See, e.g. Jens-Hinrich Binder, 'The Position of Creditors under the BRRD' (2015) Commemorative Volume in memory of Professor Dr Leonidas Georgakopoulos, Bank of Greece's Center for Culture, Research and Documentation 37; Geoff Davies and Marc Dobler, 'Bank Resolution and Safeguarding the Creditors Left Behind' (2011) 2011 Bank of England Quarterly Bulletin 213.

[101] FSB KA 3.3.

[102] FSB KA EN 4(a).

financial instruments may be affected.[103] Other contracts transferred to a solvent bank or exempted from bail-in cannot exercise the early termination rights only because of entry into resolution.[104]

Several safeguard measures are available for creditor protection. First, the losses suffered by creditors should respect the hierarchy of liquidation in national insolvency laws, which means the loss-absorption sequence should follow the ranking of claims in the liquidation proceedings – shareholders absorb losses first, followed by unsecured subordinated creditors and then senior creditors.[105] This mechanism reflects the *pari passu* rule. However, resolution powers shall also provide 'flexibility to depart from the general principle of equal treatment of creditors of the same class, with transparency about the reasons for such departures'.[106] In fact, in a partial transfer, the claims left behind might be treated in a less favourable situation than those transferred to a solvent third entity or bridge institution, and thus would be a violation of the *pari passu* rule.[107]

Second, creditors cannot suffer losses greater than the losses would have been in liquidation proceedings, and if there are any differences, creditors should be entitled to compensation.[108] This is the no creditor worse off than in liquidation principle (NCWO).[109] Although 'creditors have far less procedural rights in bank resolution than they would have under general insolvency law', with the implementation of the NCWO principle, they are 'guaranteed at least an economic outcome that would not be worse than that they would have to expect in ordinary winding-up'.[110] However, a concern is raised about the NCWO principle, that is, in practice, it would be difficult to conduct an *ex-post* fair valuation about what the position would be in an alternative liquidation that did not happen, and thus it would be difficult to determine the real losses.[111]

[103] UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law, 156-159. See also, e.g. Edward Janger and John AE Pottow, 'Implementing Symmetric Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 155, 164-168; Mark J Roe and Stephens D Adams, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale J on Reg 363, 373-377.

[104] FSB KA EN 4(a).

[105] FSB KAs 3.5(i) and 5.1.

[106] See the FSB Key Attribute 5.1. It is proposed by the FSB that equity should absorb losses first, and no loss should be imposed on senior debt holders until subordinated debt (including all regulatory capital instruments) has been written-off entirely (whether or not that loss-absorption through write-down is accompanied by conversion to equity).

[107] Binder (n 100) 48-51. See also Davies and Dobler (n 100).

[108] FSB KA 5.2.

[109] FSB KA 5.2.

[110] Binder (n 100) 45.

[111] Ibid 47.

Third, there are safeguard measures specifically set for the temporary stay tool, including: (i) 'be strictly limited in time'; (ii) 'be subject to adequate safeguards that protect the integrity of financial contracts and provide certainty to counterparties'; and (iii) 'not affect the exercise of early termination rights of a counterparty against the firm being resolved in the case of any event of default not related to entry into resolution or the exercise of the relevant resolution power occurring before, during or after the period of stay'.[112]

Fourth, legal remedies and judicial action is another safeguard measure. The resolution authorities exercising resolution measures shall be 'subject to constitutionally protected legal remedies and due process'.[113] To reach the goal of a fast and efficient resolution, the FSB advised establishing an *ex-post* compensation mechanism.[114] The intention is that such resolution would ensure a timely resolution to achieve the objectives of financial stability within a short period of time so that the involvement of judicial bodies is minimised unless the judicial proceedings are expedited.[115] The court proceedings are, therefore, more necessary when resolution actions 'are unlawful because they have been taken in bad faith or are otherwise outside its legal powers, and does not constrain the general or inherent powers of the court to award remedies'.[116]

8.2.2.2 Creditors in cross-border resolution

In a cross-border context, the non-discriminatory treatment of domestic and foreign creditors is still a general principle of cross-border bank resolution. From the home jurisdiction's perspective, home authorities cannot adopt resolution measures discriminating against foreign creditors. The FSB confirms that

> National laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim or the jurisdiction where it is payable.[117]

To simplify the illustration, all these 'nationality', 'location' and 'jurisdiction' factors are collectively referred to as 'nationality'. In reality, such equality might be a theoretical illusion, and it is not unusual for (home) resolution authorities to favour their national creditors, whether intentionally or unintentionally. There are two cases often mentioned by scholars that demon-

[112] FSB KA 4.3. See also FSB KA Appendix I - Annex 5, para 2.1.
[113] FSB KA 5.4.
[114] FSB KA 5.5.
[115] FSB KAAM EN 5(d).
[116] FSB KAAM EN 5(e).
[117] FSB KA 7.4.

strate a biased treatment by home authorities. The first case happened in the above-mentioned Icelandic financial crisis, in which only the local Icelandic depositors of those insolvent banks were transferred to a new bank and covered in its national deposit insurance scheme, while depositors in the UK and the Netherlands were not.[118] The second case happened during the Cyprus financial crisis in the process of exercising a bail-in tool.[119] To resolve the crisis, deposits over €100, 000 in two Cypriot banks were bailed-in, partly converted into equity and partly liquidated.[120] However, among the depositors, many were Russians, who, in the Cypriot media, were portrayed as 'rich, unscrupulous profiteers'.[121] And some authors even made the comment that an alternative bail-out measure would mainly benefit 'rich Russians who have invested illegal money there'.[122] In the authors' inflammatory words, 'the beneficiaries of the help won't be ordinary workers or farmers but a caste of nouveau-riche immigrants that shamelessly boast their wealth while making virtually no contribution to solving the country's problems'.[123] The case raised suspicion of Cypriot discriminatory treatment against Russian creditors. These two cases are further analysed in §8.4.1.

Despite the intention of establishing an international rule that no discrimination should be allowed against foreign persons, in reality, the home authorities may favour their own citizens. In such circumstances, a foreign creditor from the host jurisdiction may have no adequate remedy in the home jurisdiction, and it is up to host authority to provide a legal remedy against the assets of the debtor located in the host jurisdiction. One particular solution is to ring-fence the host assets and realise the assets to satisfy the host creditors with priority. This is the practice in the US, as mentioned in Chapter 4. The US authority would ring-fence the local branches, regardless of the foreign

[118] Regarding the Icelandic financial crisis, see, e.g. BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010) 12-14; Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010) 51-53; IMF, 'Cross-border Bank Resolution: Recent Developments' (June 2014) 30-31.

[119] Regarding the Cyprus financial crisis, see, e.g. IMF (n 118) 34-35; World Bank, 'Bank Resolution and "Bail-in" in the EU: Selected Case Studies Pre and Post BRRD' (2016) 18-23. For literature see, e.g. John Theodore and Jonathan Theodore, *Cyprus and the Financial Crisis: The Controversial Bailout and What It Means for the Eurozone* (Palgrave Macmillan 2015).

[120] Regarding the resolution measures, see Central Bank of Cyprus, Clarification for the Better Understanding of the Resolution Measures Implemented under the Resolution of Credit and Other Institutions Law, 2013 at the Bank of Cyprus and Laiki Bank, 30 March 2013 <https://www.centralbank.cy/en/announcements/30032013-1> accessed 25 February 2020.

[121] Theodore and Theodore (n 119) 71.

[122] M Dettmer & C Reiermann, EU Aid for Cyprus A Political Minefiled for Merkel, Spiegel Online <http://www.spiegel.de/international/europe/german-intelligence-report-warns-cyprus-not-combating-money-laundering-a-865451.html> accessed 25 February 2020.

[123] Ibid.

proceeding. Of course, this practice can protect the host creditors from a possible discriminatory resolution. However, it also impedes effective global resolution.

The ring-fencing approach is usually accompanied by the refusal of recognition of foreign resolution actions.[124] Apart from the potential discriminatory treatment from home jurisdictions, another common reason for a host authority not to recognise home resolution actions is to protect the interests of local creditors, particularly, in accordance with host laws. Under the current legal framework, there is no legal obligation for the home authority to take actions according to the host law unless it is within the EU where the Article 117 of the Bank Recovery and Resolution Directive (BRRD) applies. At the global level, there are no rules. In this sense, the conflict between equal treatment of creditors and protection of local creditors' rights in cross-border bank resolution cases resembles the conflict in corporate insolvency cases. In the recognition proceedings, these two competing principles need a delicate balance.

On the one hand, it is indisputable that a discriminatory treatment by foreign home authorities is a justifiable reason for host authorities to refuse to recognise foreign resolution measures. As mentioned at the beginning of this chapter, the FSB proposed that '[r]ecognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding'.[125] It is the leading rule guiding cross-border cases, including recognition proceedings. The FSB explained that '[i]n the context of recognition where the creditor hierarchy of the foreign jurisdiction may apply, it would be consistent with the standard to condition recognition on, at minimum, creditors in the host jurisdiction receiving treatment equal to that of home-country creditors with similar legal rights (i.e. a non-discrimination requirement).'[126]

On the other hand, yet more complex, the over-protection of 'local interest' may result in a different form of unequal treatment of creditors from different jurisdictions. The previous section in this chapter shows that in traditional cross-border corporate insolvency cases, national authorities might not refuse to recognise foreign insolvency proceedings on the basis of the mere difference of national insolvency laws, but it is a common practice for national authorities to refuse to grant additional reliefs before the local rules are satisfied. In some jurisdictions such as the US and China, where the cross-border corporate insolvency laws still apply in cross-border resolution cases, this practice will remain unless the national insolvency

[124] Binder (n 100) 59-60.

[125] FSB KA 7.5. See also FSB Principles, 13.

[126] FSB KA EN 7(g).

law is amended. However, this dissertation argued that local obstacles for impeding a global resolution strategy should be minimised. The following sections further investigate specific rules that should be applied.

8.3 Creditors' positions in the selected jurisdictions

This section examines two general issues in the selected jurisdictions: equal treatment of creditors and special treatment for host creditors. As shown below, all the selected jurisdictions acknowledge both principles, yet there is an inherent conflict between the two.

8.3.1 Equal treatment of creditors

As summarised above, equal treatment of creditors is a principle generally applied to the whole cross-border proceedings, not only limited to the recognition proceedings. In fact, the equal treatment of creditors obligation is more often imposed on the home authorities when actively taking resolution measures.

In the EU, equal treatment of creditors is one of the general principles governing bank resolution. The BRRD confirms that 'when applying the resolution tools and exercising the resolution powers, … creditors of the same class are treated in an equitable manner'.[127] In other words, 'where creditors within the same class are treated differently in the context of resolution action, such distinction should be justified in the public interest and should be neither directly nor indirectly discriminatory on the grounds of nationality'.[128] In particular, special attention is paid to the bail-in tool and the transfer tool. When applying the bail-in tool, including write-down and conversion powers, it is required that the losses should be allocated equally between liabilities of the same rank.[129] With regard to the transfer tool, 'the power to decide which liabilities to transfer out of a failing institution based upon the objectives of ensuring the continuity of services and avoiding adverse effects on financial stability may affect the equal treatment of creditors', but it is also emphasised 'where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.'[130] The home resolution authority does have

[127] Article 34(1)(f) BRRD; Article 15(1)(f) SRMR. Recital (47) BRRD also reaffirms that 'resolution authorities should take all appropriate measures to ensure that resolution action is taken in accordance with principles including that … creditors of the same class are treated in an equitable manner'.

[128] Recital (47) BRRD. See also Recital (60) SRMR.

[129] Article 48(2) BRRD.

[130] Recital (13) BRRD.

the discretion to treat similarly situated creditors differently; however, the threshold cannot be nationality. A thorough examination of the legal texts in the BRRD does not reveal any exception for nationality non-discrimination.

In the US, the Dodd-Frank Act confirms that '[a]ll claimants of a covered financial company that are similarly situated … shall be treated in a similar manner'.[131] The Federal Deposit Insurance Corporation (FDIC) may decide to depart from such requirement only if it is necessary (i) 'to maximize the value of the assets'; (ii) 'to initiate and continue operations essential to implementation of the receivership or any bridge financial company'; (iii) 'to maximize the present value return from the sale or other disposition of the assets'; and (iv) 'to minimize the amount of any loss realized upon the sale or other disposition of the assets'.[132] It thus could be inferred that nationality cannot be a justifiable reason to not comply with the equal treatment of creditors principle.

In China, although currently there is no particular bank resolution law, the general corporate insolvency law prescribes that creditors similarly situated should be repaid *pro rata*.[133] There is no distinction between Chinese and foreign creditors, and therefore it is assumed that foreign and domestic creditors should be treated in the same way.

In other words, the selected jurisdictions do not intentionally discriminate against foreign creditors, at least not explicitly in the written law. There is special situation, though, regarding depositors. The US has a long-standing 1993 'national depositor preference' rule, which requires that any 'deposit liability of the institution' should rank higher than other 'general or senior liability'.[134] In particular, this provision sets a preferential treatment for deposits at domestic institutions over deposits at foreign institutions, namely, the national depositor preference rule does not apply to 'any obligation of a depository institution which is carried on the books and records of an office of such bank or savings association located outside of any State' or 'any international banking facility deposit'.[135] In other words, deposits

[131] 12 US Code §5390(b)(4).

[132] 12 US Code §5390(b)(4)(A).

[133] Article 113 EBL.

[134] 12 US Code §1821(d)(11) 'depositor preference', established by the Omnibus Budget Reconciliation Act. See, e.g James Thomson, 'The National Depositor Preference Law' (1994) Federal Reserve Bank of Cleveland, Economic Commentary (15 February 1994); Simon Gleeson and Randall D. Guynn, *Bank Resolution and Crisis Management: Law and Practice* (OUP 2016) para 2.36ff; Schillig (n 98) para 13.46ff.

[135] 12 US Code §1813(l)(5). See James A Marino and Rosaline L Bennett, 'The Consequences of National Depositor Preference' (FDIC Banking Review) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.190.8222&rep=rep1&type=pdf> accessed 25 February 2020; FDIC, '"Deposit Liability" for Purposes of National Depositor Preference Includes Only Deposits Pyable in U.S.' (28 February 1994) <https://www.fdic.gov/regulations/laws/rules/4000-8720.html> accessed 25 February 2020.

at branches of foreign banks cannot enjoy such preferential treatment. By contrast, US authorities still have interests in resolving failing branches of foreign banks, which, as explained in Chapter 4, are resolved by a separate entity approach subject to only US authorities.[136] In 2013, the FDIC also clarified that foreign branches of US banks are not insured by the FDIC.[137]

It should be noted that such a national depositor preference rule developed over the past decades. At the earliest, the International Banking Act (IBA) allowed branches of foreign banks to take retail deposits and they can be insured by the FDIC, in order to ensure 'parity of treatment between foreign and domestic banks in like circumstances', namely, a policy of national treatment.[138] However, this position was opposed by the FDIC at the beginning, which arised from the concern that 'insufficient legal and regulatory controls could be placed on branch operation that are not legally separate from those of the parent bank'.[139] However, failures of two foreign banks in the 1990s, namely, Banca Nazionale del Lavoro and Bank of Credit and Commerce International (BCCI), strengthened the concern of the FDIC, and the Foreign Bank Supervision Enhancement Act of 1991 reversed the provisions in the IBA and required that most branches of foreign banks cannot take deposits and cannot be insured by the FDIC.[140] For those grandfathered institutions insured by the FDIC before 1991, they are subject to the FDIC resolution, without the need to discuss (home) entities outside the US.[141] In short, the exclusion of branches of foreign banks from eligible FDIC-insured institutions is because insuring branches of foreign banks 'would expose the insurance fund to unacceptable risks of loss from events beyond the FDIC's control because of limited ability to supervise direct offices of foreign banks'.[142]

A similar situation exists in China. The Commercial Bank Law (CBL) does not provide for a different treatment of foreign and domestic depositors.[143]

[136] See Chapter 4, §4.3.1.2.2.

[137] FDIC, 12 CFR Part 330, RIN 3064-AE00, Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed Reg 56583. See, e.g. Bradley K Sabel, 'Preferring Foreign Depositors - The Final Rule' (*Harvard Law School Forum on Corporate Governance and Financial Regulation* 28 September 2013) <https://corpgov.law.harvard.edu/2013/09/28/preferring-foreign-depositors-the-final-rule/> accessed 25 February 2020.

[138] S. Rep. No.95-1073, 2 (1978), reprinted in 1978 USCCAN 1421, 1422.

[139] International Banking Act of 1978: Hearings on H.R. 10899 Before the Subcomm. on Financial Institutions of the Senate Committee on Banking, Housing & Urban Aairs, 95th Cong., 2d Sess. 93, 103-04 (1978) (statement of George A LeMaistre, Chairman, Federal Deposit Insurance Corporation).

[140] 12 US Code §3104(d).

[141] Chapter 4, at Section 4.3.1.2.2.

[142] John C Dugan and others, 'FDIC Insurance and Regulation of U.S. Branches of Foreign Banks' in Guynn R (ed), Regulation of Foreign Banks and Affiliates in the United States (9th edn, Thomson Reuters 2016), 611-612.

[143] Article 71 CBL.

As a general rule, all individual deposits also enjoy preference priority, without additional sub-classes or the mentioning of corporate deposits.[144] It is still up to the new Bank Insolvency Risk Resolution Regulation to determine whether there would be any amendments to the current ranking of claims. However, the Deposit Insurance Regulation (DIR) excludes foreign branches of Chinese banks and Chinese branches of foreign banks from the list of eligible covered institutions, except for situations where China and another jurisdiction have an arrangement for the deposit insurance.[145] It is possible that foreign depositors can be left uninsured.

The EU takes an opposite stand. In the EU, the ranking of claims in liquidation is in the competence of national legislators. It is admitted that the Member States in the EU 'have divergent approaches to the subordination of creditor claim'.[146] However, the EU has attempted in Article 108 BRRD to harmonise to a certain level the ranking of claims. Implementing this Article requires that uncovered deposits from natural persons and SMEs rank higher than ordinary unsecured, non-preferred creditors, and covered deposits as well as deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency rank even higher than uncovered deposits. Different from the US, the BRRD does not make a distinction for foreign branches in non-EU countries. In relation to DGSs, within the EU, 'DGSs shall cover the depositors at branches set up by their member credit institutions in other Member States',[147] and '[d]epositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State'.[148] In other words, depositors at home and host Member States should be treated equally.

In terms of third-countries, the EU adopts an 'equivalency' test. It is required that 'Member States shall check that branches established in their territory by a credit institution which has its head office outside the Union

[144] Article 71 CBL.

[145] Article 2 DIR.

[146] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal amending: - Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; - Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; - Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; - Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, COM(2016) 850 final, COM(2016) 851 final, COM(2016) 852 final, COM(2016) 853 final, COM(2016) 858 final, Brussels, 24.11.2016, SWD(2016) 377 final/2, 74.

[147] Article 14(1) DSG Directive 2014.

[148] Article 14(2) DSG Directive 2014.

have protection equivalent to that prescribe in [DGS Directive]'.[149] And '[i]f protection is not equivalent, Member State may … stipulate that branches established by a credit institution which has its head office outside the Union may join a DSG [deposit guarantee scheme] operation within their territories'.[150] Based on these provisions, a branch of a US or Chinese bank within the territory of the EU may join a DSG of the Member State where the branch is located.

8.3.2 Host creditors' interest in the recognition proceedings

As seen below, all the selected jurisdictions guarantee that the interest of host creditors is protected, and the host authorities would refuse to recognise foreign home proceedings on the condition that host creditors' interest is compromised. In one scenario, if host creditors were treated less favourably in the home proceeding, a host authority would refuse to recognise. In another, if host and home creditors are treated the same way, but in accordance with the home law, a host authority may also refuse to recognise or recognise subject to the condition that the host law should apply to host creditors.

In the EU, resolution actions taken within the EU are automatically recognised across the EU Member States. With regard to the recognition request from third jurisdictions outside the EU, Article 95 BRRD lists five circumstances as reasons to refuse to recognise or enforce third-country resolution actions. Those related to the creditors' position are

> …
> (c) creditors, including in particular depositors located or payable in a Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;
> …
> (e) that the effects of such recognition or enforcement would be contrary to the national law.[151]

It is clear that unequal treatment (point (c)) is a legitimate reason to refuse to recognise foreign resolution actions. Point (e) is more complex to interpret as to what constitutes as 'contrary to the national law'. A relevant question is raised and analysed in §8.4.2: Should the difference in laws be as the reason to refuse to recognise or support foreign resolution measures?

[149] Article 15(1) para 1 DGS Directive 2014.
[150] Article 15(1) para 2 DGS Directive 2014.
[151] Article 95 BRRD.

In the US, the Bankruptcy Code Chapter 15 applies to recognition of foreign resolution actions. Accordingly, there are two primary mechanisms to protect host interest: first, public policy exception regulated in §1506, and second, other safeguard measures regulated in §1521(b) and §1522(a), with §1521(b) putting special emphasis on the protection of the interests of US creditors. Drawn from the previous cases, the mere fact of the difference of laws cannot trigger the public policy exception to refuse to recognise. Most foreign insolvency proceedings were recognised, unless US creditors were treated less favourably than foreign creditors. However, US courts may rely on other safeguard measures to ensure local rules are obeyed.

In China, Article 5 EBL prescribes the circumstances for refusal to recognise or enforce foreign insolvency judgments, and failure to protect the legitimate interests of local creditors is one of the grounds.[152] Although no court has invoked this exception, China does have the intention to protect Chinese local creditors.

8.4 Comparison and evaluation

8.4.1 How should circumstances be interpreted as discriminatory?

As concluded in the previous sections, any discriminatory actions against host creditors can be a reason not to recognise foreign resolution actions. But what circumstances should be interpreted as discriminatory? This question relies on a case-by-case analysis. This section analyses two real cases mentioned in §8.2.2.2 above.

The first case regards the difference in treatment of Icelandic depositors and English and Dutch depositors during the failure of Icelandic banks. In the dispute *The European Free Trade Area (EFTA) Surveillance Authority v Iceland*,[153] the court ruled that there was no legal obligation for Iceland to ensure payment to foreign depositors,[154] because the non-discrimination rule embedded in the European Economic Area (EEA) Agreement did not apply in this case on the basis that domestic deposits were transferred to a

[152] Article 5 EBL.

[153] Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013. See comments, e.g. Valia Babis, 'Abandoning Foreign Depositors in a Bank Failure? The EFTA Court Judgment in EFTA Surveillance Authority v. Iceland' (2013) 2 Global Markets Law Journal 1; M Elvira Méndez-Pinedo, 'The Icesave Saga: Iceland Wins Battle Before the EFTA Court' (2013) 1 MJIL Emerging Scholarship Project 101; Federico Lupo-Pasini, 'The Perils of Home-Country Control' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017); Federico Lupo-Pasini, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45.

[154] Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013, paras 117-185.

third institution, which is not governed by the Deposit Guarantee Scheme Directive, nor within the scope of the plea made by the plaintiffs.[155] The court may have been correct in cautiously limiting its discretion to the extent of the law and the plaintiffs' plea; however, it overlooked the nature of non-discrimination as a general public policy. By following the court's decision, it would be possible to reach the absurd conclusion that any discrimination is acceptable when there is no explicit law forbidding such action.

A second argument the court made is that 'the EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis provided that certain circumstances are duly proven'.[156] The argument implies that the 'right to regulate', especially with the aim of maintaining financial stability, overrides the non-discrimination rule. This dissertation does not challenge the right to regulate but disagrees with the court's opinion on its hierarchy vis-à-vis non-discrimination rule, namely, the right to regulate is not a justifiable reason to deviate from the non-discrimination principle.[157] As mentioned above, Bork assumes a hierarchy of principles of international insolvency law and holds that equal treatment of creditors is among the highest-ranking.[158] In the present case, at least one alternative solution would be repaying *pro rata* both Icelandic and foreign creditors, thereby respecting the *pari passu* principle.[159] There seems to be no risk of major instability because of paying foreign creditors. In addition, allowing national interest as an arbitrary reason to deviate from non-discrimination principle would encourage home banks to take risky behaviours abroad or home authorities to take less prudential supervision, given that they are aware that they will not be responsible for foreign interests.[160]

This case also relates to the national depositor preference rule in the US. Excluding foreign branches of US banks from preferential treatment would result in a discriminatory treatment of host depositors, which is a justifiable reason for host authorities to refuse to recognise US resolution actions. In addition, foreign branches in the US and China cannot participate in the home jurisdictions' deposit guarantee schemes, which is another potential

[155] Ibid paras 186-228.

[156] Ibid para 227.

[157] See similarly, Babis (n 153) 9-10. See also the discussion of domestic financial stability vis-à-vis international financial stability, Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017) 84-89.

[158] Text to n 94.

[159] Martin Wolf, 'How the Icelandic Sage Should End' (Financial Times, 14 January 2010) (presenting the data that the assets of the failed bank were sufficient to compensate depositors and over 100 percent of 4 billion euros in liabilities).

[160] Lupo-Pasini (n 157) 88.

discriminatory scenario. In these circumstances, it is also possible for host jurisdictions not to recognise home resolution actions. Apart from invoking the non-discrimination rule, refusal of recognition could also be on the basis of material fiscal policies, because the host jurisdiction may need additional funding to save host branches, which gives justification for the host jurisdiction not to cooperate with home jurisdictions.[161]

The second case relates to the alleged sacrifice of Russian depositors in the resolution of the Cyprus crisis. However, unlike the above-mentioned Iceland case, this dissertation holds the view that the exercise of bail-in, in the Cyprus case, does not violate the *pari passu* rule. A report showed that among the €37.6 bn deposits that were exposed to haircut, only €25.5 billion belonged to foreigners,[162] which meant not only Russian depositors suffered losses, but also domestic depositors.[163] Although it put many rich Russians in disadvantageous positions, the Cyprus case differs from the Icelandic case, in the way that Cyprus set the threshold at a certain amount of money (€100, 000), rather than nationalities (Icelandic v British and Dutch). Despite the suspicion that the decision unfavourable to many Russians might have an implicit political incentive behind,[164] there was no manifest discrimination against Russians.

