Recognition of foreign bank resolution actions

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Part III

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

6 Grounds for Recognition*

6.1 Introduction

Chapters 3 to 5 briefly present each jurisdiction's different approaches to recognition of foreign resolution actions. As a brief summary, the European Union (EU) formulates special rules for recognition of foreign resolution actions, both within the EU and outside the EU, and adopts an administrative approach. The United States (US) relies on the traditional corporate insolvency law led by courts, and Chapter 15 of the US Bankruptcy Code and common law are the grounds for recognition. China also relies on traditional corporate insolvency law. But different from the US, which has a comprehensive mechanism tailored to insolvency proceedings, the Chinese approach generally follows the conventional private international law principles.

Starting with this chapter, a more detailed normative analysis is conducted to search for an appropriate mechanism for recognition of foreign resolution actions. This chapter starts with the examination of grounds for recognition of foreign resolution actions. In this chapter, 'ground' has two layers of meaning: first, the rationale behind recognition, namely, why a foreign resolution action should be recognised; and second, the legal basis for recognition, namely, on what legal rules a foreign resolution action must be recognised.

In §6.2, a theoretical framework is provided, illustrating the grounds for recognition and enforcement of foreign judgments (§6.2.1) and recognition of foreign insolvency proceedings (§6.2.2). Based on the doctrines developed in these two different yet closely related fields, this chapter further draws a preliminary conclusion on the grounds for recognition of foreign resolution actions. Particularly in §6.2.3.2, contractual approaches are discussed. §6.3 subsequently compares the legal regimes for recognition of foreign resolution actions in the selected jurisdictions. Two issues are compared:

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the prerequisites for recognition, and the procedures of recognition. Next, in §6.4, specific issues are evaluated, answering four questions: (i) Should reciprocity be a pre-condition for recognition? (§6.4.1); (ii) How should jurisdiction be determined? (§6.4.2); (iii) What are the conditions and effects for recognition of a foreign resolution proceeding? (§6.4.3); and (iv) What are the conditions and effects for recognition of a foreign resolution measure? (§6.4.4). §6.5 concludes that recognition of foreign resolution actions shares a similar rationale as that for recognition of foreign judgments and foreign corporate insolvency proceedings, but detailed implementation rules need to be tailored to resolution actions.

6.2 Theoretical Framework

6.2.1 Recognition of foreign judgments

6.2.1.1 National rules of private international law

6.2.1.1.1 Comity and reciprocity

A. Comity

Recognition of foreign judgments is one of the three pillars of private international law, alongside with jurisdiction and applicable law.[1] A jurisdiction where a judgment is made is a rendering jurisdiction; a jurisdiction where a judgment seeks to be recognised is a receiving jurisdiction. As indicated in Chapter 1 at §1.2, recognition of foreign judgments is the pre-condition for enforcement, and the rationale for recognition also applies to enforcement.

The discussion starts with the doctrine of comity. It is a general principle that foreign judgments rendered by foreign courts are the result of the exercise of foreign countries' sovereign, and in the early 19th century in civil law jurisdictions such as France, a territorial sovereign perception prevailed, thus foreign judgments normally could not be recognised.[2] This sovereign principle was inspired by the famous Dutch jurist Ulrich Huber, who formulated a basic notion regarding recognition and enforcement of foreign

1 Peace Palace Library, 'Private International Law Introduction' < https://www.peacepalacelibrary.nl/research-guides/national-law/private-international-law-in-general/> accessed 30 August 2019. See also literature, e.g. AV Dicey, *Dicey, Morris and Collins on the Conflict of Laws* (JHC Morris, Lawrence Collins and Adrian Briggs eds, 15th edn, Sweet & Maxwell Thomson Reuters 2012); Adrian Briggs, *The Conflict of Laws* (OUP 2013); Adrian Briggs, *Private International Law in English Courts* (OUP 2014); Guangjian Tu, *Private International Law in China* (Springer 2016); Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).

2 Friedrich K Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 American Journal of Comparative Law 1, 5-7.

judgments. In his *De Conflictu Legum*, he set forth three major principles regarding foreign relations and sovereign:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.[3]

The first two principles reflect the traditional notion of sovereignty, while the third one reflects the comity idea, which lays down the rationale for recognition of foreign judgments. This comity principle bridged the gap between sovereignty and international cooperation by allowing 'a state to yield to another state's acts without giving up its claim of absolute power and authority in the process'.[4]

Although originating in the Netherlands, a civil law jurisdiction, the comity principle was largely embraced in common law jurisdictions. In early English common law practices, comity was considered as the basis for recognition and enforcement of foreign judgments.[5] Lord Mansfield adopted Huber's theory and found it 'in good sense, and upon general principles of justice'.[6] Joseph Story, a US judge, further developed Huber's theory and commented that '[t]he true foundation … arise[s] from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return'.[7] In the leading case rendered by the US Supreme Court, *Hilton v Guyot*, comity was interpreted:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. [8]

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3 Ernest G Lorenzen, 'Huber's De Conflictu Legum' (1919) 13 Illinois Law Review 53, 376.

4 Tim W Dornis, 'Chapter C. 18: Comity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 383.

5 Dicey (n 1) para 14-007; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett Private International Law* (14th edn, OUP 2008) 514.

6 *Holman v Johnson* (1775) 1 Cowper 341, 98 E.R. 1120, 1121.

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

8 *Hilton v Guyot*, 159 U.S. 113, 163-164 (1895).

The same judgment further explained that comity 'takes into account the interests of the [receiving state], the interest of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law'.[9] Based on these illustrations, comity represents a public (international) law perspective and provides a non-obligatory legal rationale for recognition of foreign judgments. Accordingly, a receiving jurisdiction can unilaterally decide whether or not to recognise and enforce a judgment from a rendering jurisdiction.

B. Reciprocity

In the US *Hilton* case, an additional concept is mentioned – reciprocity. The judges ruled that the US court should not recognise a French judgment because '[i]f the judgment had been rendered in [the US], or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits'.[10] Reciprocity, accordingly, perceives recognition as premised on the condition that the rendering jurisdiction would recognise a judgment from the receiving jurisdiction if the situation is reversed.

Reciprocity, as demonstrated in the *Hilton v Guyot* case, is interpreted under the framework of comity.[11] Just as comity, reciprocity also respects the sovereignty principle and is a non-obligatory approach that could be taken unilaterally. Taking a further step, reciprocity explicitly requires the consideration of potential responses from the rendering jurisdiction as a prerequisite for recognition and enforcement.[12]

Reciprocity is a standard prerequisite for recognition in many European countries, for example, Austria, Poland, Hungary, Czech, Germany and Spain,[13] but some countries have abolished it, such as Switzerland and Belgium.[14] China is another example of a country adopting the reciprocity requirement, as it prescribes the reciprocity rule in its Civil Procedure

9 *In re Artimm S.r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal. 2005), citing *In re Maxwell Communication Corp. plc*, 93 F.3d 1036, 1048, and *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 107 S.Ct. 2542, 2561-2562.

