Recognition of foreign bank resolution actions

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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.

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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]

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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.

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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.