A relevant question is raised: If unequal treatment is not found in relation to host creditors but in relation to third countries, can a host authority refuse to recognise home resolution actions? At present, the EU law only lists discriminatory treatment of domestic creditors as the legitimate reason to refuse to recognise foreign resolution actions.[165] So does the FSB.[166] However, this dissertation suggests that equal treatment of creditors is a general rule applicable universally.

A relevant case is *Bayern LB v Hypo Alpe Adria (HETA)* mentioned in Chapter 3 at §3.3.1.1.1. In this case, a court in Munich refused to recognise an Austria resolution action because the action fell outside the scope of 'resolution'. Yet, the appeal court decided to set aside the first instance judgment because the Austrian Constitutional Court later ruled the Austrian resolution invalid because of the violation of the *pari passu* rule:

[161] Chapter 7, at §7.4.3.

[162] Kate Mackenzie (Financial Times, 18 March 2013) <https://ftalphaville.ft.com/2013/03/18/1426012/the-cyprus-depositor-pain-distribution-ratio/> accessed 25 February 2020.

[163] Ian Jack and Tom Cassels, 'Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance' (2013) 8 Capital Markets Law Journal 450, 455.

[164] See, e.g. Emilios Avgouleas and Charles Goodhart, 'Critical Reflections on Bank Bail-ins' (2015) 1 Journal of Financial Regulation 3, 16.

[165] Article 95(c) BRRD; Article 33(3)(b) SRMR.

[166] FSB Principles, 12.

> However, the Court found that the right to property was nonetheless violated because the HaaSanG differentiated within the group of subordinate creditors by declaring only those claims that mature before 30 June 2019 as expired. Subordinate creditors with such claims were discriminated further as the securities and guarantees on their claims expired together with the claim. Meanwhile, the other equally subordinate creditors were not affected at all and even kept their interest claims. Since it turned out that the cut-off date could not prevent HETA from failing before the end of restructuring period (measures under the Bank Restructuring and Resolution Act had been taken with regard to the remaining creditors after the entry into force of the Hypo Reorganisation Act), it could not ensure an orderly restructuring and resolution.[167]

Normally, a host authority would have no incentive to hamper cross-border bank resolution if no host creditors are discriminated against, namely, no host interests are harmed. However, as is the consistent viewpoint made in this chapter, equal treatment of creditors ranks highest among all the general principles.[168] Therefore, when making decisions to recognise a foreign resolution action, any discriminatory consequences should be considered. This is also the result of saving judicial resources. In the *HETA* case, the differentiated treatment of creditors was later ruled invalid and thus did not need to be recognised anymore. If the host authority had recognised and enforced the original Austrian action, there would have been a reverse verdict, which would have been a waste of resources. The receiving jurisdiction can set the request in pending until the home authority makes the decision.[169]

8.4.2 Should the difference in laws be as a reason to refuse to recognise or support foreign resolution measures?

Based on the previous summary on cross-border corporate insolvency cases, a conclusion is drawn that the differences of lawa are not necessarily as a reason to refuse to recognise foreign insolvency proceedings. However, when it comes to relief measures, for instance, turning over the domestic assets to a foreign representative, the difference of laws between the relevant countries might be a reason to refuse such a relief request. This

[167] Austrian Constitutional Court, decision of 3 July 2015, ECLI:AT:VFGH:2015:G239.2014 <https://www.vfgh.gv.at/downloads/Bulletin_2015-1_G_239-2014_03.07.2015.pdf> accessed 25 February 2020.

[168] Text to n 94.

[169] This is also the case in *Goldman Sachs v Novo Banco*, in which the English court decided that the effectiveness of the resolution action, which was under review in Portugal, should be in the hands of the home court. See *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2015] EWHC 2371 (Comm), [2015] 2 CLC 475; *Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA, Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092, [2016] 2 CLC 690; *Goldman Sachs International v Novo Banco SA, Guardians of New Zealand Superannuation Fund & Ors v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683.

section argues that any difference of law should not be the reason to refuse to recognise or enforce foreign resolution actions, subject to the condition that the host jurisdiction has the basic framework of resolution in place. In fact, as shown in the following comparison, there are not many substantive differences between each jurisdiction's resolution regimes, at least in the EU and the US where both jurisdictions have resolution laws in line with the FSB Key Attributes.

8.4.2.1 Bail-in

8.4.2.1.1 Bail-in in the selected jurisdictions

The first comparison is in relation to the bail-in tool. Among the selected jurisdictions, the EU has the most systemic legal regime for bail-in as prescribed in the BRRD and Single Resolution Mechanism (SRMR).[170] It regulates various aspects of how bail-in should be implemented, including 'objective and scope', 'minimum requirement for own funds and eligible liabilities', 'implementation of the bail-in tool', and other 'ancillary provisions'. The purpose of the bail-in tool is either to 'recapitalise an institution or an entity' or 'to convert to equity or reduce the principal amount of claims or debt instruments that are transferred (i) to a bridge institution with a view to providing capital for that bridge institution; or (ii) under the sale of business tool or the assets separation tool'.[171] The bail-in tool can be exercised individually or in combination with other resolution tools.[172] However, it should be noted that the bail-in tool in the EU context is different from the FSB KAs in that the bail-in in the BRRD and SRMR only applies to 'liability' rather than 'equity'.[173]

In the US, there is no clear mention of the phrase 'bail-in' in the Federal Deposit Insurance Act (FDIA), the Dodd-Frank Act or the Bankruptcy Code, nor in the newly proposed amendments including the Financial Choice Act, the Financial Institution Bankruptcy Act, and a Chapter 14 proposed by the Hoover Institute. The most recent policy recommendation made by the Treasury entitled 'Orderly Liquidation Authority and Bankruptcy Reform' states that 'the FDIC has taken several critical steps to address these concerns, including through the development of [the single point of entry (SPE)] strategy that would involve "bail-in" of long-term creditors of the holding company'. [174] The bail-in mechanism is believed to be carried out by implementing the SPE strategy, as shown in a document entitled 'Resolution of Systemically Important Financial Institutions: The Single

[170] Articles 43-58 BRRD; Article 27 SRMR.

[171] Article 43(2) BRRD.

[172] Article 37(4) BRRD.

[173] Article 2(1)(57) BRRD.

[174] Treasury, Orderly Liquidation Authority and Bankruptcy Reform, February 21, 2018.

Point of Entry Strategy',[175] which contains no explicit mention of the term 'bail-in'. Simply put, the holding company of the financial group in distress would be put into resolution with the aim of absorbing the losses, while the operating subsidiaries, including the deposit-taking subsidiaries, would continue their normal businesses.[176] The bail-in is exercised together with the transfer tools as those discussed in §8.4.2.2. Under the SPE strategy, assets of the holding company, mainly the investments and loans to the subsidiaries, would be transferred to a 'bridge financial company',[177] and the remaining liabilities, including equity, subordinated debt and senior unsecured debt of the holding company, would be either partly repaid or, worse, not repaid at all.[178] The FDIC can also apply a 'securities-for-claims exchange' tool, by which the claims of creditors could be converted to the new debt, equity or contingent securities of the 'new holding company or new holding companies (NewCo or NewCos)', based on the bridge financial company.[179]

China, on the other hand, represents the third type of model which completely lacks a statutory bail-in tool. The Capital Rules acknowledge that write-down and conversion powers are in place for the financial authority,[180] previously the China Banking Regulatory Commission (CBRC) and currently, the China Banking and Insurance Regulatory Commission (CBIRC). However, the liabilities that could be written down or converted are only limited to the Additional Tier 1 (AT1) and Tier 2 (T2) instruments, and only for banks failing to meet the minimum capital requirements.[181] Although the legal texts explicitly contain the explicit wording 'write-down' (减记) and 'conversion into equity' (转为普通股), the two manifestations of the bail-in tool under resolution laws, the legislation itself – the Capital Rules – is supervisory guidance but not for resolution purposes. These measures are for the sole purpose of implementing Basel III reforms. Nevertheless, the SIFI Guiding Opinions confirm that bail-in will be adopted in China,[182] although the detailed implementation rules are not in place.

The following part therefore mainly compares the bail-in mechanisms in the EU and the US. The most obvious difference is the procedural aspect. The exercise of bail-in in the EU and the US differs in that bail-in is a statu-

[175] FDIC, 'Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy' (2013) 78 Fed. Reg. 76614. See, e.g., Thomas Jackson and David Skeel, 'Dynamic Resolution of Large Financial Institutions' (2012) 2 Harv Bus L Rev 435; Schillig (n 98) para 11.49ff.

[176] 78 Fed. Reg. 76614, 77616.

[177] 12 US Code §5381 (a)(3).

[178] 78 Fed. Reg. 76614, 77616.

[179] 78 Fed. Reg. 76614, 77616.

[180] Article 157 Capital Rules.

[181] Articles 153 and 157 Capital Rules.

[182] Article 29 SIFI Guiding Opinions.

tory tool in the EU which can be exercised independently, while in the US the bail-in effect is achieved through the bridge institution tool. However, these different approaches can lead to the same result that shareholders and subordinated creditors absorb the losses first.

Regarding the substantive aspect of bail-in, the *pari passu* principle still exists.[183] In the liquidation proceedings, similarly situated creditors are supposed to be repaid *pro rata*. In principle, the sequence of repayment is prescribed in the relevant law, and the insolvency practitioner or the court cannot amend it. In contrast, similarly situated creditors in the bail-in process are supposed to absorb the losses *pro rata* unless the resolution authority discretionarily determines to treat certain liabilities within a sub-group differently from the other liabilities within the same sub-group. In addition, the loss absorption should respect a certain hierarchy and bail-in can be imposed on higher rank liabilities only after the lower ranking liabilities have fully been written down or converted into equity. Regarding the ranking of claims, an established rule is that shareholders and subordinated unsecured creditors should bear the losses first.[184] In the EU, the sequence of write down and conversion is: (i) Common Equity Tier 1 (CET1); (ii) AT1; (iii) T2; (iv) subordinated debt; (v) the rest of eligible liabilities.[185] In the US, the FDIC also confirmed that '[l]osses would be apportioned according to the order of statutory priority among the claims of the former equity holders and unsecured creditors, whose equity, subordinated debt and senior unsecured debt would remain in the receivership'.[186] In short, subordinated debt is supposed to absorb the losses before other senior unsecured debt.

One closely related principle is the respect of national insolvency hierarchy and the NCWO rule, which is prescribed in both the EU[187] and the US.[188] As explained in §8.2.2.1, the NCWO rule ensures that no creditors should receive less than what they would have been received in liquidation. Although this rule is criticised as a result of its practicability or lack thereof, the purpose is to ensure that creditors who suffered losses greater than liquidation would receive further compensation. Regardless of the valuation issues, the NCWO rule also relates to the hierarchy of liquidation, which means that the general insolvency law hierarchy may affect the actual implementation of the bail-in.

[183] Recital (77) BRRD; 12 US Code §5390 (b)(4).

[184] KA 5.1; Recital (5) and Article 34(a)-(b) BRRD, Article 15(1)(a)-(b) SRMR; 12 US Code §5384(a)(1) and §5390(a)(1)(M).

[185] Article 48(1) BRRD.

[186] 78 Fed. Reg. 76614, 77616.

[187] Recitals (5) and (73) BRRD; Article 34(1)(g) BRRD.

[188] 12 US CODE §5390(a)(7).

Regarding the sequence of liquidation, the EU has not harmonised the ranking of claims in national insolvency laws, although Article 108 BRRD harmonises to a certain level the ranking of claims. In particular, uncovered deposits from natural persons and SMEs rank higher than ordinary unsecured, non-preferred creditors, and covered deposits as well as deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency rank even higher than uncovered deposits. In addition, according to the new amendment to Article 108 BRRD,[189] a new class of non-preferred senior debt is created, subordinated to other ordinary unsecured claims, on the conditions that (i) 'the original contractual maturity … is of at least one year'; (ii) 'the debt instruments contain no embedded derivatives and are not derivatives themselves'; and (iii) 'the relevant contractual documentation and, where applicable, the prospectus related to the issuance explicitly refer to the lower ranking'.[190] Simply put, short-term debts or derivatives and derivative-related instruments (such as structured notes) are favoured in the EU.

In contrast, the priority of claims prescribed in the Dodd-Frank Act is: (i) administrative expenses; (ii) any amounts owed to the US; (iii) employee salaries; (iv) employee benefits; (v) senior debt; (vi) subordinated debt; (vii) senior officer salaries; and (viii) equity.[191] As can be seen, there are no additional sub-classes within the senior debt category and no special treatment for short-term debts or derivatives.

In addition, as mentioned above, both the EU and the US now adopt the depositor preference rule. Both of them give special protection to deposits of natural persons and SMEs. However, one difference is that deposits of large corporates are also covered in the US national depositor preference rule, but not in the BRRD. EU resolution authorities can bail-in deposits of large corporates subsequent to other senior liabilities, yet prior to uncovered deposits of natural persons and SMEs. These are the differences between the EU and the US. It is worth mentioning that, in China, all individual deposits also enjoy preference priority, without additional sub-classes or the mention of corporate deposits.[192]

Another difference is about liabilities excluded from bail-in. The BRRD clearly states that certain liabilities are excluded from the coverage of the bail-inable liabilities, including (a) 'covered deposits'; (b) 'secured liabilities'; (c) 'client assets or client money'; (d) 'any liability that arises by virtue

[189] DIRECTIVE (EU) 2017/2399 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2017 amending Directive 2014/49/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy, OJ L 345/96.

[190] Article 108 (2) BRRD (revised).

[191] 12 US Code §5390 (b)(1).

[192] Article 71 CBL.

of a fiduciary relationship'; (e) 'liabilities to institutions … with an original maturity of less than seven days'; (f) 'liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems … or their participants and arising from the participation in such a system' and (g) 'a liability to … an employee…, a commercial or trade creditor ..., tax and social security authorities … and deposit guarantee schemes'. [193] Also, there are exceptional circumstances in which the resolution authority can exclude certain liabilities from bail-in.[194] In contrast, the US legal framework does not provide for such a specific exclusion of bail-inable liabilities. However, the FDIC indicated that liabilities to vendors and secured creditors should be transferred to the bridge financial company and thus avoid bail-in.[195] Also, deposits, employees' claims, tax claims are preferred claims in the Dodd-Frank Act, while client assets and liabilities arising out of fiduciary relationships do not, in essence, belong to the debtor. Exclusion of short-term debt may also be in line with the US policy choice as mentioned in the Total Loss-absorbing Capacity (TLAC) rule. Although there is no clear indication that the maturity date should be within seven days, the underlying rationale might be accepted.

8.4.2.1.2 Analysis

Based on the above analysis, in short, all jurisdictions generally accept the legitimacy of bail-in, although China does not have a detailed rule. Nonetheless, when comparing the bail-in implementation requirements in the EU and the US, the difference is also obvious: most distinctly, the EU has direct rules on bail-in in the BRRD, while the US only provides an SPE strategy without a further indication on the coverage of bail-inable liabilities and the legal process of executing the bail-in tool. In addition, the EU and US differ in the aspects of coverage of bail-inable liabilities and the ranking of claims.

In cross-border cases, usually, active recognition would not be requested in the case of bail-in. A more likely case is a host creditor brings about litigation against the home debtor in the host court and seeks full repayment of the claims. The court thus needs to decide on the validity of the bail-in procedure. Based on the present laws, it is not clear whether China would recognise foreign bail-in measures. Given that the law has not officially prescribed a statutory bail-in power in China, Article 5 EBL, especially the public policy exceptions specified therein, can be a reason to refuse to recog-

[193] Article 44(2) BRRD.

[194] Article 44(3) BRRD; Commission Delegated Regulation (EU) 2016/860 of 4 February 2016 specifying further the circumstance where exclusion from the application of write-down or conversion powers is necessary under Article 44(3) of Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 144/11.

[195] 78 Fed. Reg. 76614, 77618. Here, vendors share a similar meaning of the commercial or trade creditors in the EU, who provide daily operation services.

nise foreign bail-in. In the circumstances of pursuing recognition in the EU or US, there is no explicit law on this issue. According to Article 95 BRRD, EU resolution authorities are empowered to refuse to recognise third-country resolution actions if 'the effects of such recognition or enforcement would be contrary to the national law'.[196] However, based on the above comparison, does it mean that the US resolution procedure is contrary to EU law?

In cross-border corporate insolvency, the mere difference of laws, including both procedural and substantive differences, does not form a sufficient reason to refuse foreign insolvency proceedings. This general principle may also be extended to this special insolvency proceeding – resolution. As shown above, the most outstanding difference between the EU and the US is the procedural difference in the sense that the EU can directly apply the bail-in tool, while the US exercises the bail-in tool through the transfer tool. The different approaches are with the same purpose of resolution and can lead to the same result: shareholders and subordinated creditors absorb the losses. Despite the differences, both jurisdictions incorporate the FSB Key Attributes with the same purpose of making shareholders and subordinated creditors absorb the losses. It is difficult to reach the simple conclusion that US law is *contrary* to EU law.

A relevant case – the *Irish Bank* case – confirms that the winding-up measures taken by the Irish Finance Minister, although administrative in nature and different than the general judicial corporate insolvency proceedings, 'parallel provisions in laws adopted by the United States in response to the global financial crisis'.[197] This case demonstrates that the US accepts the validity of foreign resolution proceedings, without the need for them to be identical to US resolution proceedings. It should be acknowledged that identical resolution regimes are nearly impossible to achieve, but the administrative nature with the aim of orderly resolution should be the common cornerstone of the modern resolution regimes in different jurisdictions. Any invocation of public policy exceptions should be interpreted with a narrow approach, and the differences between bail-in procedures are not sufficient enough to refuse recognition.

8.4.2.2 Transfer tools

8.4.2.2.1 Transfer in the selected jurisdictions

In the EU, the transfer tool encompasses three resolution tools: the sale of business tool, the bridge institution tool and the asset separation tool. The sale of business tool is to effect a sale of the institution or part thereof

[196] Article 95(e) BRRD; Article 33(3)(d) SRMR.

[197] *In re* Irish Bank Resolution Corporation Ltd., 538 B.R. 692 (D. Del. 2015), 698.

to one or more private sector purchasers, by transferring shares or other instruments of ownership issued by the institution under resolution or all or any of its assets, rights, or liabilities. [198] The sale of business tool does not need the consent of the shareholders or any third party 'other than the purchaser'.[199] The bridge institution tool will be applied when no private buyer is quickly available, or the failing institution is too big to merge with another institution, which enables the resolution authorities to transfer all or a part of the business of the institution under resolution to a temporary bridge institution. [200] The asset separation tool authorises the resolution authorities to transfer certain assets, rights and liabilities of the institution under resolution or a bridge institution to an asset management vehicle.[201] The asset separation tool has to be applied together with another resolution tool.[202] The exercise of bridge institution tool and asset separation tool also may take place without the consent of the shareholders or any third party 'other than the bridge institution'.[203]

In the US, the Dodd-Frank Act empowers the FDIC to 'merge the covered financial company with another company', or 'transfer any asset or liability of the covered financial company … without obtaining any approval, assignment, or consent with respect to such transfer', [204] including to a 'bridge financial company',[205] also without consent.[206] Similarly, the FDIC can also act as the receiver of the insured deposit institutions (IDIs) and exercise transfer powers including 'purchase and assumption transaction' (P&A)[207] and 'bridge bank'.[208] These transfer powers may also be exercised without the consent of the shareholders or creditors. [209]

In China, the authorities can assume control over a failing institution and exercise the operation and management powers.[210] There might be cases where the authorities decide to sell the business or transfer assets and liabilities to another institution, but the decision needs to comply with

[198] Articles 2(1)(58) and 38-39 BRRD; Articles 3(1)(30) and 24 SRMR. See Madaus (n 99) 61; Schillig, 'The EU Resolution Toolbox' (n 99) 91-93.

[199] Article 38(1) BRRD.

[200] Articles 2(1)(60) and 40-41 BRRD; Articles 3(1)(31) and 25 SRMR. See Madaus (n 99) 61-62; Schillig, 'The EU Resolution Toolbox' (n 99) 93-94.

[201] Article 42(1) BRRD; Article 26 SRMR. See Madaus (n 99) 61-62; Schillig, 'The EU Resolution Toolbox' (n 99) 94-95.

[202] Article 37(5) BRRD; Article 22(4) SRMR.

[203] Article 40(1) BRRD; Article 42(1) BRRD.

[204] 12 US Code §5390 (a)(1)(G)(i).

[205] 12 US Code §5390 (a)(F) and (h).

[206] 12 US Code §5390 (O)(iii), (h)(2)(E)(ii) and (5)(D).

[207] 12 US Code §1821 (d)(2)(G); §1823 (c)(2)(A) and (4)(E)(iii).

[208] 12 US Code §1821 (d)(2)(F); 12 US Code §1821 (m)(new depository institutions) and (n) (bridge depository institutions). See FDIC, Resolution Handbook, 18.

[209] 12 US Code §1821(d)(2)(G)(i)(II) and (n)(3)(A)(iv).

[210] Article 66 CBL.

Chinese company law or contract law, including the statutory requirement of shareholders' or creditors' consent. In other words, the authorities do not have an explicit power to override shareholders' rights, thus assumption of control is not considered as a transfer tool here. The following part again only compares the EU and US transfer tools.

A substantive concern is about the partial transfer in which creditors similarly situated might be treated differently. As explained above, bail-in is exercised in the US through the transfer tool. [211] A similar situation might happen in the EU as well. In a partial transfer, certain liabilities might be transferred to another entity, thus unaffected, but the remaining liabilities entering into liquidation would suffer losses. Creditors left behind might be treated in a less favourable situation than those whose claims are transferred. The authorities do have discretionary power to determine which liabilities are transferred to a solvent institution and which liabilities are left behind for loss-absorbing, but they cannot discriminate against foreign creditors and only put foreign claims in the bad bank. The difference is that the US resolution authorities would follow a loss-absorption rule that the statutory priority should be respected in the sequence of equity, subordinated debt and senior unsecured debt.[212] The EU does not have a similar explicit provision. The reason is that the US treats the transfer tool as a mechanism for loss-absorption and thus respects the insolvency hierarchy similar to the bail-in tool; while in the EU, the bail-in tool and the transfer tool are separate tools and the transfer tool does not serve the function of bail-in.

The second point is about the safeguard measures in a partial transfer, which are similar in the EU and the US. In the EU, special safeguard measures are provided for liabilities include security arrangement, title transfer financial collateral arrangements, set-off arrangements, netting arrangements, covered bonds, and structured finance arrangements.[213] The BRRD regulates that '[w]hen the safeguard applies, resolution authorities should be bound to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing institution', in order to 'preserve legitimate capital market arrangements' and to 'prevent the splitting of linked liabilities, rights and contracts'.[214] Similarly, the US also regulates similar protection for 'qualified financial contracts' (QFCs), requiring

[211] 78 Fed. Reg. 76614.

[212] 78 Fed. Reg. 76614, 76616.

[213] Article 76 BRRD. Also Commission Delegated Regulation (EU) 2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of Directive 2014/59/EU of the European Parliament and of the Council, OJ L 131/15.

[214] Recital (95) BRRD.

these QFCs should be transferred either all together or not at all.[215] A QFC means 'any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the [FDIC] determines by regulation, resolution, or order to be a qualified financial contract'.[216] Despite the different wording, both the EU and the US confirm that liabilities attached to each other cannot be separated.

Procedurally, both the EU and the US authorities can exercise these transfer tools overriding the shareholders' and creditors' rights, removing the most difficult obstacle in implementing such resolution powers. However, the transfer tools are subject to different national laws and regulations. For instance, the EU sale of business tool needs to comply with Article 39 BRRD procedural requirements, while the US P&A power needs the approval of federal agency.[217] In addition, the operation of the bridge institution also needs to comply with local rules covering authorisation, management and other supervision standards.[218]

8.4.2.2.2 Analysis

Transfer tools, unlike the bail-in tool, not only require recognition but, under most circumstances, require enforcement in host jurisdictions. It would be difficult for China to directly recognise foreign resolution transfer measures, because China does not have a resolution law, and a transfer tool may be deemed as contrary to Chinese laws or in violation of creditors' rights, given that a transfer action does not need the consent of creditors.

With regard to the interaction between the EU and the US, in the recognition process, non-recognition should be restricted to a violation of fundamental national public policies. Based on the above comparison, both the EU and the US have incorporated transfer tools, and it is unlikely that the exercise of transfer tools would be deemed as a violation of public policies. In the process of granting support, host authorities might be requested to take certain actions. The above comparison shows that the EU and the US have comparable transfer tools but distinct implementation rules. These detailed differences, however, should not be a reason to refuse to grant reliefs. However, host authorities may require local laws to apply, such as registration rule concerning the establishment of a bridge institution, or approval procedures from local authorities. To implement foreign resolution actions, host authorities may need to take domestic support actions in order to achieve the goals set by foreign resolution actions.

[215] 12 US Code §5390 (c)(9).

[216] 12 US Code §5390 (c)(8)(D)(i).

[217] 12 US Code §5390 (a)(1)(G)(ii); 12 US Code §1821(d)(2)(G)(ii).