10 *Hilton v Guyot*, 159 U.S. at 228.

11 Elliott E Cheatham, 'American Theories of Conflict of Laws: Their Role and Utility' (1944) 58 Harv L Rev 361.

12 For similar arguments, see, e.g. Susan L Stevens, 'Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments' (2002) 26 Hastings Int'l & Comp L Rev 115; Yahan Wang, 'Research on Reciprocity in Recognition and Enforcement of Foreign Judgments' (Doctor Thesis, Wuhan University 2018).

13 Samuel P Baumgartner, 'How Well Do US Judgments Fare in Europe' (2008) 40 Geo Wash Int'l L Rev 173, 191-193.

14 Ibid. See also Anatol Dutta, 'Chapter R.2: Reciprocity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017). *Cf* Juenger (n 2) 7-8. See below §6.4.1.

Law.[15] In the UK, the Administration of Justice Act 1920 (1920 Act) [16] and Foreign Judgments (Reciprocal Enforcement) Act 1933 (1933 Act)[17] both adopt the reciprocity principle which requires that English judges can recognise foreign judgments from the jurisdictions in which the UK government considers reciprocity exists.[18] The American Law Institute (ALI) also proposed to introduce a reciprocity requirement in judgment recognition and enforcement proceedings.[19]

The reciprocity requirement has been controversial and led to various debates. On the one hand, some believe that reciprocity would create incentives for foreign jurisdictions to cooperate and recognise and enforce judgments rendered in other jurisdictions where reciprocity exists.[20] On the other hand, reciprocity means that a foreign judgment cannot be recognised and enforced without reciprocal treatment from the rendering jurisdiction, which raises concerns about the impediment to recognition and enforcement[21] and uncertainty and unpredictability.[22] Moreover, criticisms have also revolved around ignorance of private rights already confirmed in foreign judgments,[23] as shown in the obligation doctrine and *res judicata* doctrine.

6.2.1.1.2 Obligation doctrine

A different theory, the 'doctrine of obligation', unlike comity or reciprocity, does not address the obligation of a sovereign state from a public law perspective; instead, it takes into account the private obligation of a debtor

15 Articles 281-281 CPL. Also Article 5 EBL. For the Chinese reciprocity requirement, see Wang (n 12).

16 The 1920 Act applies to judgments rendered by 'superior courts' in other British dominions. 1920 Act, s 9(1). See Dicey (n 1) para 14-181.

17 The 1933 Act applies to designated countries, which are listed in Dicey (n 1) para 14-184.

18 1920 Act, s 14, and 1933 Act, s 1.

19 ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006) (ALI Proposed Recognition Statute), §7(a). See additional explanation, Linda Silberman, 'Some Judgments on Judgments: A View from America' (2008) 19 King's L J 235.

20 ALI Proposed Recognition Statute, §7 comment (b) at 95. See also Louisa B Childs, 'Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law' (2005) 38 NYUJ Int'l L & Pol 221; Silberman, ibid.

21 See, e.g. Qisheng He and Yahan Wang, 'Resolving the Dilemma of Judgment Reciprocity – From a Sino-Japanese Model to a Sino-Singaporean Model' in Andrea Bonomi and Gian Paolo Romano (eds), *Yearbook of Private International Law Vol XIX – 2017/2018* (2018); Wang (n 12).

22 See, e.g. Harry Davenport and H. Bartow Farr, 'Recent Decisions' (1913) 13 Colum L Rev 73, 79.

23 See, e.g. AC Rounds, 'Injunctions Against Liquor Nuisances' (1896) 9 Harv L Rev 521; Hessel E. Yntema, 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33 Mich L Rev 1129; Kermit Roosevelt, 'The Myth of Choice of Law: Rethinking Conflicts' (1999) 97 Michigan Law Review 2448.

arising from a judgment rendered by a foreign court.[24] In an English case, Blackburn J generalised that

> the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in [the receiving jurisdiction] are bound to enforce.[25]

Some US cases also upheld the obligation doctrine, arguing that a debtor is obliged to pay back a creditor on the basis of the legal relationship determined in a foreign judgment.[26] To some extent, the theory implicitly contains the requirement of comity as a courtesy to foreign laws, as well as foreign judgments delivered according to foreign laws. [27] However, this theory fails to explain why a domestic court should recognise an obligation formulated under foreign law, and, in particular, it fails to explain why some judges refuse to recognise the jurisdiction of a rendering court, which is a common ground to refuse to recognise foreign judgments.[28] Simply put, this doctrine cannot adequately explain the rationale behind recognition and enforcement of foreign judgments.

6.2.1.1.3 Res judicata

Another theory – *res judicata* – also provides an alternative underpinning for recognition and enforcement of foreign judgments. Having its roots in domestic law, *res judicata* 'is a judicial decision of special character because … it disposes finally and conclusively of the matters in controversy, such that … the subject-matter cannot be relitigated between the same parties or their privies'. [29] The main objective of *res judicata* is to avoid wasteful and repetitious litigation.[30] On the one hand, from a public law perspective, 'it is in the interest of the State that there be an end to ligation', in order not to disrupt limited national judicial resources; on the other hand, from a private

24 Dicey (n 1) para 14-007. See also the case cited, *Russell v Smyth* [1842] 9 M. & W. 810, 819; *Williams v Jones* [1845] 13 M. & W. 628, 633; *Godard v Gray* [1870] L.R. 6 Q.B. 139, 149-150; *Schibsby v Westenholz* [1870] L.R. 6 Q.B. 155, 159.

25 *Schibsby v Westenholz* [1870] L.R. 6 Q.B. 155, 159. See also, e.g., Trevor C Hartley, *International Commercial Litigation: Texts, Cases and Materials on Private International Law* (2nd edn, CUP 2015) 350.

26 See, e.g. *Johnson v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Cowans v Ticonderoga Pulp and Paper Co.*, 219 App. Div. 120, 219 N.Y. Supp. 284, *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927). See literature, e.g. Hans Smit, 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L Rev 44, 54.

27 Look Chan Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 International and Comparative Law Quarterly 443.

28 Willis LM Reese, 'The Status in This Country of Judgments Rendered Abroad' (1950) 50 Colum L Rev 783, 784.

29 Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001) para 1.11.

