Recognition of foreign bank resolution actions

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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.

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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.

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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]

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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]

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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/advSearch-Landing.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.