[218] Article 41 BRRD; 12 US Code §5390 (h); 12 US Code §1821 (n).

8.4.2.3 Restrictions on early termination rights

8.4.2.3.1 Restrictions on early termination rights in the selected jurisdictions

In the EU, Article 68 BRRD prescribes that resolution measures 'shall not, per se, under a contract entered into by the entity, be deemed to be an enforcement event, … or as insolvency proceedings … provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed'.[219] In addition, resolution measures shall not 'be deemed to be an enforcement event or insolvency proceedings under a contract entered into by: (a) a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent undertaking or by any group entity; or (b) any entity of a group which includes cross-default provisions.'[220] Consequently, entering into resolution does not constitute a default right.[221] Therefore, it shall not 'make it possible for anyone to (a) exercise any termination, suspension, modification, netting or set-off rights…; (b) obtain possession, exercise control or enforce any security over any property of the institution or entity…; (c) affect any contractual rights of the institution'.[222] Directly related to this dissertation's topic on cross-border issues, the BRRD explicitly states that '[w]here third country resolution proceedings are recognised pursuant to Article 94, or otherwise where a resolution authority so decides, such proceedings shall for the purposes of this Article constitutes a [resolution] measure'.[223]

In addition, the BRRD prescribes the 'power to temporarily suspend termination rights', empowering the authorities to 'suspend the termination rights of any party to a contract with an institution under resolution from the publication of the notice … until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication'.[224] The temporary stay also applies to other payment and delivery obligations,[225] as well as enforcement of security interests,[226] which, as the FSB advocates, gives the resolution authority some breathing time to decide how to dispose of these liabilities.[227]

[219] Article 68(1) BRRD.

[220] Article 68(1) BRRD.

[221] See, e.g. Francisco Garcimartín and Maria Isabel Saez, 'Set-off, Netting and Close-out Netting' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 342

[222] Article 68(3) BRRD.

[223] Article 68(2) BRRD.

[224] Article 71(1) BRRD.

[225] Article 69 BRRD.

[226] Article 70 BRRD.

[227] KA EN 4(a). See also Recital (94) BRRD. For literature, see, e.g. Garcimartín and Saez (n 221) 342-343; Philipp Paech, 'The Value of Financial Market Insolvency Safe Harbours' (2016) 36 Oxford Journal of Legal Studies 855, 880-881.

Similarly, the US also has such restrictions on early termination rights.[228] 'A person who is a party to a qualified financial contract with a covered financial company may not exercise any right that such person has to terminate, liquidate, or net such contract … solely by reason of or incidental to the appointment under this section of the Corporation as receiver for the covered financial company'.[229] The Federal Reserve System (Fed) explains in its policy document that this rule is 'intended to facilitate the orderly resolution of the most systemically important banking firms – the GSIBs – by limiting the ability of the firm's counterparties to terminate QFCs upon the entry of the GSIB or one or more of its affiliates into resolution'.[230] There are two types of restrictions: first, a stay shall only be 'until 5:00 p.m. (eastern time) on the business day following the date of the appointment',[231] which is the temporary stay. Second, a stay could also be imposed 'after the person has received notice that the contract has been transferred',[232] then the temporary stay becomes a permanent prohibition. Similarly, a temporary stay can also be imposed on payment obligations.[233]

China, on the other hand, does not provide for a statutory rule on restrictions on early termination rights. The EBL does not even make an explicit reference to the effectiveness of *ipso facto* clauses. Yet, in practice, Chinese financial institutions may enter into agreements containing such clauses. An outstanding example is the close-out netting provision. For instance, the National Association of Financial Market Institutional Investors (NAFMII) put forward a standardised set of documents for derivatives, including the Master Agreement, the Supplement (or Schedule), the Security Agreement, and the Definitions, collectively referred to as the 'NAFMII Documents', which in the 2009 version adopted the close-out netting mechanism for onshore derivatives transactions.[234] Also, the NAFMII Bond Repurchase Master Agreement (2013 version) recognised the application of close-out

[228] See, e.g. Douglas G Baird, 'Dodd-Frank for Bankruptcy Lawyers' (2011) 19 American Bankruptcy Institute Law Review 287; Roe and Adams (n 103).

[229] 12 US Code §5390(c)(10)(B)(i). See also 12 US Code §1821(e)(10)(B)(i).

[230] Fed, 'Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions' (2017), 82 Fed. Reg. 42882, 42899. See also 12 CFR §252.81.

[231] 12 US Code §5390(c)(10)(B)(i)(I). See also 12 US Code §1821(e)(10)(B)(i)(I).

[232] 12 US Code §5390(c)(10)(B)(i)(II). See also 12 US Code §1821(e)(10)(B)(i)(II).

[233] 12 US Code §5390(c)(8)(F). See also 12 US Code §1821(e)(8)(G).

[234] NAFMII Master Agreement (2009 version), section 9. See also Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M. Haentjens, Qingjiang Kong and B. Wessels eds, Eleven International Publishing 2017) 73.

netting in Outright Transfer Repos.[235] In addition, the CBRC, in its response to the National People's Congress (NPC), explicitly stated that there is no legal conflict between the bankruptcy law and the close-out netting provision.[236] The International Swaps and Derivatives Association (ISDA) is also heavily involved in developing close-out netting in China.[237] According to the ISDA 2017 Memorandum on Enforceability of Close-out Netting in China, in general, close-out netting is not prohibited.[238] Both the ISDA and Chinese authorities seem to overlook the possibility that close-out netting, alongside other early termination rights, may result in negative effects on the market. There is little discussion on restricting the early termination rights in China. Given the fact that the Chinese legal framework lacks a comprehensive resolution regime, the current law does not delegate any authority the statutory power to disapply contractual terms in relation to early termination rights.

8.4.2.3.2 Analysis

Both the EU and the US contain almost identical rules on prohibition and temporary stay on early termination rights. The only difference is about the time of the end of temporary stay: midnight in the EU, and 5 p.m. in the US. The difference might not be relevant since it may not be possible to exercise the early termination powers other than during working hours. The stay power is expected to be effective across the EU and the US. Immediately after the entry into resolution, the home authority could impose a temporary stay for a limited period of time. After the period, such a temporary stay does not need to be recognised in the host jurisdictions. If the liabilities are transferred to a solvent institution, home authorities would disapply early termination rights to these liabilities, host authorities would also acknowledge that there is no need to apply termination rights since those claims are not affected.

[235] NAFMII Bond Repurchase Master Agreement (2013 version), Special Provisions of Outright Transfer Repo, Section 3(V). Outright Transfer Repo or Title Transfer Repo is defined as 'the transaction where one Party (the "Repo Party") sells the Purchased Bonds to the other party (the "Reverse Repo Party") and the Reverse Repo Party pays the Purchase Amount on the Purchase Date to the Repo Party simultaneously, and the Parties agree to a certain date (Repurchase date) on which the Repo Party will purchase the Repurchase Bonds from the Reverse Repo Party at an agreed price ("Repurchase Amount")'. There is another type of repo, i.e. Pledged Repo, which refers to 'the transaction where one Party (the "Repo Party") pledges the Repurchased Bond to the other party (the "Reverse Repo Party") and the Reverse Repo Party Pays the Purchase Amount on the Purchase Date to the Repo Party simultaneously, and the Parties agree to a certain date (the "Repurchase Date") on which the Repo Party pays the Repurchase Amount to the Reverse Repo Party and the Reverse Repo Party releases the pledge over the Repurchased Bonds'. There is no close-out netting provision in Pledged Repo agreements. NAFMII Bond Repurchase Master Agreement, Section 24(53).

[236] CBRC, Responses to the Fifth Meeting of the Twelfth NPC Recommendation No 2691 (《对十二届全国人大五次会议第2691号建议答复的函》), Yin Jian Shen Han [2017] No 105.

[237] Ibid.

[238] ISDA, Memorandum on Enforceability of Close-out Netting in China (2017).

There is little guidance on how the Chinese authorities would respond in these circumstances. The lack of statutory rule might be a problem for such a cross-border issue. There is currently no resolution law in China, and any resolution action imposed by foreign authorities may be deemed as a default event under Chinese law and thus subject to early termination rights.

8.4.3 Should governing law provisions be the reason to refuse to recognise or support foreign resolution actions?

This is the scenario discussed in the previous Chapter 2 at §2.2.1 and Chapter 6 at §6.4.4.1.2.[239] Simply put, the question is whether the choice of a governing law rather than the law where a resolution action is taken can be the reason to refuse to recognise or support foreign resolution actions. The discussion revolves around the *Gibbs* rule, which established an English law tradition that an English-law-governed contract cannot be discharged by a foreign insolvency proceeding. Despite being criticised by many, the *Gibbs* rule is still in effect under the English common law. In the case of bank resolution, it is possible that a resolution measure imposed on an English-law-governed contract may not be recognised in the UK.

Other jurisdictions showed a similar concern. In the EU, the Impact Assessment 2016 questioned the validity of bail-in abroad.[240] A bail-in tool exercised by a European resolution authority on a third-country-law-governed contract may not be effective under the law of that third-country. In the US, the Dodd-Frank Act raised the concern that a transfer of foreign-law-governed contract may not be effective either. It is regulated that a transfer to a foreign institution is not allowed except for certain circumstances:

> In transferring any qualified financial contracts and related claims and property …, the [FDIC] as receiver for the covered financial company shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution, unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this Section.[241]

[239] Paul Davies raised the same question, see, Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 269.

[240] Commission Impact Assessment 2016, 143.

[241] 12 US Code §5390 (c)(9)(B).

The previous §6.4.4.1.2 in Chapter 6 supports the repeal of the outdated *Gibbs* rule, from the standpoint of making insolvency proceedings effective across borders. This section continues the discussion from a creditor's point of view. It might be understandable that the English court would protect English creditors from discriminatory and unjustifiable debt discharge arrangments. However, such protection is not necessarily to be performed through the *Gibbs* rule. As confirmed in §8.4.1, any discriminatory act can be invoked as a public policy exception to refuse to recognise foreign resolution actions. Also, as explained in §8.2.1.3.3, the law provides for various additional safeguard measures to protect the interests of creditors. A simple recourse to the *Gibbs* rule on the mere basis of choice-of-law provision is not sufficient to refuse to recognise foreign resolution actions.[242] In addition, not recognising foreign resolution actions would result in different treatments of home and host creditors, which is contradictory to the general non-discrimination principle.

The contractual approaches discussed in Chapter 6 at §6.2.3.2 are another argument for recognition. The FSB and other institutions have proposed a 'contractual recognition approach', which requires that the contracting parties agree to be bound by the resolution actions.[243] This approach, however, is questioned on the enforceability issues.[244] The EU and the US have incorporated the contractual approaches, such as contractual bail-in,[245] contractual stay,[246] and contractual transfer tools.[247]

These contractual provisions require any creditor who chooses to be governed by the host law agree to be subject to the home resolution measures. Such mutual contractual agreement discredits the rationale of the *Gibbs* rule. The *Gibbs* rule builds on the party autonomy principle and refuses non-English insolvency proceedings because parties did not choose non-English law. However, applying the same logic to the contractual resolution provisions, it should be accepted that the counterparties agree to be subject to the home resolution proceedings, and there is no contract law basis to deny such consensus. Conversely, with the existence of such contractual provisions, it will enhance cross-border effectiveness.

[242] See §8.2.1.4.

[243] FSB Principles, 6-7.

[244] See FSB, 'Public responses to the September 2015 consultative document "Cross-border Recognition of Resolution Actions"' (12 December 2014) <http://www.fsb.org/2014/12/public-responses-to-the-september-2014-consultative-document-cross-border-recognition-of-resolution-actions/> accessed 25 February 2020.

[245] Article 55 BRRD.

[246] Amended Article 71a BRRD; Article 1(33) BRRD II. See also 12 CFR §252.83(b)(1).

[247] 12 CFR §252.83(b)(1).

8.5 Concluding remarks

To conclude, a premise and leading rule is established in this chapter that cross-border resolution, from both the home and host authorities' perspectives, should ensure equal treatment of creditors and avoid discrimination on the basis of nationality. Following this rule, any discriminatory actions against host creditors can be a legitimate and reasonable basis for refusing to recognise home resolution actions.

Host authorities may have additional incentives to protect host creditors in accordance with host laws and to refuse to recognise or enforce foreign resolution actions made by home laws. This chapter supports the opinion that resolution actions should be made effective across borders and holds that protection of host creditors should not impede recognition of foreign resolution actions. It is acknowledged that different jurisdictions have different implementing resolution rules; however, these differences should not constitute barriers to recognition. As a matter of fact, the comparison made in the previous sections shows that the resolution laws in the EU and US share major similarities despite different details. This finding, in turn, supports the argument that recognition should not be refused because of different laws. One exception, however, is China. Given that China does not have a comprehensive resolution law at the moment, it is unpredictable how China would treat foreign resolution actions, and it is likely that China would refuse recognition on the basis of recognition being contrary to national laws. This example demonstrates that the FSB's endeavour to harmonise resolution laws at the global level would facilitate cross-border bank resolution.

Another point raised in this chapter is that governing law provisions should not be the reason to refuse to recognise foreign resolution actions. This is in response to the *Gibbs* rule. From the point of view of the creditors' position, applying different laws would result in different treatment of home and host creditors. Therefore, the *Gibbs* rule should be abolished to avoid different treatment of home and host creditors. The protection of creditors does not need to be guaranteed by the *Gibbs* rule; instead, such protection can be achieved by invoking public policy exceptions or additional safeguard measures.

Part IV

Conclusions

9 A Future Framework for Recognition of Foreign Resolution Actions

9.1 FSB standards and implementation in national law instruments

As introduced in Chapter 1, the Financial Stability Board (FSB) has been endeavouring to promote cross-border effectiveness of resolution actions. The FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes, or KAs) stipulate KA 7 on the establishment of a general framework for cross-border resolution, KA 8 on the establishment of crisis management groups (CMGs) and KA 9 on the formulation of institution-specific cooperation agreement (CoAgs). The FSB *Principles for Cross-border Effectiveness of Resolution Actions* specifically advocate recognition as a means to give effect to foreign resolution actions.

The FSB standards, as well as other international organisations' resolutions, are of the 'soft law' nature and do not have a binding effect. However, as explained in Chapter 7, soft law is the main form of international financial regulation. This is because soft law can provide flexibility in the implementation of international standards tailored to national practices and avoid lengthy treaty negotiation procedures. Although the FSB, as the successor of the Financial Stability Forum (FSF), is empowered with an expansionary mandate, namely 'a wider range of member commitments and strengthened peer review and external monitoring mechanism',[1] the soft law nature of FSB standards has not been changed. The FSB standards still have no binding effects on G20 jurisdictions. [2] The G20 jurisdictions have a delegated, wide range of discretion as to whether or not to implement FSB standards as well as how to implement FSB standards.

[1] Douglas W Arner and Michael W Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 UNSW Law Journal 488, 512. See also Stavros Gadinis, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2012) 48 Tex Int'l L J 157.

[2] See, e.g. Jan Wouters and Jed Odermatt, 'Comparing the "Four Pillars" of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' (2014) 17 Journal of International Economic Law 49; Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302.

Jurisdictions usually have internal incentives to follow these international standards to pursue 'welfare objectives'.[3] As explained by Posner and Sykes, national authorities adopting the Basel Accord have the straightforward 'welfare objective' to 'limit undue risk taking by financial institutions and to ensure that banks remain capable of meeting their obligations to depositors'.[4] The same logic applies to FSB Key Attributes, given that the new resolution regime is supposed to resolve failing financial institutions while maintaining financial stability without the need for recourse to taxpayers' money, that is, bail-out. As introduced at the beginning of this dissertation, the incorporation of the FSB resolution regime is in steady progress in G20 jurisdictions, especially in global systemically important bank (G-SIB) home jurisdictions and key host jurisdictions.[5] For instance, the European Union (EU) adopted the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR), the United States (US) enacted Dodd-Frank, even China is in the process of drafting a new regulation and has published SIFI Guiding Opinions.

However, also identified by the FSB, establishing an effective cross-border resolution framework is slow. As explained by Posner and Sykes, '[i]nternational law is endogenous to the interests of the states rather than an exogenous force that compels states to act contrary to their interest'.[6] In other words, national authorities may not participate in international cooperation if it is not in their interests. In the context of international financial regulation, national authorities have more incentives to protect their own national financial system rather than the global financial system including the financial system in other jurisdictions.[7] Particularly in cross-border bank resolution, authorities would prefer to take unilateral actions, even when it may cause negative externalities to other jurisdictions and impede international resolution.[8]

[3] See Eric A Posner and Alan O Skyes, 'International Law and the Limits of Macroeconomic Cooperation' (2013) 86 Southern California Law Review 1025.

[4] Posner and Skyes (n 3) 1037.

[5] FSB, 'FSB 2019 Resolution Report Eighth Report on the Implementation of Resolution Reforms "Mind the Gap"' (14 November 2019) 24-27.

[6] Ibid, 1027. See also Eric A Posner and Alan O Skyes, *Economic Foundations of International Law* (Belknap Press of Harvard University Press 2013) 12-15.

[7] Lupo-Pasini extensively discusses the 'financial nationalism' phenomenon, see Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

[8] Federico Lupo-Pasini, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45, 12; Yulia Makarova and others, *Bankers without Borders? Implications of Ring-fencing for European Cross-border Banks* (International Monetary Fund 2010); Federico Lupo-Pasini, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017). *Cf* Thomas C Baxter Jr, Joyce M Hansen and Joseph H Sommer, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57.

A typical example is China, which still relies on a simple Article 5 of the Enterprise Bankruptcy Law (EBL) to resolve cross-border insolvency cases. The strict rules prescribed in Article 5, namely, international agreements or reciprocity, plus several public policy exceptions, make recognition of foreign insolvency/resolution actions extremely difficult. Previous cases show that Chinese authorities prefer to adopt a territorial approach to protect local interests.

Although some jurisdictions have shown intention to adopt international standards, the current international rules only prescribe general and vague principles without specific implementing details. This results in the insufficiency of national rules, for example, the EU resolution laws. Articles 94 to 96 BRRD regulate recognition of foreign resolution actions. The BRRD adopts an administrative recognition approach, which is quite advanced and adapted to the new administrative resolution regime. However, these provisions are overly simple. A variety of issues are left unaddressed, such as recognition of foreign representatives, or granting reliefs like moratorium.

Even a mature legal instrument – the United States Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (MLCBI), which is tailored to international insolvency, cannot adequately address cross-border bank resolution cases. This is the current situation in the US. Chapter 15 of the US Bankruptcy Code adopts the MLCBI but is not adequate to tackle cross-border bank resolution issues. A major issue is that Chapter 15 does not apply to foreign banks with branches or agencies in the US, thus these foreign banks do not fit into a proper recogntition regime. Also, most available reliefs under Chapter 15 are discretionarily decided by judges and may not cover resolution cases, which could impede the effectiveness of cross-border bank resolution.

Simply put, none of the selected jurisdictions has clear rules to address all issues for recognition of foreign resolution actions. There are two reasons. First, some jurisdictions may have no incentives to participate in international cooperation and thus do not design comprehensive rules. Second, some jurisdictions may have incentives for international cooperation but did not formulate adequate rules, as international standards are not specific enough to instruct national legislative bodies. To address the second concern, this dissertation proposes ten principles as a more detailed guidance, in response to ten questions raised in Chapters 6, 7 and 8: (i) there should be no reciprocity request; (ii) the jurisdictions should be identified as home and host jurisdictions, based on the supervisory model; (iii) a foreign resolution proceeding should be recognised as an ongoing process, with the effects of recognising foreign representatives and moratorium; (iv) a foreign resolution measure should be recognised with an immediate effect, through either direct enforcement or supportive measures; (v) financial stability should be able to be invoked as a public policy exception; (vi) the interpretation of financial stability, including critical functions, should be conducted narrowly; (vii) material fiscal implications should also be able to be invoked as a public policy exception, but with a narrow interpretation; (viii) any discriminatory actions should be the reason for refusal of recognition; (ix) different national laws are not sufficient reasons for refusal of recognition; and (x) a choice of governing law should also not be the reason to refuse to recognise foreign resolution actions. These principles are supposed to be incorporated into national laws to be directly applicable in recognition of foreign resolution actions and are more extensively summarised in Chapter 10.

9.2 Choice of international instruments

National law instruments are used by national authorities unilaterally. To enhance international cooperation, international instruments are also needed. This section explains the roles of three international instruments: international agreements, model laws and customary international law. As a matter of fact, the ten principles can also be applied in these international instruments.

9.2.1 International agreements

The international instrument discussed first is international agreements. As a general principle of public international law, the binding force of international instruments derives from either the consent of the parties, or from meta-legal principles such as justice, equity, and fairness.[9] International agreements, such as conventions or treaties, establish 'rules expressly recognized by the contesting states' as a source of international law.[10] In other words, the binding force of international agreements traces back to the consent expressed by the contracting parties.[11]

In the field of private international law, there have been many endeavours to formulate international agreements to facilitate mutual recognition and enforcement of judgments. One of the typical examples is the Hague Conference on Private International Law (HCCH),[12] which formulated

[9] Rüdiger Wolfrum, 'Sources of International Law' in *Max Planck Encyclopedia of Public International Law* (OUP 2011).

[10] Article 38(1)(a) Statute of the International Court of Justice (United Nations [UN]) 33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevans 1179, 59 Stat 1055, 145 BSP 832, TS No 993 (ICJ Statue).

[11] See Lassa Oppenheim, 'The Science of International Law - Its Task and Method' (1908) 2 American Journal of International Law 313.

[12] See HCCH <https://www.hcch.net/en/home> accessed 25 February 2020.

the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971 Recognition and Enforcement Convention). This Convention only had five Contracting Parties[13] and did not achieve the expected outcome, because the Brussels Convention and Lugano Convention superseded the HCCH 1971 Convention within the European countries.[14] The HCCH continues to work on a 'Judgments Project' that aims to promote cross-border movement of judgments on a wider global level.[15] The first result of this project – the Hague Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention) – provides the legal basis for contracting parties in relation to recognition and enforcement when a choice of court agreements exists.[16] An additional Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention), with a wider applicable scope, was officially published in 2019.[17]

In the selected jurisdictions, bilateral agreements exist between China and several European countries. As mentioned in above in Chapter 5, as of September 2018, China has entered into legal assistance treaties with 76 countries, among which 19 treaties on legal assistance in civil and criminal matters are effective, and 18 out of 20 treaties on legal assistance in civil and commercial matters are effective.[18] There are 11 EU Member States that have entered into legal assistance agreements in civil or commercial matters with China, namely, Bulgaria, Belgium, Poland, France, Lithuania, Romania, Cyprus, Spain, Greece, Hungary and Italy.[19]

There is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.[20] It is explained that 'a principal stumbling

[13] The contracting parties were Albania, Cyprus, Kuwait, the Netherlands, and Portugal. See HCCH, 'Status Table, 16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78> accessed 25 February 2020.

[14] HCCH, 'Some Reflections of the Permanent Bureau on a General Convention of Enforcement of Judgments' (Prel. Doc. No 17 of May 1992 in Proceedings of the Seventeenth Session (1993), Vol I, 231).

[15] HCCI, 'The Judgments Project' <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 25 February 2020.

[16] Convention of 30 June 2005 on Choice of Court Agreements.

[17] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters.

[18] See Ministry of Foreign Affairs, 'Overview of Judicial Assistance Treaties' <https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml> accessed 25 February 2020.

[19] See Chapter 5 at §5.3.1.1.

[20] Travel.State.Gov, 'Enforcement of Judgments' <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html> accessed 25 February 2020.

block appears to be the perception of many foreign states that U.S. money judgments are excessive according to their notions of liability'.[21] Therefore, the US does not rely on international agreements to recognise and enforce foreign judgments.

In the field of international insolvency law, bilateral and multilateral agreements have also been facilitating cross-border insolvency.[22] For example, conventions between the EU Member States played an important role in cross-Europe insolvency until the entering into force of the European Insolvency Regulation (EIR).[23] Additional international agreements include the Treaty of Montevideo 1889, Treaty of Montevideo 1940, Code Bustamante 1928, and the Nordic Bankruptcy Convention 1933.[24]

International agreements can form a binding instrument for mutual recognition of resolution actions between contracting parties. Article 93 BRRD explicitly acknowledges the role of international agreements as legal basis for giving effect to third-country resolution actions. Accordingly, the European Commission may 'submit to the Council proposals for the negotiation of agreements with one or more third countries regarding the means

[21] Ibid.

[22] See a general overview, Bob Wessels and Gert-Jan Boon, *Cross-Border Insolvency Law: International Instruments and Commentary* (2nd edn, Kluwer 2015).

[23] Article 44 EIR 2000 (the EIR replaced: (a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899; (b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969; (c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925; (d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979; (e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979; (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930; (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977; (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962; (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934; (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933; (k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.) See also Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015) paras 10060-10061.

[24] Wessels (n 23) paras 10064 ff.

of cooperation between the resolution authorities and the relevant third country authorities'.[25] A particular advantage of international agreements is that they can regulate the actions of both home and host jurisdictions as contracting parties. One concern that has been raised in the previous chapters is that home authorities do not have legal obligations to duly consider host interests, so that host authorities may refuse to recognise home resolution actions for the purpose of protecting host interests. With a proper international agreement in place, both parties can agree in advance on how to take actions in a future resolution process and balance both parties' interests.