30 Ibid, para 1.13.

law perspective, 'no person should be proceeded against twice for the same cause.'[31]

A relevant effect of *res judicata* is the collateral estoppel doctrine. Different from *res judicata*, which bars a second suit involving the same parties or their privies based on the same cause of action, the doctrine of collateral estoppel is applied in the context of a second action 'upon a different cause of action', but 'the judgment in the prior suit precludes re-litigation of issues actually litigated and necessary to the outcome of the first action'.[32] What is common is that both theories have the 'dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation'.[33]

The *res judicata* theory is broadened to be applied in cross-border cases. Consequently, mostly from a private law perspective, parties to a foreign judgment should not be subject to another litigation of the same claim. [34] In order to avoid re-litigation proceedings between the same parties, a foreign judgment is supposed to have an effect within the receiving jurisdiction, by being recognised by the receiving court. The significance of the *res judicata* theory closely relates to the prerequisites for recognition and enforcement, particularly, the finality condition discussed below in §6.4.4.1.

6.2.1.2 Mutual trust and mutual recognition in Europe

A special regime in the field of recognition and enforcement of foreign judgments is the free movement of judgments mechanism among the EU Member States, which is governed by the Brussels system. The EU has been endeavouring to promote free movement of judgments since the 1960s through international agreements. The 1968 Brussels Convention,[35] expressed, at earliest, its intention to facilitate cross-border recognition and enforcement of foreign judgments. This Brussels Convention, however, was succeeded by the Brussels I Regulation 44/2001 (Brussels I Regulation 2001)[36], which again, was succeeded by the recast Brussels I Regulation

31 Ibid.

32 *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), footnote 5 (citing *e. g., Lawlor v. National Screen Serv. Corp*., 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122; *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898; *Cromwell v. County of Sac*, 94 U.S. 351, 352–353, 24 L.Ed. 681.)

33 *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

34 See, e.g. Smit (n 26); Courtland H Peterson, 'Res Judicata and Foreign Country Judgments' (1963) 24 Ohio St LJ 291; Barnett (n 29).

35 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299/32.

36 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1.

1215/2012 (Brussels I Regulation 2012 Recast).[37] At the moment, the old Convention only applies to certain overseas territories of the Member States, such as Aruba, an overseas territory of the Netherlands.[38]

The present effective law is the Brussels I Regulation 2012 Recast, which carries on with the fundamental principle of 'mutual recognition of judicial and extra-judicial decisions in civil matters'.[39] Recital 26 states that 'a judgement given by the courts of a Member State should be treated as if it had been given in the Member State addressed.'[40] Accordingly, Article 36 requires that '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.[41] Also, Article 39 requires that '[a] judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'.[42]

The Regulation provides that '[m]utual trust in the administration of justice in the Union' justifies the recognition mechanism, and 'the aim of making cross-border litigation less time-consuming and costly' justifies the enforcement mechanism.[43] The statutory ground for such a mutual recognition mechanism is, first, the Brussels Regulation, a legislative instrument, that imposes obligations on the courts in the Member States to follow the rules prescribed.[44] Second and more fundamentally, the mutual recognition mechanism derives from the founding treaties of the EU. Article 81 Treaty on the Functioning of the European Union (TFEU) explicitly states that

> 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.[45]

The founding treaties of the EU are built on the consent of the participating jurisdictions, namely, the EU Member States.

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37 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1.

38 Fawcett and Carruthers (n 5) 342.

39 Recital (3) Brussels I Regulation 2012 Recast.

40 Recital (26) Brussels I Regulation 2012 Recast.

41 Article 36(1) Brussels I Regulation 2012 Recast.

42 Article 39 Brussels I Regulation 2012 Recast.

43 Recital (26) Brussels I Regulation 2012 Recast.

44 See also Judgement of 16 July 2015, Diageo Brands BV v Simiramida-04 EOOD, C-681/13 EU:C:2015:471, para 40 ('the rules of recognition and enforcement laid down by [the Brussels Regulation] are based, precisely, on mutual trust in the administration of justice in the European Union').

45 Article 81 TFEU.

The rationale behind such consent or the purpose to reach an agreement is expressed in the earliest Brussels Convention, namely, the desire to implement the provisions of Article 220 of the Treaty Establishing the European Economic Community 'by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals' and to strengthen the legal protection of persons therein established.[46] The Jenard Report,[47] the explanatory report to the Brussels Convention, explains:

> a true internal market between the sis States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.[48]

This mutual trust mechanism extends to cross-border corporate insolvency (European Insolvency Regulation, EIR), cross-border bank insolvency (Directive on Reorganisation and Winding-up of Credit Institutions, CIWUD), as well as cross-border bank resolution (Bank Recovery and Resolution Directive, BRRD). As explained in previous Chapter 3, and also in the following sections, these legal instruments make insolvency/resolution proceedings effective across the European Union.

It should be noted that Demark, although being an EU Member State, is excluded from the Brussels Regulation, but subject to the Council Decision 2006/325/EC, which concluded an agreement and extends the Brussels Regulation to Denmark.[49] In parallel, the 1988 Lugano Convention and its updated 2007 version[50] applies to additional European Free Trade Association (EFTA) States including Iceland, Norway and Switzerland, as well as Denmark, and it also rests on mutual recognition.

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46 Preamble Brussels Convention.

47 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968), by Mr P Jenard, OJ C 59/1.

48 Jenard Report, 3.

49 Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2006/325/EC, OJ L 120/22.

50 Convention on jurisdiction and enforcement of judgments in civil and commercial matters, Done at Lugano on 16 September 1988, OJ L 319/9. The 1988 Convention was later amended in 2007 by Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339/3.

6.2.2 Recognition of foreign insolvency proceedings

6.2.2.1 National rules of international insolvency law

Recognition of foreign insolvency proceedings is often excluded from the regime of recognition of foreign judgments.[51] This is because, as the United Nations Commission on International Trade Law (UNCITRAL) summarised, the general private international law usually only applies to a two-party dispute, and not to collective proceedings like insolvency proceedings.[52] Also, recognition of foreign judgments is on the condition of a 'final judgment', while an insolvency judgment may be seen merely as 'a declaration of status' instead of a 'judgment', or an ongoing proceeding instead of a 'final' one.[53] However, despite being excluded from the general private international law framework, international insolvency law shares a similar rationale as the private international law and rests on the same three pillars, that is, jurisdiction, applicable law, and recognition and enforcement of foreign judgments.

6.2.2.1.1 Universalism v. territorialism

International insolvency law discussions always start with the two contradictory principles of universalism and territorialism, which address the effects of an insolvency proceeding, either with a universal effect or with only a territorial effect.[54]

Territorialism only accepts the effects of an insolvency proceeding within the jurisdiction where the proceeding is opened.[55] It originated from the Roman Empire and continued in the later Middle Ages when states simply

51 See, e.g. Article 1(2)(b) Brussels I Regulation 2012 Recast; Article 1(5) 1971 Recognition and Enforcement Convention; Article 2(2)(e) Choice of Court Convention; Article 2(1)(e) Draft Judgment Convention. See also European Parliament, 'The Hague Conference on Private International Law "Judgments Convention", Study Requested by the JURI Committee' (April 2018) 12-13.