Currently, there is no international convention or treaty that specifically applies to cross-border resolution matters. In some jurisdictions, for instance, China, judgment recognition agreements can apply in cross-border resolution cases. As concluded in Chapter 5, there is no difference between the recognition of foreign judgments and recognition of foreign insolvency judgments. Thus, the above applicable international agreements between China and other European countries apply also, with the exception that the China-Spain agreement explicitly excludes recognition of judgments related to insolvency proceedings.[26] In fact, the very first case of China recognising a foreign judgment, that is in the *B&T Ceramic Groups s.r.l.* case, is one recognising a judgment related to insolvency proceedings.[27] The same should apply to cross-border bank resolution cases, given that resolution is categorised as one of the insolvency proceedings. However, in certain judgment recognition agreements, resolution is explicitly excluded from judgment recognition agreements. For example, the Judgments Convention explicitly excludes 'resolution of financial institutions' from the applicable scope.[28]

Some non-binding international agreements have been concluded, such as memorandums of understanding (MOU)[29] or cooperation agreements (CoAgs).[30] However, the non-binding nature means there is no legal obligation, nor any legal consequences, if a party decides to depart from the provi-

[25] Article 93(1) BRRD.

[26] Treaty on legal assistance in civil and commercial matters between the People's Republic of China and the Kingdom of Spain, signed on 2 May 1992, came into effect on 1 January 1994.

[27] (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.

[28] Article 2(1)(e) Judgments Convention.

[29] For example, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Resolution of Insured Depository Institutions with Cross-border Operations in the United States and the United Kingdom, signed on 10 January 2010 (FDIC-BOE Resolution MOU).

[30] For example, Cooperation Arrangement Concerning the Resolution of Insured Depository Institutions and Certain other Financial Companies with Cross-border Operations in the United Stated and the European Banking Union, singed in September 2017 (FDIC-SRB Resolution CA).

sions agreed in arrangements.[31] Reaching these non-binding arrangements is easier than concluding hard-law international agreements. However, their effectiveness cannot be ensured. It seems to be a long process before any binding cross-border bank resolution agreements come into effect.

9.2.2 Model law (soft law)

A model law is a form of soft law that does not have binding effects on any international actors. However, a model law can provide national legislators with detailed guidance on how to formulate national rules. Two particular instruments in the field of international insolvency law are the MLCBI and the Model Law on Insolvency-related Judgments (MLJ) mentioned in Chapter 6.

The MLCBI was published in 1997 and, as of September 2019, has been adopted in 46 States in a total of 48 jurisdictions.[32] Its purpose is to 'assist States to equip their insolvency laws with a modern harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency'.[33] It is also confirmed that the MLCBI 'is a legislative text that is recommended to States for incorporation into their national law'.[34] And it has the advantage of flexibility, namely, 'a State may modify or leave out some of its provisions', although it is recommended that 'States make as few changes as possible in incorporating the Model Law into their legal systems' in order to 'achieve a satisfactory degree of harmonization and certainty'.[35] Many commentators find that the MLCBI contributes to more willingness in

[31] Article 2(5) FDIC-BOE Resolution MOU; Section 2(6) FDIC-SRB Resolution CA. See also Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 500-501.

[32] UNCITRAL, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 25 February 2020. See comments, e.g. Andre J Berends, 'The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309; Ronald J Silverman, 'Advances in Cross-border Insolvency Cooperation: the UNCITRAL Model Law on Cross-border Insolvency' (1999) 6 ILSA Journal of International & Comparative Law 265; Look Chan Ho, *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (Global Law and Business 2017); Neil Hannan, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017).

[33] MLCBI Guide, para 1.

[34] Ibid, para 19.

[35] Ibid, para 20.

international cooperation in cross-border insolvency cases.[36] However, some proposed additional reforms. For one thing, due to its limited contents and coverage, the MLCBI does not address all the problems, such as jurisdiction rule[37] or recognition of foreign insolvency-related judgments.[38] For another, as a result of its soft law nature, the MLCBI does not have binding effects on all the jurisdictions and therefore cannot ensure consistent incorporation in each jurisdiction. For example, some jurisdictions that have incorporated the MLCBI still apply the reciprocity test, such as South Africa, even though the MLCBI does not require reciprocity, which may impede recognition of foreign insolvency proceedings.[39]

Similarly, the new MLJ[40] aims to 'assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement … the MLCBI'.[41] Also, the new MLJ needs to be incorporated into national laws with sufficient flexibility for national legislators to take into account local legal systems.[42] In sum, soft law instruments, including the model law approach, have the above-mentioned

[36] See, e.g. Jenny Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 Tulane Journal of International and Comparative Law 307; Bob Wessels, 'Will UNCITRAL Bring Changes To Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will' (2006) 3 International Corporate Rescue 200; Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517; Jay L Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247; Jenny Clift, 'UNCITRAL: Clarifying the Model Law: a senior legal officer at the UN explains recent developments in the pioneering framework on cross-border insolvency' (2016) International Financial Law Review (28 April 2016) <https://www.iflr.com/Article/3549923/Uncitral-Clarifying-the-Model-Law.html?ArticleId=3549923>accessed 25 February 2020.

[37] Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review.

[38] Inga West, 'UNCITRAL Cross-border Insolvency Model Laws: And Then There Were Two' (2019) 16 International Corporate Rescue 82.

[39] Keith D Yamauchi, 'Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 International Insolvency Review 145; S Chandra Mohan, 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 International Insolvency Review 199, 208-210.

[40] See comments, e.g. Lia Metreveli, 'Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency' (2017) 51 Columbia Journal of Law and Social Problems 315; Rosalind Mason, 'Cross-border Insolvency: Recognition of Insolvency-Related Judgments and Choice of Law Characterization ' (2018) 27 Norton Journal of Bankruptcy Law and Practice 639; Florian Bruder, 'Recognition and Enforcement of Insolvency-Related Judgments' (2018) Eurofenix 32.

[41] MLJ Guide para 1.

[42] Ibid paras 15-19.

advantages such as flexibility incorporation and less political obstacles; however, it should not be overlooked that these instruments are non-binding in nature, which may result in the inconsistent interpretation of the provisions.[43]

In the field of cross-border bank resolution, several authors have proposed formulating a model law to help guide national regulators to formulate rules on recognition of foreign resolution actions.[44] The International Insolvency Institute is also funding a project on 'A Framework for Cross-border Resolution of Financial Institutions', which intends to formulate a model law and 'serve as proof of concept of the proposed systematic treatment given to the many critical issues needing resolution, providing for a fair, efficient, predictable, and transparent regime for recognition and enforcement across borders of the recovery and resolution of financial institutions'.[45] For the time being, the FSB regards the MLCBI as a source for use in cross-border bank resolution. Yet, it also acknowledges that the MLCBI 'allows jurisdictions to exclude from the recognition framework entities such as banks that are subject to special insolvency regimes' and does not include specific rules tailored to resolution actions.[46] Therefore, an additional model law is needed for a special cross-border bank resolution regime. It is also acknowledged that the adoption of a model law does not guarantee that each jurisdiction would incorporate the model law, or that each jurisdiction can interpret the model law in a consistent way. Therefore, the adoption of a model law can be only one of the approaches to addressing cross-border bank resolution issues.

9.2.3 Customary international law

Irit Mevorach recently proposed, in her book *The Future of Cross-Border Insolvency*, that modified universalism can be elevated to a concept of customary international law (CIL).[47] CIL, according to the International Court of Justice (ICJ) Statute, is a source of international law 'as evidence of

[43] See, e.g. Bob Wessels and Gert-Jan Boon, 'Soft Law Instruments in Restructuring and Insolvency Law: Exploring Its Rise and Impact' (2019) Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur 2.

[44] See, e.g., Jonathan M Edwards, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122; Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-border Resolution Gap' (2015) 10 Brook J Corp Fin & Com L 183; Matthias Lehmann, 'Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders' (2016) 66 International and Comparative Law Quarterly 107.

[45] Correspondence email of International Insolvency Institute to its Members on 25 July 2019.

[46] FSB Principles, 18.

[47] See Irit Mevorach, 'Modified Universalism as Customary International Law' in *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018); Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1043.

a general practice accepted as law'.[48] Although the theory is not confirmed in national statues or cases, it provides an alternative solution for recognition. If the courts accept this theory, the modified universalism approach can form a new legal basis to address cross-border insolvency cases.[49] The same theory can also be applied in cross-border bank resolution cases. This dissertation proposes that the principle of recognition of foreign resolution actions, subject to certain exceptions, can be regarded as CIL and, therefore, forms the legal basis for recognition.

The discussion starts with the International Law Commission's 2018 publication *Draft conclusions on identification of customary international law with commentaries* (CIL 2018), which adopts a traditional two-element approach, namely, formation of a customary international law must meet two elements, that is, 'a general practice' and 'acceptance as law' (*opinio juris*).[50]

First, a general practice is a material or objective element, which 'refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law';[51] and '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.[52] State practice 'consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions'.[53] It can be 'diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.'[54]

In relation to resolution, a distinct evidence is the adoption of the FSB Key Attributes, which was subsequently endorsed by the G20 Heads of State and Government at the Cannes Summit in November 2011 as 'a new

[48] Article 38(1)(b) ICJ Statute.

[49] n 47.

[50] Draft conclusions on identification of customary international law, with commentaries, 2018, adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, para 77; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para 27; Jurisdictional *Immunities of the State (Germany v Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para 55. *Cf* Theodor Meron, 'International Law in the Age of Human Rights' (2003) 301 General Course on Public International Law 21 (arguing for a 'core values' approach).

[51] CIL 2018, 130, Conclusion 4(1).

[52] CIL 2018, 130, Conclusion 4(2).

[53] CIL 2018, 132, Conclusion 5.

[54] CIL 2018, 133, Conclusion 6(2).

international standard for resolution regimes'.[55] These actions in relation to international organisations or international conferences can be deemed as state practice, including KAs 7-9 on cross-border issues. Another FSB resolution – the FSB Principles, however, is not endorsed by G20 jurisdictions but simply a decision made by the FSB.[56] But such a decision can still 'provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development'.[57]

Within each selected jurisdiction, some evidence can be invoked to demonstrate CIL. For example, in the EU, the most direct evidence is the legislative acts BRRD and SRMR, both of which clearly prescribe the conditions and procedures to recognise foreign resolution actions.[58] In the US, Chapter 15 practices also confirm that the US can recognise foreign resolution actions.[59] In China, although there is no direct legislation or case law, the legislative plan mentioned that the new bank resolution regulation should be in compliance with the Key Attributes that contain the basic principle to give effect to foreign resolution actions.[60]

However, to constitute 'a general practice', the practice must be general, 'meaning that it must be sufficiently widespread and representative, as well as consistent'.[61] Given that this dissertation only examines three jurisdictions, albeit representative, it is sceptical about the concluding of this generality requirement. Even though G20 jurisdictions adopting the FSB Key Attributes can contribute to generality,[62] the actual interpretation might still be uncertain.

Second, the identification of *opinio juris* requires that 'it is necessary … to be satisfied that there exists among States an acceptance as law … as to the binding character of the practice in question', which is a subjective or psychological element.[63] It means that 'the practice in question must be

[55] FSB Key Attributes, 1; Communiqué G20 Leaders Summit - Cannes - 3-4 November 2011, Section 13.

[56] FSB, 'New Measures to Promote Resolvability, Including Effective Cross-Border Resolution' (3 November 2015) <https://www.fsb.org/2015/11/new-measures-to-promote-resolvability-including-effective-cross-border-resolution/> accessed 25 February 2020.

[57] CIL 2018, 147, Conclusion 12(2).

[58] Articles 93-96 BRRD; Article 33 SRMR.

[59] See, e.g. *In re Tradex Swiss AG*, 384 B.R. 34, 42 (Bankr. D. Mass. 2008); *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015); *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018).

[60] CBRC, 'Letter to the 12th NPC 5th Meeting Recommendation No. 2691 (对十二届全国人大五次会议第2691号建议答复意见的函), Yin Jian Shen Han [2017] No. 105' (4 July 2017) <http://www.cbrc.gov.cn/govView_AB039466FD0144C08EC9FC46B4E1E73D.html> accessed 25 February 2020.

[61] CIL 2018, 135, Conclusion 8(1).

[62] n 55.

[63] CIL 2018, 138.

undertaken with a sense of legal right or obligation'.[64] Forms of evidence of *opinio juris* can be 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference'.[65] The above-mentioned evidence can attribute to the identification of *opinio juris*, yet the obstacle is to establish a psychological premise that states are willing to be bound.[66]

In addition, customary international law cannot be applied to a persistent objector. 'Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection'.[67] The present study, fortunately, does not find any evidence that the selected jurisdiction object to recognise foreign resolution actions, although sometimes they might have few incentives to follow the principle.

Once a CIL is established, it has a binding effect on both international and national courts.[68] For example, many continental European countries incorporate CIL or general principles and norms of international law in their national legal systems.[69] The British common law also has a long tradition of directly applying CIL.[70] In the US, CIL is part of common law and has the

[64] CIL 2018, 138, Conclusion 9(1).

[65] CIL 2018, 140, Conclusion 10(2).

[66] See, e.g. Anthony A D'amato and Richard Anderson Falk, *The Concept of Custom in International Law* (Cornell University Press 1971) 53, 66; Noora Arajärvi, 'From the "Demands of Humanity": The Formulation of Opinio Juris in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice' in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 189-190.

[67] CIL 2018, 152, Conclusion 15(1).

[68] See, e.g. Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011); Cedric MJ Ryngaert and Duco WH Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1.

[69] Dinah Shelton, 'Introduction' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 13. However, procedures may differ. See, e.g Hans-Peter Folz, 'Germany' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 244-245 (necessary to acquire a decision from the Federal Constitutional Court); Giuseppe Cataldi, 'Italy' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 342-344 (domestic courts have the competence to verify customary international law).

[70] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [2977] 2 WLR 356, [1977] 1 ALL ER 881. See Stephen C. Neff, 'United Kingdom' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 626-628.

status of law.[71] In China, although the Constitution does not clearly identify the status of CIL, or international usage (国际惯例) in the Chinese language, lower legislative acts recognise the effects of international usage.[72] For cross-border bank resolution cases, particularly, national courts can rely on CIL and make it the legal basis to recognise foreign resolution actions. Nonetheless, as shown above, the identification of CIL can be a tricky process. The notion of applying CIL only provides an alternative to help facilitate cross-border bank resolution and recognition of foreign resolution actions.

9.3 Concluding remarks

This chapter discusses several possible legal instruments for recognition of foreign resolution actions. Although dealing with foreign actions, the recognition issue falls under the realm of national law and is the sole power of national authorities. Therefore, national law instruments are the most important ones that can ensure a smooth recognition process. The present international standards have provided guidance for national legislators. This dissertation proposes ten additional principles for national legislators to incorporate into national regimes for recognition of foreign resolution actions. At the international level, several international law instruments can be chosen as supplementary tools to promote international cooperation, including international agreements, model law and CIL. These international instruments can be used in parallel to enhance certainty for recognition of foreign resolution actions.

[71] *The Paquete Habana*, 175 US 677, 700 (1900). See Paul R Dubinsky, 'United States' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 642-643.

[72] For example, Articles 142 and 150 General Principles of Civil Law (《民法通则》). See Jerry Z Li and Sanzhuan Guo, 'China' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 183-186.

10 Conclusions

This dissertation addresses the question of what the legal framework for recognition of foreign resolution actions should be. Chapter 1 lays out the general background. Chapter 2 defines resolution as actions taken by resolution authorities to resolve banks that are failing or likely to fail. The first two introductory chapters emphasise the importance of cross-border bank resolution to preserve global financial stability and the current lack of comprehensive regimes for recognition of foreign resolution actions. Two policy goals are identified for establishing a recognition framework: to facilitate cross-border bank resolution and make home resolution actions effective in foreign jurisdictions, and to protect the interest of host jurisdictions. This dissertation argues that foreign resolution actions should be, in principle, effective, subject to certain limited exceptions. This is in line with the recommendations of the Financial Stability Board (FSB) and other international organisations.

For a recognition regime for foreign resolution actions, Chapters 6, 7 and 8 identified ten questions, from the perspectives of private international law, financial law and insolvency law. Analysis was conducted on the basis of traditional legal doctrines and the special characteristics of resolution. The answers to these ten questions formulate ten principles, as guidance for host jurisdictions to use when formulating a legal framework on recognition of foreign resolution actions:

Principle (i): There should be no reciprocity request for recognition of foreign home resolution actions. In the selected jurisdictions, only China adopts a strict reciprocity test, which requires that a recognition decision can only be made when a foreign jurisdiction has previously recognised a Chinese judgment. However, reciprocity is an unnecessary pre-condition for recognition, as it would severely impede cross-border bank resolution. (Chapter 6, §6.4.1)

Principle (ii): Jurisdictions in cross-border bank resolution cases are distinguished as home and host jurisdictions. The distinction is made because cross-border bank resolution relies on the system of cross-border bank supervision in which home supervisory authorities of multinational banks conduct consolidated supervision on a global basis. Home resolution authorities are in a leading position to take global resolution actions for the whole group. (Chapter 6, §6.4.2)

Principle (iii): An ongoing foreign resolution proceeding should be recognised, with the effects of recognising the authority of foreign representatives and relevant reliefs such as moratorium. Recognition of home representatives allows these foreign representatives to take actions within the host territory. Putting moratorium measures in place facilitates the implementation of resolution actions taken in the home jurisdictions and maintains international financial stability. It is further advised that national laws should clearly prescribe the formal requirements, such as documents to be submitted for recognition. This proposal does not make a recommendation for either administrative recognition or judicial recognition, and national legislative bodies have the discretion to make an option. (Chapter 6, §6.4.3)

Principle (iv): A foreign resolution measure with immediate effect should be recognised. The potential judicial review process for the acts of resolution authorities in a home jurisdiction should not be the reason to refuse to recognise home resolution actions, because making resolution effective serves the public interest, which outweighs private rights in this situation. Affected creditors can still seek remedies in home jurisdictions. A debt discharge under home resolution actions can also be recognised, because a counterparty in the host jurisdiction should have foreseen this situation when it entered into a contract with a party that is subject to home resolution actions; entering into resolution alters the normal contractual relationships governed by the choice of law provision. Upon recognition, some foreign resolution actions need to be enforced, either through direct enforcement or by taking domestic supportive measures. This proposal recommends that jurisdictions should put enforcement proceedings in place, with clear procedures and guidance. (Chapter 6, §6.4.4)

Principle (v): Financial stability in the host jurisdictions should be able to be invoked as a public policy exception to refuse to recognise foreign resolution actions. This is because, in general, home jurisdictions have no incentive or legal obligation to take care of host interests, and it is justifiable for host jurisdictions to take this defensive legal mechanism to protect host interests. (Chapter 7, §7.4.1)

Principle (vi): There should be a narrow interpretation of financial stability in the host jurisdictions. This is because, first, financial stability is a public policy exception, and public policy exceptions must be interpreted narrowly; second, invoking the host financial stability exception might impede global resolution and undermine the financial stability of home jurisdictions, which in turn may affect host stability; third, the financial stability test also exists in domestic resolution decision-making, which only concerns severe situations which are rare and exceptional. (Chapter 7, §7.4.2)

Principle (vii): A recognition request may be rejected if it is accompanied with the need for massive public funds from host jurisdictions, that is, if it would have an adverse impact on host jurisdictions' fiscal policies. However, this public policy exception should also be interpreted narrowly. Furthermore, this dissertation holds the opinion that home jurisdictions' resolution actions may have unintended external stability effects on host jurisdictions, therefore, host jurisdictions might be free from the need to supply additional funds. (Chapter 7, §7.4.3)

Principle (viii): Any discriminatory actions should be the cause for refusal of recognition. Taking resolution actions does not necessarily require discriminatory treatment against foreign creditors; resolution objectives can be achieved by *pro rata* loss-absorption among domestic and foreign creditors. (Chapter 8, §8.4.1)

Principle (ix): Different national laws should no longer be reasons for refusal of recognition. After examining the present resolution laws in the selected jurisdictions, it can be seen that resolution laws have been largely harmonised between the European Union (EU) and the United States (US), though not in China. The different implementation details do not constitute a strong reason to refuse foreign resolution actions. (Chapter 8, §8.4.2)

Principle (x): A choice of governing law other than the home law should not be the reason to refuse to recognise foreign resolution actions. Protection of host creditors' rights does not necessarily need to be achieved through the choice-of-law provisions; rather, public policy exceptions and additional creditors' safeguard measures can be invoked to protect host creditors' rights. Also, not recognising foreign resolution actions simply because of the choice of law would result in a different treatment of home and host creditors. When a contractual provision is added in the contract for creditors to recognise home resolution actions, such a provision can be the supporting argument that host creditors' expectations are protected, thus undermining the reason to refuse to recognise foreign resolution actions. (Chapter 8, §8.4.3)

These principles reflect both the policy goals stated in Chapter 1. Principles (i) to (iv) deal with grounds for recognition and making resolution actions effective across borders, while principles (v) to (x) address reasons to refuse recognition, with the aim of protecting host local interests. This dissertation attempted to keep a dedicated balance between the two policy goals. On the one hand, this dissertation holds the view that foreign home resolution actions should be recognised so that a cross-border resolution decision can take effect. On the other hand, this dissertation acknowledges that host authorities should have public policy exception tools to refuse to recognise home actions, in order to protect host interests. However, it is highlighted that such public policy exceptions can only be invoked when fundamental interests of host jurisdictions are at stake, with the aim of least undermining a global resolution strategy. In other words, public policies should be interpreted narrowly.

All three jurisdictions compared in this dissertation currently have both mechanisms for recognition and reasons for the refusal of recognition. However, as illustrated in Part II, it is questionable whether the current regimes can address all important issues that may arise from the recognition of foreign resolution actions. For example, the EU adopted the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR) and created a special regime for cross-border bank resolution. As explained in Chapter 3, for Banking Union Member States, the Single Resolution Board (SRB) is the resolution authority for cross-border banks. Outside the Banking Union, resolution actions on a branch in another Member States are automatically recognised. In addition, it is a requirement that resolution colleges are established to address the resolution of banking groups. These are special intra-EU arrangements. For resolution actions taken by third country authorities with regard to third country banks with entities in the EU, Articles 94 to 96 BRRD lists the conditions for recognition and grounds for refusal of recognition. These provisions make it explicit that EU resolution authorities are empowered to recognise and enforce third-country resolution actions. Although there is no clear identification of the jurisdiction rule (principle (ii)), it is inferred that EU authorities accept the jurisdiction of home countries; this is required in Article 96 BRRD where EU branches of third country institutions are generally subject to third country resolution authorities, unless an EU branch is not subject to third country resolution actions or recognition of third country resolution actions would violate EU public policies. Article 94 BRRD specifies that, after recognition, EU resolution authorities have the power to enforce third country resolution actions with regards to subsidiaries (equity or other ownership instruments), branches, assets of third country banks located in the EU and rights and liabilities governed by the law of one of the EU Member States. However, these rules are overly simple, without distinguishing recognition of foreign resolution proceedings (principle (iii)) and foreign resolution measures (principles (iv)), let alone subsequent effects upon recognition. It is not clear how EU authorities would deal with different types of recognition requests. On the other hand, the EU values local interests. Article 95 BRRD numerates five public policies based on which EU authorities can refuse to recognise and enforce third country resolution actions, namely, financial stability, resolution objectives, equal treatment of creditors, material fiscal policies, and national laws. These public policy exceptions are in line with the FSB Principles. Given the lack of cases, for the time being, it is difficult to predict how EU authorities would apply these exceptions. It is proposed that the interpretation of these public policy exceptions should be in line with principles (v) to (x).

The US is a leading jurisdiction in formulating bank resolution rules. As early as the 1950 Federal Deposit Insurance Act (FDIA), the Federal Deposit Insurance Corporation (FDIC) was equipped with administrative resolution powers to resolve failing depository institutions. The 2010 Dodd-Frank Act also extends such resolution powers to non-bank financial institutions and bank holding companies. However, despite the leading role of the US formulating domestic rules, the US pays little attention to cross-border bank resolution issues. One of the reasons might be that the US incorporated the Model Law on Cross-border Insolvency (MLCBI) into Chapter 15 of its Bankruptcy Code, which is very effective in resolving cross-border corporate insolvency cases. Indeed, the FSB also identified the MLCBI as an instrument to resolve cross-border bank resolution cases.[1] Although being a cross-border insolvency instrument, which targets decisions of courts, Chapter 15 can apply to administrative resolution actions. However, as explained in Chapter 4, Chapter 15 is insufficient to address cross-border bank resolution cases. First, Chapter 15 explicitly excludes foreign banks (depository institutions) with branches or agencies in the US, and all branches or agencies of foreign banks are subject to US resolution authorities. It makes almost impossible to recognise or enforce foreign resolution actions imposed on US branches or agencies of foreign banks. Second, Chapter 15 adopts the distinction of centre of main interest (COMI)/establishment, which is the manifestation of modified universalism of the present international insolvency law. However, this identification may not be suitable for financial institutions that are subject to the home/host distinction (principle ii), although it is argued in Chapter 6 that home jurisdiction can be understood as COMI jurisdiction, and host jurisdiction can be understood as establishment jurisdiction. Third, the effects of recognition in Chapter 15 only extends to reliefs, including both automatic reliefs and discretionary reliefs. However, automatic reliefs are limited to certain restrictions on assets located in the US. It is uncertain how US courts would react to most discretionary reliefs related to foreign resolution actions. It is recommended that a recognition of foreign resolution proceedings (principle (iii)) and foreign resolution measures (principle (iv)) should be distinguished, with clear references to available subsequent reliefs. Fourth, Chapter 15 grants public policy exceptions for refusal of recognition and additional safeguard measures to refuse relief requests, with the effect of protecting US creditors' interests. While it may be justifiable to invoke public policy exceptions in cross-border bank resolution cases, a broad application of additional safeguard measures may impede cross-border resolution. It is recommended that public policies should be clearly listed, such as financial stability (principle (v)), fiscal policy (principle (vii)), and non-discriminatory treatment of creditors (principle (viii)).

[1] FSB, 'Principles for Cross-border Effectiveness of Resolution Actions' (3 November 2015) 18.

Courts in previous Chapter 15 cases interpreted public policies narrowly, and it is suggested that for resolution cases, such an interpretation method should also apply, following the specific principles elaborated in above (v) to (x).

China, albeit the home jurisdiction to four global systemically important bank (G-SIBs) out of 30 as of 2019, is lagging behind in adopting the FSB Key Attributes. The most recent policy document is the 2018 SIFI Guiding Opinions, which only set out several general principles without concrete resolution rules that can be applicable to failing banks. In addition, little attention is paid to cross-border issues. For the time being, only Article 5 of the Enterprise Bankruptcy Law (EBL) prescribes the rules for cross-border insolvency, following the general principles of private international law. The application of Article 5 in cross-border bank resolution cases raises several concerns. First, although Chapter 5 of this dissertation explains that resolution under the Chinese law should also be understood under the general framework of insolvency, lack of additional legislative interpretation or case law questions the applicability of this Article 5 in resolution. Second, Article 5 adopts a strict reciprocity test, which makes recognition difficult. It is proposed that reciprocity should be abandoned (principle (i)). Third, the rules prescribed in Article 5 are overly vague, without clear guidance on the effects of foreign resolution actions in China, let alone foreign actions imposed on Chinese subsidiaries, branches, assets or Chinese law governed rights and liabilities. Therefore recognition of foreign resolution proceedings (principle (iii)) and foreign resolution measures (principle (iv)) should be distinguished, with clear references to subsequent effects. Fourth, China puts much stress on local interests, with Article 5 listing a variety of public policies that can be invoked in refusal of recognition, including the basic principles of Chinese laws, the State sovereignty, security or public interest, as well as the interest of Chinese creditors. It is not clear how Chinese courts would react to these public policies when deciding a resolution case, and it is recommended that interpretation of these public policies should follow principles (v) to (x).

In sum, all the selected jurisdictions have some tools to recognise foreign resolution actions and can invoke public policies to refuse to recognise. The tricky part is how to interpret and apply the rules when facing specific resolution requests. Authorities need to decide, on a case-by-case basis, whether a recognition request falls under the scope of resolution, whether all pre-requisites for recognition have been met, to what extent a relief can be granted, and whether recognition of foreign resolution actions would have material negative effects on host jurisdictions. It is hoped that the principles proposed in this dissertation can help host authorities deal with these issues.

This dissertation, furthermore, emphasises that cross-border bank resolution relies on the interaction between both home and host authorities. The decision of a host authority concerning whether or not to recognise a home resolution action depends not only on the host jurisdiction's legal system, but also, to a large extent, on the home authority's decision-making process, including whether or not host interests have been taken into account. Since this dissertation mainly focuses on the issue of recognition which is about the actions taken by host authorities, recommendations for home authorities are not included in the previous principles. Nevertheless, legal regimes for home resolution authorities should be a next-step research topic, which is put in a broader theme of global financial governance. Chapters 7 and 8 have slightly touched upon this issue. In particular, home authorities are encouraged to adopt actions that can maintain international financial stability but are not discriminatory against host creditors. However, it is acknowledged that the current prevailing global financial governance does not have a binding regime for home authorities. From an international law point of view, home jurisdictions have no hard-law international legal obligations to protect host interests. And from a domestic law perspective, home jurisdictions are only accountable to their national constituencies but not foreign actors and, therefore, have no incentives to consider foreign interests in resolution decision-making. This situation can be explained by the financial trilemma doctrine and financial nationalism doctrine mentioned in Chapter 7.[2] Although it is suggested in this dissertation that home authorities duly take into account host interests, how to incorporate this obligation into a (new) legal regime and make home authorities accountable to foreign actors may be a challenge from both theoretical and practical points of view.

As mentioned at the beginning of Chapter 1, apart from recognition of foreign resolution actions, there are additional approaches to address cross-border resolution issues, such as establishing a supranational authority at the global level, further harmonisation of national resolution rules and enhanced cooperation between home and host authorities.[3] The special intra-EU arrangements are examples. The BRRD harmonised bank resolution laws across the EU, which, to a large extent, mitigates legal conflicts among the Member States. The SRMR created the SRB as a supranational agency empowered to be in charge of resolving cross-border banks within the Banking Union. Article 117 BRRD follows the previous Directive on

[2] See Chapter 7, §7.2.2.2. See literature, Dirk Schoenmaker, *Governance of International Banking: The Financial Trilemma* (OUP 2013); Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

[3] See Matthias Haentjens, Bob Wessels and Shuai Guo, 'Conclusions' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019).

Reorganisation and Winding-up of Credit Institutions (CIWUD) and adopts an automatic recognition mechanism. Such regimes are based on the special political and economic relations of EU Member States, such as the founding treaties of the EU and internal market within the Union, and, particularly, the harmonization of financial regulation, *inter alia*, the EU passporting and home country control mechanism. It is doubtful that these special EU arrangements can be applied across the world. On the bright side, cross-border cooperation seems to be on the rise. The BRRD, for example, provides a legal basis for the establishment of resolution colleges as platforms for cross-border cooperation between EU Member States. Even outside the EU, national authorities have reached memorandums of understanding (MOUs)[4] or other cooperation agreements (CoAgs).[5] The concern for these international agreements, as explained in Chapter 9, is that they are not binding. It is uncertain if or how countries would act on these agreements. Other international instruments discussed in Chapter 9 such as model law or customary international law can also be utilised in cross-border bank resolution cases, although it is also not clear to what extent these international law instruments would be recognised and enforced by national authorities or courts. Cooperation is not simply a legal issue but involves additional political considerations.

A final thought touches upon internationalism vis-à-vis nationalism. This dissertation is imbued with a grand theme of globalisation.[6] In the banking sector, the former Governor of the Bank of England Mervyn King once put it that 'global banking institutions are global in life, but national in death'.[7] To phrase it another way, the businesses of banks are extending around the world, but banking regulations, including insolvency/resolution regimes for banks, are still in the hands of national authorities, even though international organisations such as the Basel Committee on Banking Supervision (BCBS) and the FSB have been promoting 'soft law' international standards

[4] For example, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Resolution of Insured Depository Institutions with Cross-border Operations in the United States and the United Kingdom, signed on 10 January 2010 (FDIC-BOE Resolution MOU).

[5] For example, Cooperation Arrangement Concerning the Resolution of Insured Depository Institutions and Certain other Financial Companies with Cross-border Operations in the United Stated and the European Banking Union, singed in September 2017 (FDIC-SRB Resolution CA).

[6] See, e.g. Jeffry A Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton & Company 2007); Ronald Findlay and Kevin H O'Rourke, *Power and Plenty: Trade, War, and the World Economy in the Second Millennium* (Princeton University Press 2009); Barry Eichengreen, *Globalizing Capital: A History of the International Monetary System* (Princeton University Press 2019).

[7] Financial Services Authority, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (March 2009) 36.

to harmonise global banking regulations.[8] The incompatibility of global business vis-à-vis national legal systems makes cross-border issues an extreme challenge. One of the solutions, as Schoenmaker proposed in his 'financial trilemma' theory, is to uphold globalisation as usual and make national policies subordinate to international solutions.[9] This dissertation follows this strategy, arguing for making foreign resolution actions effective in domestic regimes and endeavouring to address potential legal barriers that may undermine a global resolution strategy.

On the other hand, there is an opposite opinion that international banks should be broken down and kept within national borders.[10] This reflects the anti-globalisation or reverse-globalisation view. As Dani Rodrik explains in his 'political trilemma' theory, national self-determination, political democracy and hyper-globalisation are three incompatible objectives that cannot be fulfilled simultaneously, and he stood by the view that hyper-globalisation should be given up, at least not be pushed forward in extreme forms.[11] Recent international events have demonstrated this trend. For instance, Brexit discussed in Chapter 3 at §3.3.1.1.3 is a form of anti-European sentiment.[12] The US President Donald Trump put forward the 'America First' slogan and started a round of trade wars with an increasing tendency

[8] See Chapter 7, §7.2.1.2. See literature, e.g. Lawrence LC Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision' (1998) 39 Va J int'l L 1; Patrick Van Roy, 'The Impact of the 1988 Basel Accord on Banks' Capital Ratios and Credit Risk-taking: An International Study' (2005) EFMA 2004 Basel Meetings; Daniel K Tarullo, *Banking on Basel: The Future of International Financial Regulation* (Peterson Institute 2008); David S Bieri, 'Financial Stability, the Basel Process and the New Geography of Regulation' (2009) 2 Cambridge Journal of Regions, Economy and Society 303; Thomas Cottier and Rosa M Lastra, 'The Quest for International Law in Financial Regulation and Monetary Affairs' (2010) 13 Journal of International Economic Law 527; Thomas Cosimano and Dalia Hakura, 'Bank Behavior in Response to Basel III: A Cross-Country Analysis' (2011) IMF Working Papers 2011/119; Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302.

[9] See Chapter 7 at §7.2.2.2. See Schoenmaker (n 2). Also, e.g., Dani Rodrik, 'How Far Will International Economic Integration Go?' (2000) 14 The Journal of Economic Perspectives 177; Dirk Schoenmaker, 'Is Burden Sharing Needed for International Financial Stability' in Philipp Hartmann, Haizhou Huang and Dirk Schoenmaker (eds), *The Changing Fortunes of Central Banking* (CUP 2018).

[10] Schoenmaker (n 2) 90-114.

[11] Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton & Company 2011).

[12] See, e.g. Dominic Cummings, 'On the referendum #21: Branching histories of the 2016 referendum and "the frogs before the storm"' (Dominic Cummings's Blog, 9 January 2017) <https://dominiccummings.com/2017/01/09/on-the-referendum-21-branching-histories-of-the-2016-referendum-and-the-frogs-before-the-storm-2/> accessed 25 February 2020; Harold D Clarke, Matthew Goodwin and Paul Whiteley, *Brexit: Why Britain Vote to Leave the European Union* (CUP 2017); Kevin O'Rourke, *A Short History of Brexit: From Brentry to Backstop* (Pelican 2019).

toward national protectionism.[13] The recent outbreak of coronavirus, on the one hand, upheld the populist view that international travel and immigration should be reduced out of the fear of swift spread of the virus across the globe, and on the other hand, strengthened the anti-globalisation opinion that cross-country interdependent economic relations are vulnerable especially when one of the supply chains is broken.[14]

Are we on the verge of the collapse of globalisation? In the banking sector, have international banks come to the end to their roles? It is hard to tell at this moment. And these questions leave room for future debate. What cannot be overlooked is the *status quo* of international banks predominately engaging in global markets. Global leaders are still in the process of continuously strengthening the global (financial) safety net. A failure of global solutions and a lack of international cooperation could lead to catastrophic consequences. As for lawyers, it is a sophisticated art to search for solutions in the midst of vast legal provisions and keep a delicate balance between global objectives (international cooperation) and each jurisdiction's own interest.

[13] See, e.g. 'Trade wars, Trump tarrifs and protectionism explained' (BBC, 10 May 2019) <https://www.bbc.com/news/world-43512098> accessed 25 February 2020; Anne van Aaken and Jürgen Kurtz, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism' (2019) 22 Journal of International Economic Law 601; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655.

[14] See, e.g. Rana Foroohar, 'Coronavirus is speeding up the decoupling of global economies' (Financial Times, 23 February 2020) <https://www.ft.com/content/5cfea02e-549f-11ea-90ad-25e377c0ee1f> accessed 25 February 2020; Steven Erlanger, 'Spread of Virus Could Hasten the Great Coming Apart of Globalization' (The New York Times, 25 February 2020) <https://www.nytimes.com/2020/02/25/world/europe/coronavirus-globalization-backlash.html> accessed 25 February 2020.

Bibliography

Abbott KW and Snidal D, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421

Acharya VV, *The Social Value of the Financial Sector Too Big to Fail or Just Too Big?* (Beck T and Evanoff DD eds, World Scientific Publishing 2013)

Acharya VV and others, *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance*, vol 608 (John Wiley & Sons 2010)

Adler LDC, *Managing the Chapter 15 Cross-Border Insolvency Case: A Pocket Guide for Judges* (2nd edn, Federal Judicial Center 2014)

Ali FA and Røsæg E, 'New Rules on Cross-Border Insolvencies in Norway' (2015/2016) 17 Yearbook of Private International Law 385

Allen F and others, 'Moral Hazard and Government Guarantees in the Banking Industry' (2015) 1 Journal of Financial Regulation 30

Allen HJ, 'What Is Financial Stability – The Need for Some Common Language in International Financial Regulation' (2014) 45 Geo J Int'l L 929

Allen WA and Wood G, 'Defining and Achieving Financial Stability' (2006) 2 Journal of Financial Stability 152

Arajärvi N, 'From the "Demands of Humanity": The Formulation of Opinio Juris in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice' in Lepard BD (ed), *Reexamining Customary International Law* (CUP 2017)

Armour J and others, *Principles of Financial Regulation* (OUP 2016)

Arner DW, 'Law, Financial Stability and the International Financial Architecture' in Arner DW (ed), *Financial Stability, Economic Growth, and the Role of Law* (CUP 2009)

Arner DW and Taylor MW, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 UNSW Law Journal 488

Aspachs O and others, 'Searching for A Metric for Financial Stability' (2006) LSE Financial Markets Group Special Paper Series No 167

Asser TMC, 'Bank Resolution Procedures Used in a Banking Law Receivership' in *Legal Aspects of Regulatory Treatment of Banks in Distress* (International Monetary Fund 2001)

Avgouleas E and Goodhart C, 'Critical Reflections on Bank Bail-ins' (2015) 1 Journal of Financial Regulation 3

Babis V, 'Abandoning Foreign Depositors in a Bank Failure? The EFTA Court Judgment in EFTA Surveillance Authority v. Iceland' (2013) 2 Global Markets Law Journal 1

Baird DG, 'Dodd-Frank for Bankruptcy Lawyers' (2011) 19 American Bankruptcy Institute Law Review 287

Barnett P, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001)

Barth J, Mayes D and Taylor M, 'Safeguarding Global Financial Stability, Overview' in *Handbook of Safeguarding Global Financial Stability* (Elsevier 2013)

Basedow J and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

Bates C and Gleeson S, 'Legal Aspects of Bank Bail-ins' (2011) 5 Law and Financial Markets Review 264

Baumgartner SP, 'How Well Do US Judgments Fare in Europe' (2008) 40 Geo Wash Int'l L Rev 173

Baxter Jr TC, Hansen JM and Sommer JH, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57

Baxter RR, 'International Law in "Her Infinite variety"' (1980) 29 The International and Comparative Law Quarterly 549

BCBS, 'Literature Review on Integration of Regulatory Capital and Liquidity Instruments' (2016) No 30 BCBS Working Paper

Bebchuk LA and Guzman AT, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 The Journal of Law and Economics 775

Berends AJ, 'The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309

Bernstein D and Sahni RA, 'United States' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

Bieri DS, 'Financial Stability, the Basel Process and the New Geography of Regulation' (2009) 2 Cambridge Journal of Regions, Economy and Society 303

Binder J-H, 'The Position of Creditors under the BRRD' (2015) Commemorative Volume in memory of Professor Dr Leonidas Georgakopoulos, Bank of Greece's Center for Culture, Research and Documentation 37

---, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019)

Binder J-H and Singh D (eds), *Bank Resolution: The European Regime* (OUP 2016)

Black J and Jacobzone S, 'Tools for Regulatory Quality and Financial Sector Regulation: A Cross-Country Perspective' (2009) OECD Working Papers on Public Governance No.16

Blair C and Kushmeider R, 'Challenges to the Dual Banking System: The Funding of Bank Supervision' (2006) 18 FDIC Banking Rev 1

Bliss RR and Kaufman GG, 'A Comparison of U.S. Corporate and Bank Insolvency Resolution' (2006) Economic Perspectives 44

Bordo MD, 'An Historical Perspective on the Quest for Financial Stability and the Monetary Policy Regime' (2018) Hoover Institution Economics Working Paper 17108

Bork R, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review

---, *Principles of Cross-border Insolvency Law* (Intersentia 2017)

Bornemann A, 'Resolution Regimes for Financial Institutions and the Rule of Law' in Haentjens M and Wessels B (eds), *Bank Recovery and Resolution A Conference Book* (Eleven International Publishing 2014)

Bovens M, Goodin RE and Schillemans T (eds), *The Oxford Handbook of Public Accountability* (OUP 2014)

Bovenzi J, Guynn R and Jackson T, *Too Big to Fail: The Path to a Solution* (Economic Policy Program Financial Regulatory Reform Initiative, 2013)

Bridge M, 'Collectivity, Management of Estates and the *Pari Passu* Rule in Winding-up' in Armour J and Bennett H (eds), *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing 2003)

Briggs A, *The Conflict of Laws* (OUP 2013)

---, *Private International Law in English Courts* (OUP 2014)

---, 'Chapter R. 4: Recognition and Enforcement of Judgments (Common Law)' in Basedow J and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

Bromley J and Phillips T, 'International Lessons from Lehman's Failure: A Cross-Border No Man's Land' in Lastra RM (ed), *Cross-border Bank Insolvency* (OUP 2011)

Bruder F, 'Recognition and Enforcement of Insolvency-Related Judgments' (2018) Eurofenix 32

Brummer C, 'Why Soft Law Dominates International Finance – And Not Trade' (2010) 13 Journal of International Economic Law 623

---, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (CUP 2015)

Bu Q, 'China's Enterprise Bankruptcy Law (EBL 2006): Cross-border Perspectives' (2009) 18 International Insolvency Review 187

Buckel E, 'Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 Georgetown Journal of International Law 1281

Bufford SL, 'Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice' (2007) 27 Northwestern Journal of International Law & Business 351

---, 'Coordination of Insolvency Cases for international Enterprise Groups: A Proposal' (2012) 86 American Bankruptcy Law Journal 685

Butler H and Macey J, 'Myth of Competition in the Dual Banking System' (1987) 73 Cornell L Rev 677

Buxbaum HL, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' (2000) 36 Stanford Journal of International Law 23

Campbell A, 'Deposit Insurance: Consumer Protection, Banks Safety and Moral Hazard' (1999) 10 European Business Law Review 96

Carnell RS, Macey JR and Miller GP, *The Law of Financial Institutions* (Wolters Kluwer 2013)

Cataldi G, 'Italy' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

CBRC Shanghai Legal Department, 'The Division of Powers in Resolving Commercial Bank Bankruptcy Risks' (2016) Financial Regulation Research 79

Chalmers D, Davies G and Monti G, *European Union Law: Text and Materials* (3rd edn, CUP 2014)

Cheatham EE, 'American Theories of Conflict of Laws: Their Role and Utility' (1944) 58 Harv L Rev 361

Chen A, 'An Analysis of the Development of Cross-border Crisis Management in China's Bankruptcy Law and Regulations' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019)

Chen V, Godwin A and Ramsay I, 'Cross-border Cooperation in Bank Resolution: A Framework for Asia' (2016) Singapore Journal of Legal Studies 1

Childs LB, 'Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law' (2005) 38 NYUJ Int'l L & Pol 221

Chua EJ, 'Bankruptcy Reform in China' (2006) 1 Pratt's Journal of Bankruptcy Law 552

Čihák M and Nier E, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009)

Claessens S and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010)

Clark LM and Glosbank DM, *Ancillary and Other Cross-border Insolvency Cases under Chapter 15 of the Bankruptcy Code* (LexisNexis Matthew Bender 2008)

Clarke HD, Goodwin M and Whiteley P, *Brexit: Why Britain Vote to Leave the European Union* (CUP 2017)

Clift J, 'The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 Tulane Journal of International and Comparative Law 307

Cosimano T and Hakura D, 'Bank Behavior in Response to Basel III: A Cross-Country Analysis' (2011) IMF Working Papers 2011/119

Cottier T and Lastra RM, 'The Quest for International Law in Financial Regulation and Monetary Affairs' (2010) 13 Journal of International Economic Law 527

Coyle JF, 'Rethinking Judgements Reciprocity' (2013) 92 NCL Rev 1109

Craig P, 'Development of the EU' in Barnard C and Peers S (eds), *European Union Law* (OUP 2017)

Crawford J, ''Single Point of Entry': The Promise and Limits of the Latest Cure for Bailouts' (2014) 109 Northwestern University Law Review Online 103

Crespo CS, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302

Crockett AD, 'Why is Financial Stability a Goal of Public Policy?' (1997) 82 Economic Review 5

Cuniberti G and Rueda I, 'Abolition of Exequatur: Addressing the Commission's Concerns' (2011) 75 Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 286

D'amato AA and Falk RA, *The Concept of Custom in International Law* (Cornell University Press 1971)

D'hulster K, 'Cross-border Banking Supervision: Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors' (2012) 13 Journal of Banking Regulation 300

Davenport H and Farr HB, 'Recent Decisions' (1913) 13 Colum L Rev 73

Davies G and Dobler M, 'Bank Resolution and Safeguarding the Creditors Left Behind' (2011) 2011 Bank of England Quarterly Bulletin 213

Davies K, *Understanding European Union law* (6th edn, Routledge 2016)

Davies P, 'Resolution of Cross-border Groups' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

de Stefano C, 'Reforming the Governance of International Financial Law in the Era of Post-Globalization' (2017) 20 Journal of International Economic Law 509

Devos D, 'Legal Protection of Payment and Securities Settlement Systems and of Collateral Transactions in the European Union' (2008) Current Developments in Monetary and Financial Law 471

Dicey AV, *Dicey, Morris and Collins on the Conflict of Laws* (Morris JHC, Collins L and Briggs A eds, 15th edn, Sweet & Maxwell Thomson Reuters 2012)

Dodge WS, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071

Dombret A, *Too Big to Fail III Should We Break Up the Banks?* (Kenadjian PS ed, De Gruyter 2015)

Domej T, 'Chapter R. 3: Recognition and Enforcement of Judgments (Civil Law)' in Basedow J and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

Dornis TW, 'Chapter C. 18: Comity' in Basedow J and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

Dubinsky PR, 'United States' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Duffie D and Skeel D, 'A Dialogue on the Costs and Benefits of Automatic Stays for Derivatives and Repurchase Agreements' in Scott KE and Taylor JB (eds), *Bankruptcy Not Bailout: A Special Chapter 14* (Hoover Institution Press 2012)

Dugan JC and others, 'FDIC Insurance and Regulation of U.S. Branches of Foreign Banks' in Guynn R (ed), *Regulation of Foreign Banks and Affiliates in the United States* (9th edn, Thomson Reuters 2016)

---, 'Forms of Entry and Operation in the United States' in Guynn R (ed), *Regulation of Foreign Banks and Affiliates in the United States* (9th edn, Thomson Reuters 2016)

Dutta A, 'Chapter R.2: Reciprocity' in Basedow J and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017)

Eatwell J, Gossé J-B and Alexander K, 'Financial Markets and International Regulation' in Eatwell J, McKinley T and Petit P (eds), *Challenges for Europe in the World, 2030* (Routledge 2014)

Edwards JM, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122

Eichengreen B, *Globalizing Capital: A History of the International Monetary System* (Princeton University Press 2019)

Eichengreen B and Portes R, *The Anatomy of Financial Crises* (1987)

Eisenbeis RA and Kaufman GG, 'Bank Crisis Resolution and Foreign-Owned Banks' (2005) 1 Pratt's Journal of Bankruptcy Law 588

Elbalti B, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite' (2017) 13 Journal of Private International Law 184

Evanoff D and Moeller W (eds), *Dodd Frank Wall Street Reform and Consumer Protection Act: Purpose, Critique, Implementation Status and Policy Issues* (Word Scientific 2014)

Faber D and others, *Ranking and Priority of Creditors* (Faber D and others eds, OUP 2016)

Faber D and Vermunt N (eds), *Bank Failure: Lessons from Lehman Brothers* (OUP 2017)

Farber DA, 'What (if Anything) Can Economics Say about Equity?' (2002) 101 Mich L Rev 1791

Fawcett JJ and Carruthers JM, *Cheshire, North & Fawcett Private International Law* (14th edn, OUP 2008)

FDIC and BOE, 'Resolving Globally Active, Systemically Important Financial Institutions' in Evanoff D and Moeller W (eds), *Dodd-Frank Wall Street Reform and Consumer Protection Act: Purposes, Critique, Implementation Status and Policy Issues* (World Scientific 2014)

Felsenfeld C and Glass D, *Banking Regulation in the United States* (3rd edn, Juris 2011)

Ferguson RW and others, *International Financial Stability* (Centre for Economic Policy Research 2007)

Finch V, 'Security, Insolvency and Risk: Who Pays the Price?' (1999) 62 The Modern Law Review 633

---, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, CUP 2009)

Findlay R and O'rourke KH, *Power and Plenty: Trade, War, and the World Economy in the Second Millennium* (Princeton University Press 2009)

Fletcher IF, *Insolvency in Private International Law* (OUP 2005)

---, 'Choice of Law Rules' in Moss G, Fletcher IF and Isaacs S (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016)

Folz H-P, 'Germany' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Frieden JA, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton & Company 2007)

Friedman M, *Capitalism and Freedom* (The University of Chicago Press 1962)

Frydman R, Duncan I and Goldberg MD, *Imperfect Knowledge Economics: Exchange Rates and Risk* (Princeton University Press 2007)

Frydman R and Goldberg MD, *Beyond Mechanical Markets: Asset Price Swings, Risk, and the Role of the State* (Princeton University Press 2011)