52 MLCBI Guide, para 8.

53 Ibid.

54 See, e.g. Ian F Fletcher, *Insolvency in Private International Law* (OUP 2005); Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015); Look Chan Ho, *Cross-border Insolvency: Principles and Practice* (Sweet & Maxwell 2016); Reinhard Bork, *Principles of Cross-border Insolvency Law* (Intersentia 2017).

55 Thomas C Baxter Jr, Joyce M Hansen and Joseph H Sommer, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57; Wessels (n 54) para 10013; Gabriel Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017) para 2.03. *Cf* cooperative territoriality, Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell Law Review 696; Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 Michigan Law Review 2216; virtual territoriality, Edward Janger, 'Virtual Territoriality' (2010) 48 Columbia Journal of Transnational Law 401.

ignored the assets located outside their own territory.[56] Universalism, on the other hand, given the expansion of international business and global asset allocation, maintains that an insolvency proceeding should have worldwide effect.[57] It emerged as a result of expansion of international business and an increasing number of foreign creditors asking for the participation in insolvency proceedings.[58]

Universalism prevails because it adapts to the goals of global insolvency: reaching an efficient and fair proceeding.[59] Allowing creditors from different jurisdictions to participate in the same proceeding would facilitate an efficient process by avoiding costs that might have occurred in territorial proceedings, enhance predictability[60] and ensure creditors are treated equally in one proceeding.[61] Also, universalism corresponds to the globalisation trend, such as mobilisation of international goods and increasing numbers of foreign creditors, and is more tailored to modern business models – multinational enterprises, that require a cross-border insolvency system when they fail.[62] Besides, universalism contributes to the maximisation of debtors' assets by placing them under one proceeding and is more helpful in reaching reorganisation plans where a collective participation of creditors is necessary.[63]

A jurisdiction can accept the effects of foreign insolvency proceedings (incoming universalism) or claim a worldwide effect of insolvency proceedings opened within its territory (outgoing universalism).[64] Although any

56 Bob Wessels, Hon Bruce A Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP 2009) 40-41.

57 Bork (n 54) 26-28. See also Jay L Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 Brooklyn Journal of International Law 499; Lucian Arye Bebchuk and Andrew T Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 The Journal of Law and Economics 775; Bob Wessels, 'Cross-Border Insolvency: Do Judges Break New Grounds?' in *Business and Bankruptcy Law in the Netherlands, Selected Essays* (Kluwer Law International 1999); Jay L Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276; Christoph G Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2007) 32 Brooklyn Journal of International Law 755.

58 Paulus (n 57) 755-766.

59 Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018) 6-9.

60 See, e.g. Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000) 98 Michigan Law Review 2177, 2181; Wessels (n 54) para 10010; Bork (n 54) 28.

61 See, e.g. Rizwaan J Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 24-45; Daniel A Farber, 'What (if Anything) Can Economics Say about Equity?' (2002) 101 Mich L Rev 1791, 1821.

62 Janis Sarra, 'Oversight and Financing of Cross-border Business Enterprise Group Insolvency Proceedings' (2008) 44 Tex Int'l LJ 547, 550-551; Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 153 ff; Mevorach (n 59) 9-11.

63 Westbrook, 'A Global Solution to Multinational Defaults' (n 57) 2285; Mevorach (n 59) 11-12.

64 Bork (n 54) 26-27.

jurisdiction can adopt an outgoing universalism, its actual effect solely depends on the counterparty jurisdiction – whether it accepts incoming universalism.[65] Application of universalism requires close cooperation among different jurisdictions. Still, obstacles abound as some jurisdictions are reluctant to recognise and enforce foreign insolvency proceedings, especially when against local interests.[66] In practice, many jurisdictions do not adopt pure territorialism or universalism, rather would follow a 'middle way' – 'modified universalism'.[67]

The section continues to discuss two legal instruments that adopt modified universalism – the UNCITRAL Model Law on Cross-border Insolvency (MLCBI), adopted in the US as Chapter 15 of the US Bankruptcy Code, and the EIR. As stated in the Preamble, the MLCBI sets out its objectives as (i) '[c]ooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency'; (ii) '[g]reater legal certainty for trade and investment'; (iii) '[f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor'; (iv) '[p]rotection and maximization of the value of the debtor's assets'; and (v) '[f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment'.[68] These objectives all explain the rationale for choosing a (modified) universalism choice. Even in jurisdictions that have not adopted the MLCBI, it seems that the increase of global trade and investment incentivises national legislators to adopt a more open attitude towards foreign insolvency proceedings.[69]

A major feature of the MLCBI and the EIR is the distinction of main and nonmain/secondary insolvency proceedings, conveying an idea to the world that one main proceeding can exist with worldwide legal effect,

65 Ibid.

66 On the implausibility of universalism principle, see, e.g. Frederick Tung, 'Is International Bankruptcy Possible' (2001) 23 Michigan Journal of International Law 31. See also, e.g. Wessels (n 54) para 10016; Wessels, Markell and Kilborn (n 56) 62.

67 Westbrook, 'A Global Solution to Multinational Default' (n 57) 2299ff; Miguel Virgós and Francisco J. Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) 17; Fletcher (n 54) 15-17. Similar terms include limited, curtailed or controlled universalism. See Wessels (n 54) para 10025. *Cf* multilaterism, Hannah L Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' (2000) 36 Stanford Journal of International Law 23; contractualism, Robert K Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 Texas Law Review 51; Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Michigan Journal of International Law 1; Robert K Rasmussen, 'Resolving Transnational Insolvencies through Private Ordering' (2000) 98 Michigan Law Review 2252; universal proceduralism, Edward Janger, 'Universal Proceduralism' (2007) 32 Brooklyn Journal of International Law 819.