Gadbaw RM, 'Systemic Regulation of Global Trade and Finance: A Tale of Two Systems' (2010) 13 Journal of International Economic Law 551

Gadinis S, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2012) 48 Tex Int'l L J 157

Galanti E, 'The New EC Law on Bank Crisis' (2002) 11 International Insolvency Review 49

Gao S and Wang Q, 'The US Reorganization Regime in the Chinese Mirror: Legal Transplantation and Obstructed Efficiency' (2017) 91 American Bankruptcy Law Journal 139

Gao X, 'On the Application of Public Policy in Private International Law 论国际私法上的公共政策之运用' (University of International Business and Economics 2005)

Garcia GG and Nieto MJ, 'Preserving Financial Stability: A Dilemma for the European Union' (2007) 25 Contemporary Economic Policy 444

Garcimartín F and Saez MI, 'Set-off, Netting and Close-out Netting' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

Garten HA, 'A Political Analysis of Bank Failure Resolution' (1994) 74 Boston University Law Review 429

Garza MA, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38 Fordham International Law Journal 1587

Gehrig T and others, 'European Banking Supervision: The First Eighteen Months' in Schoenmaker D and Véron N (eds), *Bruegel Blueprint Series 25* (Bruegel 2016)

Gelpern A and Gerding EF, 'Private and Public Ordering in Safe Asset Markets' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 97

Gilson RJ and Kraakman RH, 'The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549

Given TC and Vilaplana VA, 'Comity Revisited: Multinational Bankruptcy Cases Under Section 304 of the Bankruptcy Code' (1983) Ariz St LJ 325

Glaessner T and Mas I, 'Incentives and the Resolution of Bank Distress' (1995) 10 The World Bank Research Observer 53

Gleeson S, 'The Importance of Group Resolution' in Dombret A and Kenadjian PS (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013)

---, 'The Consequences of Chapter 14 for International Recognition of US Bank Resolution Action' in Scott K, Jackson T and Taylor J (eds), *Making Failure Feasible: How Bankruptcy Reform Can End "Too Big to Fail"* (Hoover Institute Publisher 2015)

Gleeson S and Guynn RD, *Bank Resolution and Crisis Management: Law and Practice* (OUP 2016)

Glosband DM, 'SPhinX Chapter 15 Opinion Misses the Mark' (2007) 25 American Bankruptcy Institute Journal 44

Godwin A, Guo L and Ramsay I, 'Is Australia's' Twin Peaks' System of Financial Regulation a Model for China?' (2016) CIFR Working Paper No 102/2016/Project E018

Gong X, 'To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan' (2013) 10 International Corporate Rescue 240

---, 'A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation' (Leiden University 2016)

Goode RM, 'Is the Law Too Favourable to Secured Creditors' (1983) 8 Can Bus LJ 53

---, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 2011)

Goodhart C, 'The Regulatory Response to the Financial Crisis' (2008) 4 Journal of Financial Stability 351

---, 'Concordat' in *The Basel Committee on Banking Supervision: A History of the Early Years 1974-1997* (CUP 2011)

Gordon JN and Ringe W-G, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) Columbia Law Review 1297

Gormley TA, Johnson S and Rhee C, *Ending "Too Big To Fail" Government Promises vs. Investor Perceptions* (National Bureau of Economic Research 2011)

Griffith-Jones S, 'International Financial Stability and Market Efficiency as a Global Public Good' in Kaul I and others (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003)

Grohsgal B, 'Case in Brief Against "Chapter 14"' (2014) American Bankruptcy Institute Journal 44

Gropper AL, 'The Payment of Priority Claims in Cross-Border Insolvency Cases' (2010) 46 Tex Int'l L J 559

Gros D and Schoenmaker D, 'European Deposit Insurance and Resolution in the Banking Union' (2014) 52 Journal of Common Market Studies 529

Grünewald S, *The Resolution of Cross-border Banking Crises in the European Union: A Legal Study from the Perspective of Burden Sharing* (Wolters Kluwer, Law & Business 2014)

Guo S, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481

---, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44

Guzman AT, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Michigan Law Review 2177

Guzman AT and Meyer T, 'Soft Law' in Kontorovich E and Parisi F (eds), *Economic Analysis of International Law* (Edward Elgar 2016)

Haentjens M, 'National Insolvency Law In International Bank Insolvencies' in Santen B and Van Offeren D (eds), *Perspectives on International Insolvency Law: A tribute to Bob Wessels* (Kluwer 2014)

Haentjens M and de Gioia-Carabellese P, *European Banking and Financial Law* (Routledge 2015)

Haentjens M and Janssen L, 'New National Solutions for Bank Failures: Game-changing in the UK, Germany and the Netherlands?' (2015) Journal of Financial Regulation 294

Haentjens M, Janssen L and Wessels B, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Haentjens M, Kong Q and Wessels B eds, Eleven International Publishing 2017)

Haentjens M and Wessels B, 'Three Paradigm Shifts in Recent Bank Insolvency Law' (2016) 31 Journal of International Banking Law and Regulation 396

--- (eds), *Bank Recovery and Resolution A Conference Book* (Eleven International Publishing 2014)

--- (eds), Research Handbook on Crisis Management in the Banking Sector (Edward Elgar 2015)

--- (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019)

Haentjens M, Wessels B and Guo S, 'Conclusions' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019)

Hanisch H, 'Crediting a Creditor with Proceeds Recovered Abroad out of the Debtor's Assets Recovered Abroad in Domestic Insolvency Proceedings' in Fletcher IF (ed), *Cross-border Insolvency: Comparative Dimensions, The Aberystwyth Insolvency Papers*, vol 12 (United Kingdom National Committee of Comparative Law 1990)

Hannan N, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017)

Hannoun H, *Towards a Global Financial Stability Framework* (BIS 2010)

Hartley TC, *International Commercial Litigation: Texts, Cases and Materials on Private International Law* (2nd edn, CUP 2015)

Hayek FA, *The Road to Serfdom* (The University of Chicago Press 1944)

He Q, 'The New Pragmatism and Latest Development of Bankruptcy Conflict Law' (2007) Chinese Journal of Law 140

He Q and Wang Y, 'Resolving the Dilemma of Judgment Reciprocity – From a Sino-Japanese Model to a Sino-Singaporean Model' in Bonomi A and Romano GP (eds), *Yearbook of Private International Law Vol XIX – 2017/2018* (2018)

Herring RJ, 'Conflicts Between Home and Host Country Prudential Supervisors' in Evanoff DD, Kaufman GG and LaBrosse JR (eds), *International Financial Instability: Global Banking and National Regulation* (World Scientific Publishing 2007)

Hess P, 'China's Financial System: Past Reforms, Future Ambitions and Current State' in Rövekamp F and Hilpert HG (eds), *Currency Cooperation in East Asia*, vol 38 (Springer 2014)

Hinarejos A, 'Economic and Monetary Union' in Barnard C and Peers S (eds), *European Union Law* (OUP 2017)

Ho LC, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 International and Comparative Law Quarterly 443

---, 'On Pari Passu, Equality and Hotchpot in Cross-Border Insolvency' (2003) Lloyd's Maritime and Commercial Law Quarterly 95

---, *Cross-border Insolvency: Principles and Practice* (Sweet & Maxwell 2016)

---, *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (Global Law and Business 2017)

Hoelscher DS, *Bank Restructuring and Resolution* (Palgrave Macmillan 2006)

Honsberger J, 'Conflict of laws and the Bankruptcy Reform Act of 1978' (1980) 30 Case Western Reserve Law Review 631

Horspool M, Humphreys M and Wells-Greco M, *European Union Law* (8th edn, OUP 2014)

Howarth D and Quaglia L, 'The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism' (2014) 52 Journal of Common Market Studies 125

Huang H, 'Institutional Structure of Financial Regulation in China: Lessons from the Global Financial Crisis' (2010) 10 Journal of Corporate Law Studies 219

Huang J, 'Conflicts between Civil Law and Common Law in Judgment Recognition and Enforcement: When is the Finality Dispute Final' (2011) 29 Wis Int'l LJ 70

Huertas TF, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series

---, *Safe to Fail* (Palgrave Macmillan 2014)

---, 'Safe to Fail' in *Safe to Fail* (Palgrave Macmillan 2014)

---, 'Too Big to Fail: A Policy's Beginning, Middle and End (?)' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015)

Hüpkes EH, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States, and Canada* (Kluwer Law International 2000)

---, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005)

Hüpkes EH, Quintyn M, and Taylor MW, 'The Accountability of Financial Sector Supervisors: Principles and Practice' (2005) IMF Working Paper WP/05/51

IMF, 'United States Financial Sector Assessment Program Review of the Key Attributes of Effective Resolution Regimes for the Banking and Insurance Sectors – Technical Note' (2015) IMF Country Report No 15/171

Jack I and Cassels T, 'Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance' (2013) 8 Capital Markets Law Journal 450

Jackson T and Skeel D, 'Dynamic Resolution of Large Financial Institutions' (2012) 2 Harv Bus L Rev 435

Jackson TH, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986)

Jackson TH and Kronman AT, 'Secured Financing and Priorities Among Creditors' (1979) 88 Yale Law Journal 1143

James SB, 'International Bankruptcy: Limited Recognition in the New U.S. Bankruptcy Code' (1980) 3 Hous J Int'l L 241

Janger E, 'Universal Proceduralism' (2007) 32 Brooklyn Journal of International Law 819

---, 'Virtual Territoriality' (2010) 48 Columbia Journal of Transnational Law 401

---, 'Symposium Introduction: Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 1

Janger E and Pottow JAE, 'Implementing Symmetric Treatment of Financial Contracts in Bankruptcy and Bank Resolution' (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 155

Janssen L, 'EU Bank Resolution Framework: A Comparative Study on the Relation with National Private Law' (Leiden University 2019)

Javier B, Paola G and Yira M, 'Practical Guidelines for Effective Bank Resolution' (2007) The World Bank Policy Research Working Paper 4389

Jin K-Y, 'How to Eat an Elephant: Corporate Group Structure of Systemically Important Financial Institutions, Orderly Liquidation Authority, and Single Point of Entry Resolution' (2014) 124 Yale Law Journal 1746

Joosen BPM, 'Regulatory Capital Requirements and Bail in Mechanisms' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

Juenger FK, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 American Journal of Comparative Law 1

Kaczorowska A, *European Union Law* (4th edn, Routledge 2016)

Keay A, Boraine A and Burdette D, 'Preferential Debts in Corporate Insolvency: A Comparative Study' (2001) 10 International Insolvency Review 167

Keay A and Walton P, 'The Preferential Debts Regime in Liquidation Law: In the Public Interest?' (1999) 3 Company Financial and Insolvency Law Review 84

Kenadjian PS (ed), *The Bank Recovery and Resolution Directive Europe's Solution for "Too Big To Fail"?* (De Gruyter 2013)

Kern A, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) European Law Review 154

Keynes JM, *The General Theory of Employment, Interest, and Money* (Palgrave Macmilan 1936)

King RG and Levine R, 'Finance and Growth: Schumpeter Might Be Right' (1993) 108 The Quarterly Journal of Economics 717

---, 'Finance, Entrepreneurship and Growth' (1993) 32 Journal of Monetary Economics 513

Kleftouri N, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017) 18 ERA Forum 263

Kler X, 'COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application within Cross-Border Insolvency Cases' (2018) 34 Am U Int'l L Rev 429

Kokkini-Iatridou D and Verheul JP, 'Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' (1987) Netherlands Reports to the Twelfth International Congress of Comparative Law 189

Kokorin I and Wessels B, 'Recognition of Foreign Insolvency Judgments: The Case of Yukos' (2017) 14 European Company Law 226

Kong Q, *New Bank Insolvency Law for China and Europe Volume 1: China* (Haentjens M, Kong Q and Wessels B eds, Eleven International Publishing 2017)

Kong Q and Sun Y, 'China' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

Krause SA, Janovsky P and Lebowitz MA, 'Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies' (1995) 64 Fordham L Rev 2591

Krimminger M, 'Banking in a Changing World: Issues and Questions in the Resolution of Cross-Border Banks' in Evanoff DD, Kaufman GG and LaBrosse JR (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007)

Kudrna Z, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283

Kupiec P and Wallison P, ‘Can the “Single Point of Entry” Strategy Be Used to Recapitalize a Systemically Important Failing Bank?’ (2015) 20 Journal of Financial Stability 184

Laeven L, ‘Deposit Insurance in the European Union’ in Enoch C and others (eds), *From Fragmentation to Financial Integration in Europe* (International Monetary Fund 2014)

Lagram-Taylor R, ‘Goldman Sachs International v Novo Banco SA’ (2019) 16 International Corporate Rescue 115

Lastra RM, ‘Systemic Risk, SIFIs and Financial Stability’ (2011) 6 Capital Markets Law Journal 197

---, ‘Do We Need a World Financial Organization?’ (2014) 17 Journal of International Economic Law 787

Lee LL, ‘The Basle Accords as Soft Law: Strengthening International Banking Supervision’ (1998) 39 Va J int’l L 1

Lee PL, ‘Cross-Border Resolution of Banking Groups: International Initiatives and US Perspectives-Part III’ (2014) 10 Pratt’s J Bankr L 291

---, ‘Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part I’ (2015) 132 Banking Law Journal 437

---, ‘Bankruptcy Alternatives to Title II of the Dodd-Frank Act-Part II’ (2015) 132 Banking Law Journal 503

Lehmann M, ‘Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders’ (2016) 66 International and Comparative Law Quarterly 107

---, ‘Conflict-of-law Issues’ in Haentjens M and Wessels B (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019)

Leong J, ‘Is Chapter 15 Universalist or Territorialist-Empirical Evidence from United States Bankruptcy Court Cases’ (2011) 29 Wis Int’l LJ 110

Li A, *Study on Legal Issues of Cross-border Insolvency of Commercial Banks* 商业银行跨境破产法律问题研究 (China University of Political Science and Law Press 2012)

Li JZ and Guo S, ‘China’ in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Li S and Wang Z, ‘The Gap between Expectation of Legislation and Judicial Practice and its Resolution: Empirical Analysis of Bankruptcy Law’s Three-years Implementation’ (2011) 22 Journal of China University of Political Science and Law

Lindgren C-J, Garcia GG and Saal MI, *Bank Soundness and Macroeconomic Policy* (International Monetary Fund 1996)

Lipson C, ‘Why are Some International Agreements Informal?’ (1991) 45 International Organization 495

Liu J, ‘A Case on Application for Recognition and Enforcement of Italian Court Ruling on Bankruptcy’ (2003) China law 32

Liu L, ‘The Reason and Rule for Recognition and Enforcement of Court Judgments among the ‘One Belt and One Road’ Countries “一带一路”国家间法院判决承认与执行的理据与规则’ (2018) Journal of Law Application 40

Lo Schiavo G, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer 2017)

LoPucki LM, ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’ (1999) 84 Cornell Law Review 696

---, ‘The Case for Cooperative Territoriality in International Bankruptcy’ (2000) 98 Michigan Law Review 2216

Lorenzen EG, ‘Huber’s De Conflictu Legum’ (1919) 13 Illinois Law Review 53

Lorenzen EG, 'Validity and Effects of Contracts in the Conflict of Laws' (1921) 31 Yale Law Journal 565

Lubben SJ, 'Repeal the Safe Harbors' (2010) 18 American Bankruptcy Institute Law Review 319

Lubben SJ and Wilmarth Jr AE, 'Too Big and Unable to Fail' (2017) 69 Fla L Rev 1205

Lupo-Pasini F, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017)

---, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45

---, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017)

---, 'The Perils of Home-Country Control' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017)

Lupo-Pasini F and Buckley RP, 'International Coordination in Cross-Border Bank Bail-ins: Problems and Prospects' (2015) 16 European Business Organization Law Review 203

Ma D, 'A Study of the Order Public in Private International Law 国际私法中的公共秩序研究' (Wuhan University 2010)

Madaus S, 'Bank Failure and Pre-emptive Planning' in Haentjens M and Wessels B (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014)

Madaus S, Wilke AK and Knauth P, 'Bringing Non-EU Insolvencies to Germany: Really so Different from The UNCITRAL Model Law on Cross-Border Insolvency?' (2020) 17 International Corporate Rescue 21

Makarova MY and others, *Bankers without Borders? Implications of Ring-fencing for European Cross-border Banks* (International Monetary Fund 2010)

Malkiel BG and Fama EF, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 The Journal of Finance 383

Manger-Nestler C, 'Impacts of International Law on the Restructuring of the Global Financial System' in Bogdandy Av and Wolfrum R (eds), *Max Planck Yearbook of United Nations Law*, vol 15 (Brill 2011)

Marshall A, *Principles of Economics* (Macmillan 1890)

Mason R, 'Cross-border Insolvency: Recognition of Insolvency-Related Judgments and Choice of Law Characterization ' (2018) 27 Norton Journal of Bankruptcy Law and Practice 639

Massman S, 'Developing a New Resolution Regime for Failed Systemically Important Financial Institutions: An Assessment of the Orderly Liquidation Authority' (2015) 89 American Bankruptcy Law Journal 625

McDonald O, *Lehman Brothers: A Crisis of Value* (Manchester University Press 2016)

Melissa SR, 'American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)' (1992) 9 Bankruptcy Developments Journal 453

Melnik SA, 'United States' in Chan LH (ed), *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (3rd edn, Global Law and Business 2012)

Méndez-Pinedo ME, 'The Icesave Saga: Iceland Wins Battle Before the EFTA Court' (2013) 1 MJIL Emerging Scholarship Project 101

Meron T, 'International Law in the Age of Human Rights' (2003) 301 General Course on Public International Law 21

Metreveli L, 'Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency' (2017) 51 Columbia Journal of Law and Social Problems 315

Mevorach I, ‘The Home Country of A Multinational Enterprise Group Facing Insolvency’ (2008) 57 International and Comparative Law Quarterly 427

---, *Insolvency within Multinational Enterprise Groups* (OUP 2009)

---, ‘On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency’ (2011) 12 European Business Organization Law Review 517

---, ‘Beyond the Search for Certainty: Addressing the Cross-border Resolution Gap’ (2015) 10 Brook J Corp Fin & Com L 183

---, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018)

---, ‘Modified Universalism as Customary International Law’ in *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018)

---, ‘Modified Universalism as Customary International Law’ (2018) 96 Texas Law Review 1043

Minsky HP, *Stabilizing an Unstable Economy* (Yale University Press 1986)

---, ‘The Financial Instability Hypothesis’ (1992) The Jerome Levy Economics Institute of Bard College Working Paper No 74

Mitchell AD, Hawkins JK and Mishra N, ‘Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector’ (2016) 19 Journal of International Economic Law 787

Mohan SC, ‘Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?’ (2012) 21 International Insolvency Review 199

Mokal RJ, ‘Priority as Pathology: The Pari Passu Myth’ (2001) 60 The Cambridge Law Journal 581

---, *Corporate Insolvency Law: Theory and Application* (OUP 2005)

---, ‘The *Pari Passu* Principle and its Relationship with Other Methods of Insolvency Distribution’ in *Corporate Insolvency Law: Theory and Application* (OUP 2005)

---, ‘Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts’ (2015) 10 Brooklyn Journal of Corporate, Financial & Commercial Law 15

Morales SA and Deutcsh BA, ‘Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Trinity of Comity’ (1983) 39 Bus Law 1573

Moss G, ‘Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism’ (2007) 32 Brooklyn Journal of International Law 1005

Moss G, Bayfield D and Peters G, ‘Recognition and Enforcement’ in Moss G, Fletcher IF and Isaacs S (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016)

Moss G, Fletcher IF and Isaacs S, *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (Moss G, Fletcher IF and Isaacs S eds, 3rd edn, OUP 2016)

Moss G and Smith T, ‘Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings’ in Moss G, Fletcher IF and Isaacs S (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016)

Moss G, Wessels B and Haentjens M, ‘Principles for Cross-border Financial Institution Insolvencies’ in Moss GS, Wessels B and Haentjens M (eds), *EU Banking and Insurance Insolvency* (OUP 2017)

--- (eds), *EU Banking and Insurance Insolvency* (OUP 2017)

Mund SC, '11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 Wisconsin International Law Journal 325

Nadelmann KH, 'Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?' (1943) 91 University of Pennsylvania Law Review and American Law Register 601

---, 'Legal Treatment of Foreign and Domestic Creditors' (1946) 11 Law and Contemporary Problems 696

---, 'Revision of Conflicts Provisions in the American Bankruptcy Act' (1952) 1 The International and Comparative Law Quarterly 484

---, 'An International Bankruptcy Code: New Thoughts on an Old Idea' (1961) 10 The International and Comparative Law Quarterly 70

---, 'Bankruptcy Reform Act and Conflict of Laws: Trial-and-Error' (1988) 29 Harv Int'l LJ 27

Neff SC, 'United Kingdom' in Shelton D (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Nieto MJ and Wall LD, 'Prompt Corrective Action: Is there a Case for an International Banking Standard' in Evanoff DD, Kaufman GG and LaBrosse JR (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007)

Nygh PE, *Autonomy in International Contracts* (OUP 1999)

O'Rourke K, *A Short History of Brexit: From Brentry to Backstop* (Pelican 2019)

Oppenheim L, 'The Science of International Law – Its Task and Method' (1908) 2 American Journal of International Law 313

Ou J, Xiong W and Yang S, 'Research on Reforming and Improving China's Financial Regulatory Framework' (2017) Finance & Economics 37

Paech P, 'The Value of Financial Market Insolvency Safe Harbours' (2016) 36 Oxford Journal of Legal Studies 855

Paulus CG, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32 Brooklyn Journal of International Law 755

Peterson CH, 'Res Judicata and Foreign Country Judgments' (1963) 24 Ohio St LJ 291

Plender R and Wilderspin M, *The European Private International Law of Obligations* (Sweet & Maxwell 2015)

Posner EA and Skyes AO, *Economic Foundations of International Law* (Belknap Press of Harvard University Press 2013)

---, 'International Law and the Limits of Macroeconomic Cooperation' (2013) 86 Southern California Law Review 1025

Przeworski A, Stokes SC and Manin B (eds), *Democracy, Accountability, and Representation* (CUP 1999)

Qiao X, 'On the Finality Problems in the Recognition and Enforcement of Foreign Judgments' (2017) Wuhan University International Law Review 70

Randell C, 'European Banking Union and Bank Resolution' (2013) 7 Law and Financial Markets Review 30

---, 'Group Resolution under the EU Resolution Directive' in Dombret A and Kenadjian PS (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013)

Rasmussen RK, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Texas Law Review 51

---, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1

---, 'Resolving Transnational Insolvencies through Private Ordering' (2000) 98 Michigan Law Review 2252

Rebecca P and Nan G, 'The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems' (2018) 27 International Insolvency Review 5

Reese WL, 'The Status in This Country of Judgments Rendered Abroad' (1950) 50 Colum L Rev 783

Reese WL and Rosenberg M, *Cases and Materials on Conflict of Laws* (8th edn, Foundation Press 1984)

Ringe W-G and Patel J, 'The Dark Side of Bank Resolution: Counterparty Risk through Bail-in' (2019) European Banking Institute Working Paper Series 2019 – no 31

Roberts A, Choer Moraes H and Ferguson V, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655

Rodrik D, 'How Far Will International Economic Integration Go?' (2000) 14 The Journal of Economic Perspectives 177

---, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton & Company 2011)

Roe MJ and Adams SD, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale J on Reg 363

Roosevelt K, 'The Myth of Choice of Law: Rethinking Conflicts' (1999) 97 Michigan Law Review 2448

Rounds AC, 'Injunctions Against Liquor Nuisances' (1896) 9 Harv L Rev 521

Russo C, 'Third Country Cooperation Mechanism within the Bank Recovery and Resolution Directive: Will They Be Effective?' in Binder J-H and Singh D (eds), *Bank Resolution: The European Regime* (OUP 2016)

Ryngaert CM and Siccama DW, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1

Sarra J, 'Oversight and Financing of Cross-border Business Enterprise Group Insolvency Proceedings' (2008) 44 Tex Int'l LJ 547

Schelo S, *Bank Recovery and Resolution* (Kluwer Law International 2015)

Schillig M, 'The EU Resolution Toolbox' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015)

---, 'Financial Stability, Systemic Risk, and Taxpayers' Money – The Rationale for a Special Resolution Regime' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016)

---, 'Private Sector Transfer, Bridge Bank, and Asset Separation' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016)

---, *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016)

---, 'Global Solutions' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019)

Schinsi GJ, 'Defining Financial Stability' (2004) IMF Working Paper WP/04/187

Schoenmaker D, 'The Financial Trilemma' (2011) 111 Economics Letters 57

---, *Governance of International Banking: The Financial Trilemma* (OUP 2013)

---, 'Firmer Foundations for A Stronger European Banking Union' (2015) Breugel Working Paper 2015/13

---, 'Is Burden Sharing Needed for International Financial Stability' in Hartmann P, Huang H and Schoenmaker D (eds), *The Changing Fortunes of Central Banking* (CUP 2018)

---, 'Resolution of International Banks: Can Smaller Countries Cope?' (2018) 21 International Finance 39

Schooner H, 'US Bank Resolution Reform: Then and Again' in Lastra RM (ed), *Cross-border Bank Insolvency* (OUP 2011)

Schwarcz SL, 'The Confused US Framework for Foreign-Bank Insolvency: An Open Research Agenda' (2005) 1 Review of Law & Economics 81

---, 'Systemic Risk' (2008) 97 Geo LJ 193

Schwarcz SL and others, 'Comments on the September 29, 2014 FSB Consultative Document,'Cross-Border Recognition of Resolution Action'' (2014) Centre for International Governance Innovation CIGI Paper No 51