68 Preamble MLCBI.

69 See, e.g. Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (n 57); Bebchuk and Guzman (n 57).

while local non-main proceedings can have limited legal effects within the territory.[70] A main proceeding takes place where the debtor has its centre of main interests (COMI);[71] and a secondary proceeding takes place where the debtor has an establishment.[72] The MLCBI sets out criteria for determination of COMI: 'in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the [COMI]'.[73] The EIR interprets COMI as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.[74] Establishment is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services' in the MLCBI,[75] and as 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets' in the EIR.[76] In addition, the MLCBI and the EIR allow public policy exception, empowering the court to refuse to take action if the action would be manifestly contrary to the public policy.[77]

The two instruments also have differences. The MLCBI is an international model law that needs to be incorporated into national laws, such as Chapter 15 of the US Bankruptcy Code, and only prescribes the effects of recognition, while the EIR harmonises international insolvency laws for EU Member States, and includes rules on jurisdiction, applicable law, and recognition and enforcement.[78] Under the MLCBI, a foreign resolution proceeding can only be filed for recognition,[79] and upon recognition, different effects may occur, including automatic reliefs[80] and other discretionary effects.[81] However, under the EIR, main proceedings should be recognised and be effective across the Member States.[82] EIR also allows the opening of local secondary proceeding, with its effects 'restricted to the assets of the debtor situated within the territory of the Member State in which [secondary] proceedings have been opened'.[83]

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70 Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review, 257.
71 Article 2(b) MLCBI, 11 US Code §1502(3); Article 3(1) EIR Recast.
72 Article 2(c) MLCBI, 11 US Code §1502(4); Article 3(2) EIR 2015 Recast.
73 Article 16(3) MLCBI, 11 US Code §1516(c).
74 Article 3(1) EIR 2015 Recast.
75 Article 2(f) MLCBI. 11 US Code §1502(2).
76 Article 2(10) EIR 2015 Recast.
77 Article 6 MLCBI; Article 33 EIR 2015 Recast.
78 Bork (n 70).
79 Articles 15-17 MLCBI; 11 US Code §§1515-1517.
80 Article 20 MLCBI; 11 US Code §1520.
81 Articles 19 and 21 MLCBI; 11 US Code §§1519 and 1521.
82 Articles 19-20 EIR 2015 Recast.
83 Article 34 EIR 2015 Recast.

Subsequent to recognition, under the MLCBI, reliefs can be granted.[84] Relief, in this sense, functions similar to enforcement, yet the scope of relief might be broader, including, for example, recognition and enforcement of foreign insolvency judgments, recognition and enforcement of foreign bankruptcy discharge, turnover of assets to foreign representatives, and antecedent transaction avoidance.[85] In contrast, under the EIR, there is no mention of the word 'relief', while Chapter II is titled 'recognition of insolvency proceedings', with enforcement under the regime of the Brussels system.[86] In this chapter of this dissertation, relief or enforcement is categorised within the scope of 'effects' of recognition.[87] Under international insolvency law, recognition of foreign insolvency actions is the prerequisite for following proceedings, similar to recognition of foreign judgments.

In 2018, the UNCITRAL passed a new Model Law on Recognition and Enforcement of Insolvency -Related Judgments (MLJ),[88] 'designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement the [MLCBI]'.[89] The new MLJ supplements the MLCBI and can be applied to recognise foreign insolvency-related judgments, while courts in some jurisdictions (such as the UK) do not have such power under the MLCBI.[90] The MLJ also reflects the (modified) universalism principle.

6.2.2.1.2 Comity and reciprocity

Although (modified) universalism is the dominant principle in the field of international insolvency law, this principle is not entirely accepted across the world. For example, as explained in Chapter 5, China does not incorporate the MLCBI and does not accept modified universalism.[91] This section continues to examine other traditional private international law doctrines that may provide rationale for the recognition of foreign insolvency proceedings.

84 Articles 19-21 MLCBI; 11 US Code §§ 1519-1521. See also MLCBI Guide, 29-30.

85 See, e.g. Ho (n 54) 165-179.

86 Article 32 EIR 2015 Recast; Articles 39-44 and 47-57 Brussels I Regulation 2012 Recast.

87 See below § 6.4.3.2 and § 6.4.4.2.

88 UNCITRAL, 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)' (2 July 2018) <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij> accessed 25 February 2020.

89 Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLJ Guide), 11.

90 MLJ Guide, 11-12.

91 Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-border Issues' (2019) 28 International Insolvency Review 44. However, Irit Mevorach argues that modified universalism can be deemed as customary international law and thus applies to the whole world. See Mevorach (n 59). See more discussion on customary international law in Chapter 9.

From a public law perspective, recognition of foreign insolvency proceedings, either judicial or administrative,[92] is a form of recognition of foreign sovereignty. The comity theory thus can form the grounds for recognition of foreign insolvency proceedings. UNCITRAL acknowledges that there are two types of legal basis for recognition: comity and international agreement based on the principle of reciprocity.[93] Both of the doctrines, as summarised in §6.2.1.1.1, are manifestations of the comity theory.[94] Also, the new MLJ Preamble 1(d) states one of the purposes of the new Model Law is '[t]o promote comity and cooperation between jurisdictions regarding insolvency-related judgments'.[95] This illustration again also confirms the comity bases for recognition.

In judicial practices, the US courts have been relying on comity to decide cross-border corporate insolvency proceedings, especially when deciding a discretionary relief.[96] In a recent case adjudicated in New York, the judge again confirmed that 'American Courts have recognized the need to extend comity to foreign bankruptcy proceedings'; and it is explained that '[t]he equitable and orderly distribution of a debtor's property requires assembling *all* claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail.'[97] Similarly, in the UK, comity is also recognised in the landmark judgment *Rubin v Eurofinance*: 'comity … requires mutual respect for the territorial integrity …, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former'.[98] In China, reciprocity is the pre-condition for recognition of foreign insolvency judgments when no international agreement exists.[99] It can be concluded that comity and reciprocity play a role in international insolvency.

6.2.2.1.3 Obligation doctrine and res judicata

From a private law perspective, the obligation doctrine and res judicata may also serve as the ground/rationale for recognition of foreign judgments, that is, recognising creditors' rights that have been altered by foreign

92 Article 2(a) MLCBI, definition of 'foreign proceeding'.
93 MLCBI Guide, paras 214-215.
94 See §6.2.1.2.1.
95 Preamble 1(d) MLJ.
96 See, e.g. *Canada Southern R. Co. v. Gebhard,* 109 U.S. 527, 539, 3 S.Ct.363, 27 L.Ed. 1020 (1883); *In re British American Insurance Co. Ltd,* 488 B.R. 205, 239 (Bankr. S.D. Fla. 2013); *In re Loy,* 432 B.R. 551, 558 (E.D. Va. 2010); *In re Rede Engegia S.A.*, 515 B.R. 69, 89 (Bankr. S.D.N.Y 2014); *In re Vitro SAB de CV*, 701 F.3d 1031, 1043 et seq., 1053 et seq. (5th Cir. 2012) ; *In re Lida,* 377 B.R. 243, 253 et seq. (9th Cir. BAP 2007). See Bork (n 54) para 2.39.
97 *In re Agrokor*, 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).
98 *Rubin v Eurofinance SA* [2012] UKSC 46 [30]; [2013] 1 A.C. 235 (SC), on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971 (citing *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827).
99 Article 5 EBL.

insolvency proceedings and avoiding re-litigation. This is not a frequently raised topic in the field of cross-border insolvency law. However, there is an opinion that the opening of a foreign insolvency proceeding discourages the receiving jurisdiction from opening another proceeding, also with the purpose of saving debtors from repetitious proceedings.[100] This opinion is said to reflect the adjudicatory comity theory, which refers to 'the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction'.[101] The *AirScan* judgment also mentioned the *res judicata* principle and confirmed its effect of 'bar[ring] [creditors] from raising … objections for the first time in the Bankruptcy Court'.[102] These private law doctrines may be seen as supplementary reasons upholding the recognition of foreign insolvency proceedings.

6.2.2.2 Automatic recognition in Europe

European legislation, once again, represents a more harmonised approach towards cross-border insolvency issues. As illustrated in Chapter 3, the EU adopts a harmonised cross-border insolvency framework under the EIR, with the EIR 2015 Recast as the currently effective version. Accordingly, insolvency proceedings are automatically recognised throughout the EU Member States.[103] The rationale for automatic recognition under the EIR is explained as being for the 'proper functioning of the internal market',[104] and 'to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects'.[105] The rationale falls within the scope of judicial cooperation in civil matters under Article 81 of the Treaty on the European Union (TEU),[106] similar to mutual recognition of judgments under the Brussels system,[107] and on the same basis of mutual trust.[108]

Interestingly, several European jurisdictions also adopt an automatic recognition process for non-EU third countries. For example, the German insolvency law allows for automatic recognition without the need to go

100 William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071, 2106.

101 *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014).

102 *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685, 699 (Bankr. S.D.N.Y. 2010), citing *Diorinou v. Mezitis*, 237 F.3d 133, 139, 143 (2d Cir. 2001); *Paramedics Electromedicina Commercial, Ltda v. GE medical Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004); *In re Parmalat Sec. Litig.*, 493 F.Supp.2d 723, 737 (S.D.N.Y. 2007); *In re Bd of Directors of Telecom Argentina, S.A.*, No.06 Civ. 2352, 2006 WL 3378687, 5 (S.D.N.Y. 2006).

103 Chapter 2, Articles 19-33 EIR; Articles 3 and 9 CIWUD. Also, Recital (65) EIR 2015 Recast.

104 Recital (3) EIR 2015 Recast.

105 Recital (8) EIR 2015 Recast.

106 Recital (3) EIR 2015 Recast.

107 Text to n 39.

108 Recital (65) EIR 2015 Recast.

through a formal recognition process, except for stakeholders objecting to the enforcement effects of foreign insolvency proceedings.[109] Similarly, Norway, a non-EU third country not bound by the EIR, also passed a new law allowing for automatic recognition of foreign insolvency proceedings.[110] Such automatic recognition might still be rare for most other jurisdictions.

6.2.3 Recognition of foreign resolution actions

6.2.3.1 National rules

As demonstrated in the previous Chapters 3 to 5, the selected jurisdictions, that is, the EU, the US and China, do have some rules on recognition of foreign resolution actions, but in general, lack clear guidance on this particular issue. This section illustrates the rationale why foreign resolution actions should be recognised.

First, from a purely economic point of view, a most effective resolution action is a global resolution strategy, and it requires that the actions taken by home authorities be effective in host jurisdictions.[111] Given the present global operation model for banks, for instance, inter-dependence on central trading, valuation, financial accounting and software systems, etc., it is costly to break down international banks into different segments for resolution and doing so may cause financial instability.[112] Recognition, in this process, is essential to facilitate the cross-border effectiveness of resolution actions.

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109 Section 343 paragraph 1 sentence 1 German Insolvency Code (InsO). See Stephan Madaus, Anna K Wilke and Philipp Knauth, 'Bringing Non-EU Insolvencies to Germany: Really so Different from The UNCITRAL Model Law on Cross-Border Insolvency?' (2020) 17 International Corporate Rescue 21.

110 Faraz Ahmed Ali and Erik Røsæg, 'New Rules on Cross-Border Insolvencies in Norway' (2015/2016) 17 Yearbook of Private International Law 385.

111 See, e.g. Thomas F Huertas, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series; Zdenek Kudrna, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283, 284-286; Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 494.

112 For example, the break down of Lehman Brothers. See Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010) 45. See also Simon Gleeson, 'The Importance of Group Resolution' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Charles Randell, 'Group Resolution under the EU Resolution Directive' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); IMF, 'United States Financial Sector Assessment Program Review of the Key Attributes of Effective Resolution Regimes for the Banking and Insurance Sectors - Technical Note' (2015) IMF Country Report No 15/171, 8; John Armour and others, *Principles of Financial Regulation* (OUP 2016) 631.

Second, resolution is characterised as one type of insolvency proceedings and should follow the universalism principle enshrined in international insolvency law. A proper recognition regime helps effective administration of a debtor, promoting transnational economy and is beneficial to both debtors and creditors.[113] It is acknowledged that some cross-border insolvency law instruments exclude banks and other financial institutions. However, such exclusion does not make the discussions mentioned in §6.2.2 inapplicable. Virgós and Garcimartín put forward the 'hermeneutic circle' theory and maintain that a consistent interpretation of corporate insolvency law and bank insolvency law should be applied. [114] Therefore, the rationale behind cross-border insolvency cases, particularly enhancing international cooperation and coordination, also applies to cross-border bank resolution cases.[115]

Third, a tricky question is raised regarding the administrative nature of resolution actions. Usually, recognition refers to recognising foreign judgments but not administrative actions. However, the comity doctrine can be applied and help explain that the administrative nature does not impede recognition. Discussions about comity start with the sovereignty theory,[116] which falls within the realm of public law, not only for judges but also for states and administrative authorities. In fact, comity 'is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation'. [117] Resolution authorities thus should not be stopped from applying comity. Recognition of resolution actions, therefore, falls under the scope of comity.

Forth, the *res judicata* theory has the effect of barring creditors from initiating a second proceeding in host jurisdictions.[118] The same effect can also apply to resolution cases where creditors are expected to accept the consequences as a result of foreign law. The obligation doctrine also seems to be suitable in this situation because the application of foreign law (by administrative authorities) leads to a new creditor/debtor relationship and thus should be recognised as a new relationship in the host jurisdiction.[119] All these reasons explain why foreign resolution actions should be recognised, and the following sections will explain in more detail the rules (conditions) for recognition and its consequences.

113 Text to n 59 - n 63.
114 Virgós and Garcimartín (n 67) 8.
115 Mevorach (n 59) 10-11.
116 Text to n 3.
117 *Hilton v Guyot*, 159 U.S. at 163-164.
118 n 102.
119 See §6.2.1.1.2.