Schwarcz SL and Sharon O, 'The Bankruptcy-Law Safe Harbor for Derivatives: A Path-Dependence Analysis' (2014) 71 Wash & Lee L Rev 1775

Schwartz A, 'Security Interests and Bankruptcy Priorities: A review of Current Theories' (1981) 10 The Journal of Legal Studies 1

Scott HS, *Connectedness and Contagion: Protecting the Financial System from Panics* (MIT Press 2016)

Scott K, 'The Dual Banking System: A Model of Competition in Regulation' (1977) 30 Stanford Law Review 1

---, 'A Guide to the Resolution of Failed Financial Institutions: Dodd-Frank Title II and Proposed Chapter 14' in Scott K and Taylor J (eds), *Bankruptcy Not Bailout A Special Chapter 14* (Hoover Institution Press 2012)

Scott K, Jackson T and Taylor J (eds), *Making Failure Feasible: How Bankruptcy Reform Can End "Too Big To Fail"* (Hoover Institute Press 2015)

Scott K, Shultz G and Taylor J, *Ending Government Bailouts As We Know Them* (Hoover Institute 2010)

Scott K and Taylor J (eds), *Bankruptcy Not Bailout: A Special Chapter 14* (Hoover Institute Press 2012)

Seelig SA, 'Techniques of Bank Resolution' in Hoelscher DS (ed), *Bank Restructuring and Resolution* (Palgrave Macmillan 2006)

Serière Vd, 'Bail-in: Some Fundamental Questions' in Haentjens M and Wessels B (eds), *Bank Recovery and Resolution: A Conference Book* (Eleven International Publishing 2014)

Shandro S, 'Judicial Co-operation in Cross-border Insolvency – The English Court Takes a Step Backwards in BCCI (No. 10)' (1998) 7 International Insolvency Review 63

Sheldon R, *Cross-border Insolvency* (Bloomsbury 2015)

Shelton D, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

---, 'Introduction' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011)

Shi J, *Studies on Legal Issues in Cross-border Insolvency* (Wuhan University Press 1999)

---, 'Chinese Cross-border Insolvencies: Current Issues and Future Developments' (2001) 10 International Insolvency Review 33

Silberman L, 'Some Judgments on Judgments: A View from America' (2008) 19 King's L J 235

Silverman RJ, 'Advances in Cross-border Insolvency Cooperation: the UNCITRAL Model Law on Cross-border Insolvency' (1999) 6 ILSA Journal of International & Comparative Law 265

Sjostrom W, 'The AIG Bailout' (2009) 66 Washington and Lee Law Review 943

---, 'Afterword to the AIG Bailout' (2015) 72 Washington and Lee Law Review 795

Skeel D, *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (John Wiley & Sons 2010)

---, 'Single Point of Entry and the Bankruptcy Alternative' in Baily MN and Taylor JB (eds), *Across the Great Divide: New Perspectives on the Financial Crisis* (Hoover Press 2014)

---, 'The Empty Idea of 'Equality of Creditors'' (2017) 166 University of Pennsylvania Law Review 699

---, 'Bankruptcy for Banks: A Tribute (and Little Plea) to Jay Westbrook' (2018) 27 Norton Journal of Bankruptcy Law and Practice 584

Skeel D and Jackson TH, 'Transaction Consistency and the New Finance in Bankruptcy' (2012) 112 Columbia Law Review 152

Smit H, 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L Rev 44

Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Рипол Классик 1817)

Sommer JH, 'Why Bail-in? And How?' (2014) December Federal Reserve Bank of New York Economic Policy Review 207

Sorkin AR, *Too big to fail: the inside story of how Wall Street and Washington fought to save the financial system--and themselves* (Penguin 2010)

Sparks K, *The Keys to Banking Law: A Handbook for Lawyers* (2nd edn, American Bar Association 2017)

Stevens SL, 'Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments' (2002) 26 Hastings Int'l & Comp L Rev 115

Story J, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard, Gray, and Company 1834)

Su J, *Supervisory Liability of the Regulator in Bank Insolvency Proceedings* (China University of Political Science and Law Press 2016)

Taekema S, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) Law and Method 1

Tarullo DK, *Banking on Basel: The Future of International Financial Regulation* (Peterson Institute 2008)

Taylor MW, 'Regulatory Reform After the Financial Crisis: Twin Peak Revisited' in Huang RH and Schoenmaker D (eds), *Institutional Structure of Financial Regulation: Theories and International Experiences* (Routledge 2015)

Tegelaar JT and Haentjens M, 'Judicial Protection in Cross-border Bank Resolution' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019)

Theodore J and Theodore J, *Cyprus and the Financial Crisis: The Controversial Bailout and What It Means for the Eurozone* (Palgrave Macmillan 2015)

Trachtman JP, 'The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Coordination' (2010) 13 Journal of International Economic Law 719

---, 'Global Regulation of Finance' in *The Future of International Law Global Government* (CUP 2013)

Trautman D, 'Foreign Creditors in American Bankruptcy Proceedings' (1988) 29 Harvard International Law Journal 49

Troiano V, 'Cross-border Cooperation between Resolution Authorities in the BRRD' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015)

Tu G, *Private International Law in China* (Springer 2016)

Tu G and Li X, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57

Tung F, 'Is International Bankruptcy Possible' (2001) 23 Michigan Journal of International Law 31

van Aaken A and Kurtz J, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism' (2019) 22 Journal of International Economic Law 601

Van Roy P, 'The Impact of the 1988 Basel Accord on Banks' Capital Ratios and Credit Risk-taking: An International Study' (2005) EFMA 2004 Basel Meetings

Vasser S, 'Derivatives in Bankruptcy' (2005) 60 The Business Lawyer 1507

Verdun A, 'Economic and Monetary Union' in Cini M and Borragan N (eds), *European Union Politics* (OUP 2016)

Virgós M and Garcimartín FJ, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004)

Wang Y, 'Research on Reciprocity in Recognition and Enforcement of Foreign Judgments' (Doctor Thesis, Wuhan University 2018)

WB, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (2015)

Wessels B, 'Cross-Border Insolvency: Do Judges Break New Grounds?' in *Business and Bankruptcy Law in the Netherlands, Selected Essays* (Kluwer Law International 1999)

---, 'Protection of Small Depositors against Banks in Distress' (2004) 19 Journal of International Banking Law and Regulation 331

---, 'Directive on the Reorganization and Winding-up of Credit Institutions' (2005) American Bankruptcy Institute Journal 34

---, 'Banks in Distress under Rules of European Insolvency Law' (2006) 21 Journal of International Banking Law and Regulation 301

---, 'Will UNCITRAL Bring Changes To Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will' (2006) 3 International Corporate Rescue 200

---, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015)

---, 'Commentary on Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions' in Moss GS, Wessels B and Haentjens M (eds), *EU Banking and Insurance Insolvency* (OUP 2017)

---, *International Insolvency Law Part II: European Insolvency Law* (4th edn, Kluwer 2017)

---, 'International Insolvency Law and EU Bank Resolution Rules' in Haentjens M and Wessels B (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019)

Wessels B and Boon G-J, *Cross-Border Insolvency Law: International Instruments and Commentary* (2nd edn, Kluwer 2015)

---, 'Soft Law Instruments in Restructuring and Insolvency Law: Exploring Its Rise and Impact' (2019) Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur 2

Wessels B, Markell HBA and Kilborn J, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009)

---, 'Prominent Principles of Domestic Law' in *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009)

West I, 'UNCITRAL Cross-border Insolvency Model Laws: And Then There Were Two' (2019) 16 International Corporate Rescue 82

Westbrook JL, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499

---, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276

---, 'Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation' (2002) 76 American Bankruptcy Law Journal 1

---, 'Chapter 15 and Discharge' (2005) 13 Am Bankr Inst L Rev 503

---, 'Chapter 15 at Last' (2005) 79 American Bankruptcy Law Journal 713

---, 'Locating the Eye of the Financial Storm' (2006) 32 Brooklyn Journal of International Law 1019

---, 'Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies' (2009) 27 Penn St Int'l L Rev 869

---, 'The Elements of Coordination in International Corporate Insolvencies: What Cross-Border Bank Insolvency Can Learn from Corporate Insolvency' in Lastra RM (ed), *Cross-Border Bank Insolvency* (OUP 2011)

---, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247

---, 'SIFIs and States' (2014) 49 Tex Int'l L J 329

Wojcik K-P, 'Bail-in in the Banking Union' (2016) 53 Common Market Law Review 91

Wolfrum R, 'Sources of International Law' in *Max Planck Encyclopedia of Public International Law* (OUP 2011)

Wood P, *Principles of International Insolvency* (Sweet & Maxwell 2007)

Wouters J and Odermatt J, 'Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' (2014) 17 Journal of International Economic Law 49

Wyplosz C, 'International Financial Stability' in Kaul I, Grunberg I and Stern MA (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999)

Yamauchi KD, 'Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 International Insolvency Review 145

Ye D, *On the Public Policy in Chinese Foreign Judicial Practice Relating to Civil and Commercial Matters* (Law Press 2012)

Yntema HE, 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33 Mich L Rev 1129

Zavvos GS and Kaltsouni S, 'The Single Resolution Mechanism in the European Banking Union: Legal Foundations, Governance Structure and Financing' in Haentjens M and Wessels B (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015)

Zhang L, 'Study of Private International Law Issues in International Insolvency Cooperation 跨境破产合作中的国际私法问题研究' (China University of Political Science and Law 2005)

Zhang M, 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law' (2006) 20 Emory Int'l L Rev 511

Zhang W, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"' (2013) 12 Chinese Journal of International Law 143

Summary

This dissertation studies the question what the legal framework for recognition of foreign resolution actions should be. Chapter 1 lays out the general background, namely, the need for a regime to give effect to foreign bank resolution actions. This dissertation builds on both a normative analysis and positive analysis and compares three jurisdictions: the European Union (EU), the United States (US) and mainland China.

Chapter 2 defines resolution as actions taken by resolution authorities to resolve banks that are failing or likely to fail. The first two introductory chapters in Part I emphasise the importance of cross-border bank resolution to preserve global financial stability and the current lack of comprehensive regimes for recognition of foreign resolution actions. Two policy goals are identified for establishing a recognition framework: to facilitate cross-border bank resolution and make home resolution actions effective in foreign jurisdictions, and to protect the interest of host jurisdictions. This dissertation argues that foreign resolution actions should be, in principle, effective, subject to certain limited exceptions. This is in line with the recommendations of the Financial Stability Board (FSB) and other international organisations.

All three jurisdictions compared in this dissertation currently have both mechanisms for recognition and reasons for the refusal of recognition. However, as illustrated in Part II, it is questionable whether the current regimes can address all important issues that may arise during the process of recognising foreign resolution actions. Chapter 3 introduces the EU regime. The EU adopted the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR) and created a special regime for cross-border bank resolution. For Banking Union Member States, the Single Resolution Board (SRB) is the resolution authority for cross-border banks. Outside the Banking Union, resolution actions imposed on an EU bank with one or more branches in other Member States are automatically recognised in those other Member States. In addition, resolution colleges must be established to resolve banking groups consisting of entities in different Member States. These are special intra-EU arrangements. On the other hand, for resolution actions taken by third country authorities with regard to third country banks with entities in the EU, Articles 94 to 96 BRRD list the conditions for recognition and grounds for refusal of recognition. These provisions make it explicit that

EU resolution authorities are empowered to recognise and enforce third country resolution actions. Article 94 BRRD specifies that, after recognition, EU resolution authorities have the power to enforce third country resolution actions with regard to subsidiaries (equity or other ownership instruments), branches, and assets of third country banks located in the EU, and rights and liabilities governed by the law of one of the EU Member States. In particular, Article 96 accepts the jurisdiction of third country resolution authorities, and EU branches of third country institutions are generally subject to third country resolution authorities, unless an EU branch is not subject to third country resolution actions or recognition of third country resolution actions would violate EU public policies. Article 95 BRRD numerates five public policies, based on which EU authorities may refuse to recognise and enforce third country resolution actions, namely, financial stability, resolution objectives, equal treatment of creditors, material fiscal policies, and national laws. Given the lack of cases, for the time being, it is difficult to predict how EU authorities would apply these exceptions. In general, these rules are overly simple, without a comprehensive list of conditions for recognition or distinguishing recognition of foreign resolution proceedings with ongoing effects and foreign resolution measures with immediate effects, let alone subsequent consequences after recognition.

Chapter 4 turns to the US, which is a leading jurisdiction in formulating bank resolution rules. As early as the 1950 Federal Deposit Insurance Act (FDIA), the Federal Deposit Insurance Corporation (FDIC) was equipped with administrative resolution powers to resolve failing depository institutions. The 2010 Dodd-Frank Act extends FDIC's resolution powers to non-bank financial institutions and bank holding companies. However, in spite of the leading role of the US formulating domestic rules, the US pays little attention to cross-border bank resolution issues. One of the reasons might be that the US incorporated the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) into Chapter 15 of its Bankruptcy Code, which is very effective in resolving cross-border corporate insolvency cases. Chapter 15 mainly targets the decisions of judges, but it can also apply to administrative resolution actions. However, Chapter 15 is inadequate to address cross-border bank resolution cases. First, Chapter 15 explicitly excludes foreign banks (depository institutions) with branches or agencies in the US, and all US branches or agencies of foreign banks are subject to US resolution authorities. It makes it almost impossible for US authorities to recognise or enforce foreign resolution actions imposed on US branches or agencies of foreign banks. Second, Chapter 15 adopts the distinction of centre of main interest (COMI)/establishment, which is the manifestation of modified universalism as currently adopted in international insolvency law. However, this may not be suitable for financial institutions that are subject to the supervisory home/host distinction, although it is argued in Chapter 6 of this dissertation that home jurisdiction can be understood as COMI jurisdiction, and host jurisdiction can be understood as establishment jurisdiction. Third, the effects of recognition in Chapter 15 only mention reliefs, including both automatic reliefs and discretionary reliefs. However, it is uncertain how US judges would react to relief requests related to foreign resolution actions. Fourth, Chapter 15 grants public policy exceptions for refusal of recognition and additional safeguard measures to refuse relief requests, with the purpose of protecting US creditors' interests. While it may be justifiable to invoke public policy exceptions in cross-border bank resolution cases, a broad application of additional safeguard measures may impede cross-border resolution. Judges in previous Chapter 15 cases interpreted public policies narrowly, and it is suggested that for resolution cases, such an interpretation method should also apply. And for cross-border bank resolution cases, it is recommended that specific public policies should be clearly listed, just as the EU does.

China, albeit the home jurisdiction to four global systemically important banks (G-SIBs) out of 30 as of 2019, is lagging behind in adopting the FSB Key Attributes. As illustrated in Chapter 5, the most recent policy document on bank resolution is the 2018 SIFI Guiding Opinions, which only set out several general principles without concrete resolution rules that can be applicable to failing banks. In addition, little attention is paid to cross-border issues. For the time being, only Article 5 of the Enterprise Bankruptcy Law (EBL) prescribes rules for cross-border insolvency, following the general principles of private international law. The application of Article 5 in cross-border bank resolution cases raises several concerns. First, the current Chinese legal regime lacks clear legislative guidance or case law on the applicability of Article 5 in resolution, although this dissertation argues that resolution should also be understood under the general framework of insolvency. Second, Article 5 adopts a strict reciprocity test, which makes recognition difficult. It is proposed that reciprocity should be abandoned. Third, the rules prescribed in Article 5 are overly vague, without clear guidance on the effects of foreign resolution actions in China, in particular, foreign actions imposed on Chinese subsidiaries, branches, assets of foreign banks, or Chinese law governed rights and liabilities. Fourth, China puts much stress on local interests, with Article 5 listing a variety of public policies that can be invoked in refusal of recognition, including the basic principles of Chinese laws, the State sovereignty, security or public interest, as well as the interest of Chinese creditors. It is not clear how Chinese judges would interpret and apply these public policies when deciding a resolution case.

Based on the comparative studies in Part II, Part III conducts normative analysis and further investigates the application of traditional legal doctrines in cross-border bank resolution. Chapter 6 examines the grounds for recognition. This chapter builds on the doctrines in private international law, namely, comity and reciprocity, the obligation doctrine and res judicata, as well as modified universalism principle in international insolvency law, which all form the basis for recognition of foreign bank resolution actions.

Chapter 6 also points out that specific rules should be formulated to address cross-border bank resolution. In particular, four principles are proposed:

Principle (i): There should be no reciprocity requirement for recognition of foreign home resolution actions. In the selected jurisdictions, only China adopts a strict reciprocity test, which requires that a recognition decision can only be made when a foreign jurisdiction has previously recognised a Chinese judgment. However, reciprocity is an unnecessary pre-condition for recognition, as it would severely impede cross-border bank resolution. (Chapter 6, §6.4.1)

Principle (ii): Jurisdictions in cross-border bank resolution cases are distinguished as home and host jurisdictions. The distinction is made because cross-border bank resolution relies on the system of cross-border bank supervision in which home supervisory authorities of multinational banks conduct consolidated supervision on a global basis. Home resolution authorities are in a leading position to take global resolution actions for the whole group. (Chapter 6, §6.4.2)

Principle (iii): An ongoing foreign resolution proceeding should be recognised, with the effects of recognising the authority of foreign representatives and relevant reliefs such as moratorium. Recognition of home representatives allows these foreign representatives to take actions within the host territory. Putting moratorium measures in place facilitates the implementation of resolution actions and maintains international financial stability. It is further advised that national laws should clearly prescribe the formal requirements, such as documents to be submitted for recognition. This proposal does not make a recommendation for either administrative recognition or judicial recognition, and national legislative bodies should have discretion to make an option. (Chapter 6, §6.4.3)

Principle (iv): A foreign resolution measure with immediate effect should be recognised. The potential judicial review process for the acts of resolution authorities in a home jurisdiction should not be the reason to refuse to recognise home resolution actions, because making resolution effective serves the public interest, which outweighs private rights in this situation. Affected creditors can still seek remedies in home jurisdictions. A debt discharge under home resolution actions can also be recognised, because a counterparty in the host jurisdiction should have foreseen this situation when it entered into a contract with a party that is subject to home resolution actions; entering into resolution alters the normal contractual relationships governed by the choice of law provision. Upon recognition, some foreign resolution actions need to be enforced, either through direct enforcement or by taking domestic supportive measures. This proposal recommends that jurisdictions should put enforcement proceedings in place, with clear procedures and guidance. (Chapter 6, §6.4.4)

Chapter 7 builds on the doctrines of financial law and identifies the dilemma of national financial policy and international financial stability. This chapter finds that international financial stability is a desired outcome but without binding international legal rules. International financial regulation is soft law in nature and does not have mandatory effect on national policy makers. Therefore, Chapter 7 proposes another three principles:

Principle (v): Financial stability in the host jurisdictions should be able to be invoked as a public policy exception to refuse to recognise foreign resolution actions. This is because, in general, home jurisdictions have no incentive or legal obligations to take care of host interests, and it is justifiable for host jurisdictions to take this defensive legal mechanism to protect host interests. (Chapter 7, §7.4.1)

Principle (vi): There should be a narrow interpretation of financial stability in the host jurisdictions. This is because, first, financial stability is a public policy exception, and public policy exceptions must be interpreted narrowly; second, invoking the host financial stability exception broadly might impede global resolution and undermine the financial stability of home jurisdictions, which in turn may affect host stability; third, the financial stability test also exists in domestic resolution decision-making, which only concerns severe situations which are rare and exceptional. (Chapter 7, §7.4.2)

Principle (vii): A recognition request may be rejected if it is accompanied by the need for massive public funds from host jurisdictions, that is, if it would have an adverse impact on host jurisdictions' fiscal policies. However, this public policy exception should also be interpreted narrowly. Furthermore, this dissertation holds the opinion that home jurisdictions' resolution actions may have unintended external stability effects on host jurisdictions, therefore, host jurisdictions might be free from the need to supply additional funds. (Chapter 7, §7.4.3)

Chapter 8 studies the position of creditors and maintains the basic rules that foreign creditors should not be discriminated against. In addition, the interests of home and host creditors should be balanced. Chapter 8 also propose three other principles:

Principle (viii): Any discriminatory actions should be the cause for refusal of recognition. Taking resolution actions however does not necessarily require discriminatory treatment against foreign creditors; resolution objectives can be achieved by pro rata loss-absorption among domestic and foreign creditors. (Chapter 8, §8.4.1)

Principle (ix): Different national laws should not be a reason for refusal of recognition. After examining the present resolution laws in the selected jurisdictions, it can be seen that resolution laws have been largely harmonised between the EU and the US, though not in China. The different implementation details do not constitute a strong reason to refuse foreign resolution actions. (Chapter 8, §8.4.2)

Principle (x): A choice of governing law other than the home law should not be a reason to refuse to recognise foreign resolution actions. Protection of host creditors' rights does not necessarily need to be achieved through the choice-of-law provisions; rather, public policy exceptions and additional creditors' safeguard measures can be invoked to protect host creditors' rights. Also, not recognising foreign resolution actions simply because of the choice of law would result in a different treatment of home and host creditors. When a contractual provision is added in the contract for creditors to recognise home resolution actions, such a provision can be the supporting argument that host creditors' expectations are protected, thus undermining the reason to refuse to recognise foreign resolution actions. (Chapter 8, §8.4.3)

Chapter 9 discusses several other international legal instruments that may be additional tools to facilitate recognition of foreign resolution actions. These include international agreements, model law and customary international law. These international instruments can be used in parallel to enhance certainty for recognition of foreign resolution actions and are recommended to follow the ten principles mentioned above. Chapter 10 contains the concluding remarks of the whole dissertation.

Samenvatting (Summary in Dutch)

Erkenning van buitenlandse afwikkelingsmaatregelen ten aanzien van banken

Dit proefschrift onderzoekt de vraag wat het wettelijk kader voor erkenning van buitenlandse afwikkelingsmaatregelen ten aanzien van banken zou moeten zijn. In Hoofdstuk 1 wordt de algemene achtergrond van het onderzoek uiteengezet, namelijk de noodzaak van een dergelijk wettelijk kader. Het onderzoek bevat zowel een positiefrechtelijke als een normatieve analyse naar de de mogelijkheden van erkenning en vergelijkt drie jurisdicties: de Europese Unie (EU), de Verenigde Staten (VS) en vasteland China.

In Hoofdstuk 2 wordt "afwikkeling" gedefinieerd als door afwikkelingsautoriteiten genomen maatregelen om banken af te wikkelen die insolvent zijn of dat waarschijnlijk zullen worden. De eerste twee inleidende hoofdstukken in Deel I benadrukken het belang van grensoverschrijdende afwikkeling van banken om de wereldwijde financiële stabiliteit te waarborgen. Daarnaast wordt het huidige gebrek aan wereldwijde regimes voor de erkenning van buitenlandse afwikkelingsmaatregelen besproken. Voor het opzetten van een stelsel van erkenning worden twee beleidsdoelen vastgesteld: ten eerste het vergemakkelijken van grensoverschrijdende afwikkeling van banken en de mogelijkheid om nationale afwikkelingsmaatregelen op te kunnen leggen in buitenlandse jurisdicties; en ten tweede het beschermen van de belangen van *host states*. Dit proefschrift stelt dat buitenlandse afwikkelingsmaatregelen in principe moeten worden erkend, behoudens bepaalde, beperkte uitzonderingen. Dit is in lijn met de aanbevelingen van de *Financial Stability Board* (FSB) en andere internationale organisaties.

De drie jurisdicties die in dit proefschrift worden vergeleken, hebben momenteel zowel mechanismen voor erkenning van buitenlandse afwikkelingen en afwikkelingsmaatregelen als gronden voor weigering van die erkenning. Zoals uiteengezet in Deel II, is het echter de vraag of de huidige (nationale) regimes de problemen die zich kunnen voordoen tijdens afwikkeling/resolutie voldoende verhelpen.

In Hoofdstuk 3 wordt het EU-regime ten aanzien van erkenning besproken. De EU heeft op dit vlak de *Bank Recovery and Resolution Directive* (BRRD) en de *Single Resolution Mechanism Regulation* (SRMR) aangenomen en heeft een speciale regeling voor de grensoverschrijdende afwikkeling van banken opgezet. Voor de lidstaten van de Europese bankenunie is de *Single Resolution Board* (SRB) de afwikkelingsautoriteit voor grensoverschrijdende banken. Buiten de bankenunie worden afwikkelingsmaatregelen die worden opgelegd aan een EU-bank met een of meer bijkantoren in andere lidstaten automatisch erkend in die andere lidstaten. Daarnaast moeten afwikkelingscolleges worden opgericht om bankgroepen af te wikkelen die bestaan uit entiteiten in verschillende lidstaten. Hiertegenover staan de voorwaarden voor erkenning en de gronden voor weigering van afwikkelingsmaatregelen die door autoriteiten van derde landen worden genomen met betrekking tot niet-EU banken met entiteiten in de EU, opgenomen in artikelen 94 tot en met 96 BRRD. Deze bepalingen verduidelijken dat de Europese afwikkelingsautoriteiten de bevoegdheid hebben om afwikkelingsmaatregelen van derde landen te erkennen en toe te passen. Artikel 94 BRRD schrijft voor dat EU-afwikkelingsautoriteiten na de erkenning van niet-EU afwikkelingsmaatregelen, de bevoegdheid hebben om die maatregelen af te dwingen met betrekking tot dochterondernemingen, bijkantoren en activa van in de EU gevestigde banken uit derde landen, en ten aanzien van vorderingen en schulden die worden beheerst door het recht van een van de EU-lidstaten. Artikel 96 erkent de jurisdictie van afwikkelingsautoriteiten van derde landen. EU-bijkantoren van instellingen uit derde landen zijn over het algemeen onderworpen aan de afwikkelingsautoriteiten van die derde landen, tenzij een EU-bijkantoor niet onderworpen is aan afwikkelingsmaatregelen van derde landen of de erkenning van die afwikkelingsmaatregelen de openbare orde van de EU zou schenden. Artikel 95 BRRD noemt vijf openbare-orde-excepties op grond waarvan EU-autoriteiten kunnen weigeren afwikkelingsmaatregelen van derde landen te erkennen en toe te passen, te weten: financiële stabiliteit, afwikkelingsdoelstellingen, gelijke behandeling van schuldeisers, fiscaal beleid en nationaal recht. Omdat artikel 95 BRRD (nog) niet is toegepast, is het voorlopig moeilijk te voorspellen hoe de EU-autoriteiten deze gronden zouden toepassen. Over het algemeen zijn deze gronden eenvoudig opgesteld, zonder een uitgebreide lijst van voorwaarden en zonder onderscheid tussen de erkenning van buitenlandse afwikkelingsprocedures met aanhoudende effecten en buitenlandse afwikkelingsmaatregelen met onmiddellijke effecten, laat staan de langetermijngevolgen van de erkenning.