6.2.3.2 *Contractual basis*

As mentioned in Chapter 1 at §1.2, the Financial Stability Board (FSB) summarised both the mutual recognition process and supportive measures as 'statutory approaches'.[120] In the meanwhile, the FSB Principles propose adopting 'contractual recognition' to fill the gap until statutory approaches have been fully implemented or to reinforce legal certainty and predictability. [121] Contractual provisions can be added in financial contracts, recognising the effects of foreign resolution authorities' actions.[122] As evaluated by Schwarcz et al., although '[c]ontractual approaches cannot fill the gap [where no statutory recognition framework is in place]', to an extent, 'they can help to reinforce legal certainty and predictability assent a statutory framework'.[123]

In fact, legislators in both the EU and the US have included contractual approaches in their bank resolution laws, in order to add certainty that third-countries' parties would recognise the effects of EU or US resolution actions. In the EU, Article 55 BRRD prescribed 'contractual recognition of bail-in', which has been implemented in the EU Member States starting from 1 January 2016. [124] In accordance with this Article, institutions in the EU are required to include a contractual term in certain agreements that creditors agree to be bound by the bail-in tool initiated by the European resolution authorities; these agreements are those creating liabilities for the European institutions but which governed by the law of a third country that is not an EU Member States.[125] The purpose of such contractual measures is to 'ensure the ability to write down or convert liabilities when appropriate in third countries',[126] although there is also a possibility that the third countries may forbid such kind of contractual terms. [127] Similarly, the BRRD

120 FSB Principles, 5-6.
121 Ibid, 6-7, 13-16.
122 Ibid.
123 Steven L Schwarcz and others, 'Comments on the September 29, 2014 FSB Consultative Document,'Cross-Border Recognition of Resolution Action'' (2014) Centre for International Governance Innovation CIGI Paper No 51.
124 Article 130 BRRD Transposition.
125 Article 55 BRRD.
126 Recital (78) BRRD.
127 European Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal amending:
- Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms;
- Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;
- Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms;
- Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, Brussels, 24.11.2016, SWD(2016) 377 final/2, 143-146.

II amendment adds a new Article on 'contractual recognition of resolution stay powers', requiring institutions to add the same provision recognising the effects of EU actions of temporary stay of early termination rights.[128] In the US, two contractual requirements are imposed on foreign-law governed liabilities – contractual recognition of transfer tools and contractual recognition of stay powers. [129]

At the international level, the International Swaps and Derivatives Association (ISDA) published model contracts which add contractual recognition provisions. For instance, the ISDA has also published the Bail-in Article 55 BRRD Protocol, functioning as guidance for international derivative traders to incorporate the contractual bail-in provision. [130] Also, the ISDA has published the ISDA 2015 Universal Resolution Stay Protocol[131] and ISDA Resolution Stay Jurisdictional Modular Protocol (ISDA JMP)[132] as guidance for incorporating contractual temporary stay terms, serving a similar function as the bail-in protocol. According to the FSB report, all the G-SIBs except for Chinese ones have adopted the ISDA 2015 Universal Protocol. [133] It is assumed that the Chinese banks have opted-out because there is not an updated bank resolution law in China at present.

Contractual recognition resolution provisions prevent a foreign party from challenging the resolution actions taken in home jurisdiction A. However, contractual provisions between private parties do not have binding effects on resolution authorities[134] and cannot form the legal grounds for recognition of foreign resolution actions. However, as explained in the following §6.4.4.1.2 and Chapter 8 at §8.4.3, the contractual provisions reduce the possibility of refusal of recognition, because the agreement between the

128 Amended Article 71a BRRD, Article 1(33) BRRD II.

129 12 CFR §252.83(b)(1).

130 ISDA 2016 Bail-in Article 55 BRRD Protocol (Dutch/French/German/Irish/Italian/Luxembourg/Spanish/UK entity-in-resolution version). A second version was updated in 2017. ISDA, 'ISDA Publishes Second Bail-in Article 55 BRRD Protocol' (19 April 2017).

131 ISDA, 'ISDA 2015 Universal Resolution Stay Protocol' (4 November 2015).

132 ISDA, 'ISDA Resolution Stay Jurisdictional Modular Protocol' (3 May 2016).

133 FSB, 'Ten years on - taking stock of post-crisis resolution reforms: Sixth Report on the Implementation of Resolution Reforms' (6 July 2017) 13.

134 The EU even acknowledges that some jurisdictions may forbid such contractual terms. See EU Commission, Commission Staff Working Document Impact Assessment Accompanying the document Proposal amending: Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms; Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; Regulation (EU) No 806/2014 of the European Parliament and of the Council of July 15, 2014, establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, SWD/2016/0377 final/2–2016/0360 (COD), 129.

contractual parties is strong evidence that host creditors should have foreseen such a resolution action, and their rights should not be deemed as jeopardised.

6.2.3.3 Mutual recognition under the CIWUD and the BRRD

As illustrated in Chapter 3, resolution recognition within the EU also has a special arrangement, namely, mutual recognition under the BRRD, duplicating the mechanism under the CIWUD.[135] This mutual recognition mechanism applies to the parent-branch situation.[136] As explained in the CIWUD, '[t]he administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State', and 'it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised'.[137] It is because 'a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted',[138] and '[i]t would be particularly undesirable to relinquish such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings'.[139] Also explained in Chapter 3 and in §6.2.1.2 above, such mutual recognition only exists within the EU but not in non-EU jurisdictions.

6.3 Grounds for recognition in the selected jurisdictions

6.3.1 Prerequisites for recognition

This section examines, from a positive law perspective, the *status quo* of laws in the selected jurisdictions with regard to prerequisites for recognition of foreign resolution actions. Two main issues are examined in this section. First, how can each jurisdiction recognise an 'administrative' action? This question derives from the private international law tradition that recognition is for judicial judgements but not administrative actions. Second, what are the conditions for each jurisdiction to recognise foreign resolution actions?

In the EU, as explained in Chapter 3, there are various situations of recognition. In particular, a Member State may adopt different approaches for recognition towards actions from other EU Member States and actions from

135 Article 117 BRRD.
136 Article 1 CIWUD.
137 Recital (6) CIWUD.
138 Recital (3) CIWUD.
139 Recital (4) CIWUD.

third countries. In this part, the focus is only about recognition of third-country resolution actions, which is comparable to the situations in the US and China. The legal basis is Articles 93-95 BRRD and Article 33 of the Single Resolution Mechanism Regulation (SRMR). By the BRRD and SRMR, the EU establishes a special administrative regime for recognition, where administrative resolution authorities are designated with direct powers to recognise foreign resolution actions.

With regard to specific conditions for recognition, there are no special requirements in the BRRD or the SRMR, except for those provided in international agreements[140] or five public policy exceptions.[141] One particular issue, however, relates to reciprocity. Recital 101 BRRD states that the European Banking Authority (EBA) should be empowered to develop and enter into non-binding framework cooperation arrangements with authorities of third countries, while '[i]n general, there should be reciprocity in those arrangements'.[142] Nevertheless, in Article 94 BRRD and Article 33 SRMR, there is no reciprocity requirement. A question relates to whether reciprocity is a prerequisite under EU law. This chapter holds the view that reciprocity is only mentioned in the context of international agreements, and it is not any barrier for further recognition. In other words, reciprocity is not a condition for recognition under EU law.