Hoofdstuk 4 behandelt de VS, een vooraanstaande jurisdictie ten aanzien van bankafwikkeling. Reeds in de *Federal Deposit Insurance Act* (FDIA) van 1950 kreeg de *Federal Deposit Insurance Corporation* (FDIC) de bevoegdheid om omvallende instellingen af te wikkelen. De *Dodd-Frank Act* uit 2010 breidt de afwikkelingsbevoegdheden van de FDIC uit tot niet-bancaire financiële instellingen en bankholdingmaatschappijen. Ondanks de leidende rol van de VS bij het formuleren van binnenlandse regels, wordt weinig aandacht besteed aan grensoverschrijdende bankafwikkeling. Een van de redenen hiervoor zou kunnen zijn dat de VS de *UNCITRAL Model Law on Cross-border Insolvency* (MLCBI) heeft opgenomen in Hoofdstuk 15 van haar *Bankruptcy Code*, die een effectief kader biedt voor grensoverschrijdende insolventiezaken. Hoofdstuk 15 is voornamelijk gericht op gerechtelijke procedures, maar kan ook worden toegepast op administratieve/bestuursrechtelijke afwikkelingsmaatregelen. Hoofdstuk 15 geeft echter geen toereikend handvatten voor een grensoverschrijdende afwikkeling van een bank. Ten eerste zijn buitenlandse banken (deposito-instellingen) met filialen of agentschappen in de VS expliciet uitgesloten van het bereik van Hoofdstuk 15, en zijn alle Amerikaanse filialen of agentschappen van buitenlandse banken onderworpen aan de Amerikaanse afwikkelingsautoriteiten. Dit maakt het voor Amerikaanse autoriteiten bijna onmogelijk om buitenlandse afwikkelingsmaatregelen die zijn opgelegd aan Amerikaanse filialen of agentschappen van buitenlandse banken te erkennen of toe te passen. Ten tweede bevat Hoofdstuk 15 het centrum van voornaamste belangen (*centre of main interest*; COMI) principe, zoals dat momenteel wordt aangenomen in het internationale insolventierecht. Dit lijkt echter ongeschikt voor financiële instellingen die te maken hebben met *home/host* toezicht, hoewel in Hoofdstuk 6 van dit proefschrift wordt betoogd dat *"home state"* kan worden opgevat als COMI-jurisdictie en *"host state"* kan worden opgevat als vestigingsland. Ten derde lijkt de erkenning uit Hoofdstuk 15 enkel een voorlopige voorziening te zijn, die zowel van rechtswege als discretionair tot stand kan komen. Het is onduidelijk hoe Amerikaanse rechters zouden reageren op het verzoek om een voorlopige voorziening ten aanzien van buitenlandse afwikkelingsmaatregelen. Ten vierde bevat Hoofdstuk 15 openbare-orde-excepties voor de weigering van erkenning en aanvullende regels om voorlopige voorzieningen te kunnen weigeren, met als doel de belangen van Amerikaanse schuldeisers te beschermen. Hoewel het gerechtvaardigd kan zijn om een beroep te doen op de openbare orde in gevallen van grensoverschrijdende afwikkeling van banken, kan een brede toepassing van de openbare-orde-uitzondering grensoverschrijdende afwikkeling belemmeren. In uitspraken waar de uitzondering aan de orde kwam, werd de openbare-orde-exceptie uit Hoofdstuk 15 derhalve in enge zin geïnterpreteerd. Dit wijst erop dat ook voor afwikkelingszaken een dergelijke interpretatiemethode mogelijk zou zijn. Voor de grensoverschrijdende afwikkeling van banken wordt aanbevolen om dit beleid expliciet in de regelgeving op te nemen.

China, thuisland van vier van de dertig *global systemically important banks* (G-SIB's), loopt achter bij het overnemen van de *FSB Key Attributes*. In Hoofdstuk 5 wordt onder andere het meest recente beleidsdocument over de afwikkeling van banken besproken, de *SIFI Guiding Opinions 2018*, waarin alleen enkele algemene beginselen zonder concrete afwikkelingsmaatregelen worden uiteengezet die van toepassing kunnen zijn op falende banken. Daarnaast is er weinig aandacht voor grensoverschrijdende vraagstukken. Voorlopig bevat alleen artikel 5 van de *Enterprise Bankruptcy Law* (EBL) regels voor grensoverschrijdende faillissementen, die leunen op de algemene beginselen van het internationaal privaatrecht. In de grensoverschrijdende afwikkeling van banken is de toepassing van artikel 5 echter problematisch. Ten eerste mist China duidelijke regelgeving en jurisprudentie over de toepassing van artikel 5 bij afwikkeling, hoewel dit proefschrift stelt dat het algemene raamwerk voor faillissementen ook ruimte biedt voor resolutie. Ten tweede hanteert artikel 5 een strikte wederkerigheidstoets, waardoor erkenning moeilijk wordt. Daarom wordt in Hoofdstuk 5 voorgesteld om die wederkerigheid uit artikel 5 te schrappen. Ten derde zijn de in artikel 5 voorgeschreven regels te vaag, zonder duidelijke aanwijzingen ten aanzien van de rechtsgevolgen van buitenlandse afwikkelingsmaatregelen in China, met name van buitenlandse maatregelen die worden opgelegd aan Chinese dochterondernemingen, bijkantoren, activa van buitenlandse banken, of vorderingen en schulden die door Chinees recht worden beheerst. Ten vierde legt China veel nadruk op lokale belangen. Hiertoe somt artikel 5 uitzonderingen op waarop een beroep kan worden gedaan om de erkenning te weigeren, waaronder beginselen van Chinees recht, de staatssoevereiniteit, veiligheid of openbare orde en het belang van Chinese schuldeisers. Het is niet duidelijk hoe de Chinese rechter deze uitzonderingen zou interpreteren en toepassen in afwikkelingszaken.

Op grond van de rechtsvergelijkende studie in Deel II van dit proefschrift, wordt in Deel III een normatieve analyse gemaakt waarbij wordt onderzocht hoe klassieke rechtsbeginselen kunnen worden toegepast op de grensoverschrijdende afwikkeling van banken. Hoofdstuk 6 gaat in op de gronden voor erkenning. Het hoofdstuk bouwt voort op beginselen van het internationaal privaatrecht: internationale *comity* en wederkerigheid, de *obligation doctrine* en het gezag van gewijsde, en het beginsel van (aangepast) universalisme uit het internationale insolventierecht (*modified universalism*). Tezamen vormen deze beginselen de basis voor de erkenning van buitenlandse afwikkelingsmaatregelen ten aanzien van banken. Hoofdstuk 6 stelt verder dat specifieke regels zouden moeten worden opgesteld voor de grensoverschrijdende afwikkeling van banken. In het bijzonder worden vier beginselen voorgesteld:

Beginsel (i): Geen wederkerigheidsvereiste voor de erkenning van buitenlandse maatregelen tot afwikkeling met betrekking tot een buitenlandse bank. In de geselecteerde jurisdicties alleen China een strikte wederkerigheidstoets toe, die vereist dat een erkenningsbesluit alleen kan worden genomen als een buitenlandse jurisdictie eerder de afwikkeling van Chinese banken naar Chinees recht heeft erkend. Wederkerigheid is echter een onnodige voorwaarde voor erkenning, aangezien dit de grensoverschrijdende afwikkeling van banken ernstig zou belemmeren. (Hoofdstuk 6, §6.4.1)

Beginsel (ii): Jurisdicties in grensoverschrijdende afwikkeling van banken worden onderscheiden in *home state* en *host state*. Het onderscheid wordt gemaakt omdat grensoverschrijdende bankafwikkeling berust op het systeem van grensoverschrijdend bankentoezicht, waarbij de *home* toezichthouders van multinationale banken wereldwijd geconsolideerd toezicht uitoefenen. *Home* afwikkelingsautoriteiten bevinden zich in een leidende positie om mondiale afwikkelingsmaatregelen voor de hele groep te nemen. (Hoofdstuk 6, §6.4.2)

Beginsel (iii): Een lopende buitenlandse afwikkelingsprocedure moet worden erkend, inclusief relevante voorzieningen zoals het moratorium. Door de erkenning van *home* afwikkelingsautoriteiten, kunnen deze maatregelen nemen in de *host state*. Het invoeren van een moratorium vergemakkelijkt de uitvoering van afwikkelingsmaatregelen en waarborgt de internationale financiële stabiliteit. Het is aan te bevelen dat de nationale wetgeving de formele vereisten voor de erkenning voldoende duidelijk voorschrijft, bijvoorbeeld welke documenten moeten worden ingediend. Ten aanzien van dit beginsel, neemt het proefschrift geen stelling in betreffende de keuze tussen administratieve erkenning of gerechtelijke erkenning; het is aan de nationale regelgevers om hierin een keuze te maken. (Hoofdstuk 6, §6.4.3)

Beginsel (iv): Een buitenlandse afwikkelingsmaatregel die onmiddellijke effecten sorteert, moet worden erkend. De mogelijkheid dat handelingen van *home* autoriteiten kunnen worden onderworpen aan rechterlijke toetsing, mag geen reden zijn om die maatregelen niet te erkennen, omdat een effectieve afwikkeling het algemeen belang dient, dat in deze situatie zwaarder weegt dan de rechten van individuele partijen. Daarnaast kunnen betrokken schuldeisers nog steeds verhaal zoeken in de *home state*. Een *bail-in* volgens *home* maatregelen kan ook worden erkend, omdat de contractspartij in de *host state* deze situatie had kunnen voorzien toen zij een overeenkomst sloot met een partij die onderworpen is aan het recht van de *home state*; de afwikkeling wijzigt de contractuele relatie tussen de partijen. Na erkenning moeten de buitenlandse afwikkelingsmaatregelen worden toegepast, middels directe handhaving of door het nemen van nationale ondersteunende maatregelen. Aanbevolen wordt dat alle jurisdicties procedures ter uitoefening van de maatregelen invoeren, met duidelijke regels en richtlijnen. (Hoofdstuk 6, §6.4.4)

Hoofdstuk 7 neemt als uitgangspunt de beginselen van het financieel recht en identificeert de spanningen tussen nationaal financieel beleid en internationale financiële stabiliteit. In dit Hoofdstuk wordt geconstateerd dat internationale financiële stabiliteit een doel is, maar dat hiervoor geen bindende internationale regels bestaan. Internationale financiële regelgeving bestaat uit *soft law* en dwingt nationale beleidsmakers niet tot navolging. Daarom worden er in Hoofdstuk 7 drie verdere beginselen geïntroduceerd:

Beginsel (v): De financiële stabiliteit van de *host state* zou een openbare-orde-exceptie moeten zijn om de erkenning van buitenlandse afwikkelingsmaatregelen te weigeren. Dit komt omdat *home state* in het algemeen geen wettelijke verplichtingen kent om rekening te houden met de belangen van de *host state*. Daarom is het gerechtvaardigd dat de *host state* een beroep kan doen op de openbare orde exceptie teneinde de eigen financiële stabiliteit te waarborgen. (Hoofdstuk 7, §7.4.1)

Beginsel (vi): De financiële stabiliteit van de *host state* moet in enge zin worden geïnterpreteerd. Ten eerste omdat financiële stabiliteit een openbare-orde-exceptie is. Ten tweede zou een beroep op de financiële stabiliteit van het *host state* de grensoverschrijdende afwikkeling kunnen belemmeren en de financiële stabiliteit van de *home state* kunnen ondermijnen, wat op zijn beurt de stabiliteit van de *host state* kan aantasten. Ten derde speelt financiële stabiliteit ook een rol bij de besluitvorming op *home state* niveau, en heeft in dat kader alleen betrekking heeft op ernstige situaties die zeldzaam en uitzonderlijk zijn. (Hoofdstuk 7, §7.4.2)

Beginsel (vii): Een erkenningsverzoek kan worden afgewezen als het een groot beroep doet op publieke middelen van *host states*. In dat geval zou de erkenning een negatief effect hebben op het fiscale beleid van de *host state*. Deze openbare-orde-exceptie zou ook in enge zin moeten worden geïnterpreteerd. In dit proefschrift wordt de opvatting verdedigt dat de afwikkelingsmaatregelen van de *home state* onbedoelde externe stabiliteitseffecten kunnen hebben op de *host state*. Daarom moeten *host states* gevrijwaard worden van het verstrekken van aanvullende financiële hulp. (Hoofdstuk 7, §7.4.3)

Hoofdstuk 8 behandelt de positie van schuldeisers en verdedigt de opvatting dat buitenlandse schuldeisers niet mogen worden benadeeld. Bovendien moeten de belangen van de schuldeisers van *home* en *host state* worden afgewogen. Hoofdstuk 8 stelt drie aanvullende beginselen voor:

Beginsel (viii): Elke vorm van benadeling is een reden voor weigering van erkenning. Het nemen van afwikkelingsmaatregelen vereist de gelijke behandeling van alle schuldeisers: afwikkelingsdoelstellingen moeten worden bereikt door pro rata verliesverdeling onder binnenlandse en buitenlandse crediteuren. (Hoofdstuk 8, §8.4.1)

Beginsel (ix): Verschillen in nationale regelgeving mogen geen reden zijn voor weigering van erkenning. Na bestudering van de huidige resolutieregimes in de geselecteerde jurisdicties, blijkt dat de resolutieregimes grotendeels zijn geharmoniseerd in de Europese Unie (EU) en de Verenigde Staten (VS), maar niet in China. Desalniettemin vormen de verschillen geen overtuigende reden om buitenlandse afwikkelingsmaatregelen te weigeren. (Hoofdstuk 8, §8.4.2)

Beginsel (x): Een keuze van ander toepasselijk recht dan het eigen recht mag geen reden zijn om te weigeren buitenlandse afwikkelingsmaatregelen te erkennen. Bescherming van de rechten van *host* schuldeisers wordt niet noodzakelijkerwijs bereikt door contractuele rechtskeuze. In plaats daarvan kunnen openbare-orde-excepties en aanvullende vrijwaringsmaatregelen worden gebruikt om de rechten van *host* schuldeisers te beschermen. Ook zou het niet-erkennen van buitenlandse afwikkelingsmaatregelen louter vanwege de rechtskeuze leiden tot een verschillende behandeling van *home* en *host* schuldeisers. In de desbetreffende overeenkomsten kan worden opgenomen dat schuldeisers de afwikkelingsmaatregelen van de *home state* erkennen. Die bepaling wordt kracht bijgezet doordat *host* schuldeisers kunnen verwachten te worden beschermd volgens de wetten van de *home state*. (Hoofdstuk 8, §8.4.3)

Hoofdstuk 9 bespreekt verschillende internationale juridische instrumenten die de erkenning van buitenlandse afwikkelingsmaatregelen kunnen vergemakkelijken. Dit zijn onder meer internationale overeenkomsten, modelwetten en het internationale gewoonterecht. Bij het gebruik van deze instrumenten wordt aanbevolen om de tien bovengenoemde beginselen in acht te nemen. Hoofdstuk 10 bevat de slotopmerkingen.

Curriculum vitae

Mr Shuai Guo (Jiangsu, 25 March 1991) is a PhD candidate at Leiden Law School, Leiden University and started his research in 2016. He holds an LLB (2013) and an LLM (2016) from China University of Political Science and Law (CUPL). He passed the bar exam of P.R.C in 2013. He was a visiting researcher to the University of Texas at Austin. He was a consultant to the United Nations Conference on Trade and Development (UNCTAD) and an intern at the World Trade Organization (WTO). Since 2016 his domain of research is cross-border bank recovery and resolution, with a comparative analysis of the EU, US and China. He is involved in a project jointly sponsored by the International Insolvency Institute (III) and the Conference of European Restructuring and Insolvency Law (CERIL) and is the co-author of the book *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution* (Eleven International Publishing, forthcoming) with Prof. Bob Wessels. He is involved in the Royal Dutch Academy of Sciences (KNAW) project *New Bank Insolvency Law for China and Europe* and is the main author of the third volume: *comparative analysis* (forthcoming). He also assisted in editing the *Research Handbook on Cross-border Bank Resolution* (Edward Elgar Publishing) and contributed to the *Conclusions* Chapter with Prof. Matthias Haentjens and Prof. Bob Wessels. He is a III NextGen member and an award-winner of the III 2018 Insolvency Studies Prize for his article *Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law*, which has been published in Norton Journal of Bankruptcy Law and Practice, 27(5), 481-519*.* His primary publication also includes *Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues*, International Insolvency Review, 28(1), 44-62. He has published in other peer-review journals including the Chinese Journal of Global Governance, Erasmus Law Review, and Journal of World Trade.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020:

MI-316 R. Zandvliet, *Trade, Investment and Labour: Interactions in International Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-317 M. de Jong-de Kruijf, *Legitimiteit en rechtswaarborgen bij gesloten plaatsingen van kinderen. De externe rechtspositie van kinderen in gesloten jeugdhulp bezien vanuit kinder- en mensenrechten*, (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 600 6

MI-318 R.J.W. van Eijk, *Web Privacy Measurement in Real-Time Bidding Systems. A Graph-Based Approach to RTB system classification*, Amsterdam: Ipskamp Printing 2018, ISBN 978 94 028 1323 4

MI-319 M.P. Sombroek-van Doorm, *Medisch beroepsgeheim en de zorgplicht van de arts bij kindermishandeling in de rechtsverhouding tussen arts, kind en ouders*, (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6236 906 1

MI-320 Y. Tan, *The Rome Statute as Evidence of Customary International Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-321 T. van der Linden, *Aanvullend Verrijkingsrecht*, (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 678 5, e-ISBN 978 94 6274 544 5

MI-322 L.B. Louwerse, *The EU's Conceptualisation of the Rule of Law in its External Relations. Case studies on development cooperation and enlargement*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-323 I. Antonaki, *Privatisations and golden shares. Bridging the gap between the State and the market in the area of free movement of capital in the EU*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-324 E. Cammeraat, *Economic Effects of Social Protection*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-325 L.B. Esser, *De strafbaarstelling van mensenhandel ontrafeld. Een analyse en heroriëntatie in het licht van rechtsbelangen*, (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 697 6

MI-326 L.G.A. Janssen, *EU bank resolution framework. A comparative study on the relation with national private law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-327 L.Y. d'Hondt, *Addressing Industrial Pollution in Indonesia. The Nexus between Regulation and Redress Seeking*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-328 L.F. Fiallos Pazmiño, *Legal perspectives on the cross-border operations of unmanned aircraft systems*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-329 M. Lochs, *Contempt of court. Een meerwaarde voor de goede strafrechtspleging in Nederland?* (diss. Leiden), Den Haag: Boom juridisch 2019, ISBN 978 94 6290 714 0

MI-330 M.V. Antonov, *Formalism, Realism and Conservatism in Russian Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-331 P. van Berlo, *Human rights elephants in an era of globalisation. Commodification, crimmigration, and human rights in confinement*, (diss. Leiden), Nijmegen: Wolf Legal Publishers 2020, ISBN 978 94 6240 565 3

MI-332 M. Wensveen, *Eigen haard is goud waard? Een studie naar de woonsituatie, het verhuisgedrag en recidive van (ex-)gedetineerden*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019, ISBN 978 94 0281 780 5

MI-333 J. Brouwer, *Detection, detention, deportation. Criminal justice and migration control through the lens of crimmigration*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6236 988 7

MI-334 H. Bosdriesz, *Furthering the fight against impunity in Latin America. The contributions of the Inter-American Court of Human Rights to domestic accountability processes*, (diss. Leiden), Amsterdam: Ipskamp Printing 2019

MI-335 M.R. Bruning e.a., *Kind in proces: van communicatie naar effectieve participatie*, Nijmegen: Wolf Legal Publishers 2020

MI-336 J. van Kralingen, *De ondeelbaarheid van het pand- en hypotheekrecht; deconstructie van een leerstuk. Een historisch-comparatieve studie*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 782 9

MI-337 J.C.A. van Dam, *Guidance documents of the European Commission in the Dutch legal order*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-338 F. Jiang, *Greening' the WTO Ban on China's Export Duties. Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-339 M.J.R. Broekema, *Cognitive Bias in the Judgment of Business Valuations and Valuators. How Systematic Patterns of Irrationality Affect Entrepreneurs, Legal Professionals and Business Valuators*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-340 H. Horii, *Child Marriage as a Choice. Rethinking agency in international human rights*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-341 R. de Graaff, *Concurrence in European Private Law*, (diss. Leiden), The Hague: Eleven International Publishing 2020, ISBN 978 94 6236 134 8

MI-342 J.M.M. van der Vliet, *The International Legal Protection of Environmental Refugees. A human rights-based, security and State responsibility approach*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6236 139 3

MI-343 M. Samadi, *Normering en Toezicht in de Opsporing. Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 816 1

MI-344 D.J. Verheij, *Credit rating agency liability in Europe. Rating the combination of EU and national law in rights of redress*, (diss. Leiden), The Hague: Eleven International Publishing 2020

MI-345 P. Rustenburg, *Een algemene normtheorie toegepast op open normen in het belastingrecht*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-346 J.V.O.R. Doekhie e.a., *Invoering jeugdstrafrecht in Caribisch Nederland. Een verkenning naar een jeugdstrafrechtmonitor*, Den Haag: Boom criminologie 2020, ISBN 978 94 6236 151 5

MI-347 A. Varga, *Establishing State Responsibility in the Absence of Effective Government*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-348 M. Darouei, *Managing a Sustainable Career in the Contemporary World of Work: Personal Choices and Contextual Challenges*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-349 N. Strohmaier, *Making Sense of Business Failure. A social psychological perspective on financial and legal judgments in the context of insolvency*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-350 S. Kouwagam, *How Lawyers Win Land Conflicts for Corporations. Legal Strategy and its Influence on the Rule of Law in Indonesia*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-351 A.D. Sarmiento Lamus, *The proliferation of dissenting opinions in international law. A comparative analysis of the exercise of the right to dissent at the ICJ and the IACtHR*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-352 B. Ribeiro de Almeida, *Building land tenure systems. The political, legal, and institutional struggles of Timor-Leste*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-353 K.A.M. van der Zon, *Pleegrechten voor kinderen. Een onderzoek naar het realiseren van de rechten van kinderen die in het kader van de ondertoezichtstelling in een pleeggezin zijn geplaatst*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 842 0

MI-354 E.G. van 't Zand e.a., *Bestuurlijke boetes en de Verklaring Omtrent het Gedrag. Een onderzoek naar de realiseerbaarheid en wenselijkheid van het betrekken van bestuurlijke boetes bij de VOG-screening aan de hand van een casestudy naar handhaving en integriteit in de financiële sector*, Den Haag: Boom juridisch 2020, ISBN 978 94 6290 843 7

MI-355 J. Boakye, *Understanding Illegal Logging in Ghana. A Socio-Legal Study on (non)Compliance with Logging Regulations*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020

MI-356 N.N.A. Sánchez Castillo-Winckels, *International law and the sustainable governance of shared natural resources. A principled approach*, (diss. Leiden), Amsterdam: Ipskamp Printing 2020, ISBN 978 94 0282 145 1

MI-357 S.S. Arendse, *De uiterlijke verschijningsvorm in het strafrecht. Een analyse van de jurisprudentie van de Hoge Raad*, (diss. Leiden), Den Haag: Boom juridisch 2020, ISBN 978 94 6290 844 4

MI-358 J. Reef, M. Jeltes & Y.N. van den Brink, *De PIJ-maatregel doorgelicht. Juridische grondslagen, populatiekenmerken, gedragsverandering en recidive*, Nijmegen: Wolf Legal Publishers 2020, ISBN 978 94 6240 608 7

E.M.
MEIJERS
INSTITUUT

INSTITUUT VOOR
RECHTSWETENSCHAPPELIJK
ONDERZOEK

This dissertation investigated what the legal framework for recognition of foreign bank resolution actions should be. It aims to fulfil the current gap in legislative actions and scholarly research on the issue of cross-border bank resolution and attempts to formulate rules that would facilitate resolution actions effective across borders so as to achieve the ultimate goal of a global orderly resolution for banks. This dissertation conducts both normative and positive analysis and compares three jurisdictions, namely, the European Union, the United States and China. Building on the traditional legal doctrines of private international law, financial law and insolvency law, this dissertation proposes ten principles that should apply in recognition of foreign bank resolution actions.

This is a volume in the series of the Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University. This study is part of the Law School's research programme 'Coherent Private Law'.