In the US, as explained in Chapter 4, the traditional regime under Chapter 15 US Bankruptcy Code still applies, which incorporated the MLCBI into the US Bankruptcy Code, except for foreign banks with branches or agencies in the US. And it is confirmed that Chapter 15 also applies to resolution actions, because administrative resolution falls under the scope of insolvency. This argument is based on the definitions specified in the US Bankruptcy Code. A foreign proceeding is defined as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation',[143] and a foreign court could be 'a judicial or other authority competent to control or supervise a foreign proceeding'.[144] It follows that an administrative proceeding under the supervision of an administrative authority can be included in the general framework of insolvency, and courts are allowed to recognise foreign administrative resolution actions.[145]

140 Article 93 BRRD.
141 Article 95 BRRD; Article 33 SRMR.
142 Recital (101) BRRD.
143 Article 2(a) MLCBI; 11 US Code §101(23).
144 Article 2(e) MLCBI; 11 US Code §1502(3).
145 See, e.g. *In re Tradex Swiss AG*, 384 B.R. 34, 42 (Bankr. D. Mass. 2008); *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692, 697 (D. Del. 2015); *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 639 (Bankr. S.D.N.Y. 2018).

Accordingly, conditions for recognition of foreign resolution actions are prescribed in Chapter 15 US Bankruptcy Code, in particular, §1517, which requires that: (1) a foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements in section 1515, which lists the documents needed for the court's review.[146] Based on this provision, the most critical criterion is about the determination of the jurisdiction, that is, COMI or establishment jurisdiction. However, in resolution cases, the jurisdiction issue would be less complicated because there would be a clear distinction between home and host jurisdictions. This is further examined in §6.4.2.

The rationale of comity also plays an important role in the US cross-border insolvency regime, which forms a reason for recognition and granting reliefs. §1507 US Code explicitly states that '[i]n determining whether to provide additional assistance …, the court shall consider whether such additional assistance, consistent with the principles of comity …'.[147] Besides, '[i]f the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this Chapter … a court in the United States shall grant comity or cooperation to the foreign representative'.[148] It should be noted that comity was added by the US legislators, while the original MLCBI text does not have such a condition. The comity principle had been confirmed in the previous Section 304,[149] which was replaced by the current Chapter 15. The US courts have been highlighting 'the importance of judicial deference of foreign bankruptcy proceedings'.[150] They realised that '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound,

146 11 US Code §1517.

147 11 US Code §1507.

148 11 US Code §1507(b)(3). See also 11 US Code §1507(c) and (d).

149 The original Section 304 reads: '(c) In determining whether to grant relief under subsection (b) of this section, the court shall be … consistent with … (5) comity'. See Stacy Allen Morales and Babara Ann Deutcsh, 'Bankruptcy Code Section 304 and US Recognition of Foreign Bankruptcies: The Trinity of Comity' (1983) 39 Bus Law 1573; Thomas C Given and Victor A Vilaplana, 'Comity Revisited: Multinational Bankruptcy Cases Under Section 304 of the Bankruptcy Code' (1983) Ariz St LJ 325; SR Melissa, 'American Recognition of International Insolvency Proceedings: Deciphering Section 304(c)' (1992) 9 Bankruptcy Developments Journal 453; Stuart A Krause, Peter Janovsky and Marc A Lebowitz, 'Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies' (1995) 64 Fordham L Rev 2591.

150 *In re International Banking Corp. B.S.C.*, 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010) (citing *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Maxwell*, 93 F.3d at 1048; *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Circ. 1993); *Cunard*, 773 F.2d at 458).

a plan of reorganization would fail'.[151] The US is a leading jurisdiction advocating international cooperation in judicial assistance.

China, on the other hand, does not have a comprehensive resolution law, let alone provisions on recognition of foreign resolution actions. The only relevant article is Article 5 of the Enterprise Bankruptcy Law (EBL), which stipulates the conditions for recognising foreign insolvency judgments. However, there is no legislative or judicial authority on whether foreign resolution actions can be deemed as foreign insolvency proceedings or whether foreign resolution decisions can be deemed as foreign insolvency judgments. Given the complete lack of a resolution law, this dissertation proposes that Article 5 EBL should be able to apply, based on the viewpoint demonstrated in Section 2.1.3 that resolution is under the general umbrella of insolvency, taking the same position as the US.

According to Article 5 EBL, only when an international agreement exists, or a reciprocal requirement is met, a Chinese court can recognise an insolvency-related judgment. The two conditions are confirmed in previous cross-border insolvency cases, for example, the *B&T Ceramic Groups s.r.l.* case (China-Italy agreement),[152] the *Pellis Corium* ('P.E.L.C.O.R') case (China-France agreement),[153] and the *Sascha Rudolf Seehaus* case (reciprocity from Germany).[154] In addition, Article 5 EBL follows the general principles under private international law, and if a foreign judgment is to be recognised, it has to be a valid judgment or ruling rendered by a foreign court.[155]

In addition, if Chinese judges do not accept resolution as insolvency, this dissertation further puts forward an alternative solution that was invoked in a recent case *Sino-Environment Technology Group v Thumb Env-Tech Group*, which recognised the status of a foreign insolvency practitioner as a legal representative of the debtor.[156] In this way, the foreign representative, including representatives in resolution proceedings, can still get access to Chinese assets and proceedings, under the Chinese company law framework, but not insolvency law.

151 *In re Agrokor*, 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).
152 (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.
153 (2005) Sui Zhong Fa Min San Chu Zi No.146 Civil Ruling.
154 (2012) E Wu Han Zhong Min Shang Wai Chu Zi No.00016 Civil Ruling.
155 Article 282 CPL.
156 *Sino-Environment Technology Group Ltd, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling.

6.3.2 Procedures for recognition

For the European regime in relation to third-country resolution actions, Title VI BRRD applies, and the EU adopts an administrative recognition regime.[157] According to Article 94, a European resolution college should jointly decide on whether to recognise a third-country resolution proceeding and, subsequently, 'respective national resolution authorities shall seek the enforcement of the recognised third-country resolution proceedings in accordance with their national law'.[158] While in the absence of a joint decision reached in the European resolution college or in the absence of a European resolution college, each national resolution authority should make its own decision regarding recognition and enforcement of third-country resolution proceedings.[159]

One particular issue is about the recognition under the Single Resolution Mechanism (SRM). Under Article 33 SRMR, the competent authority authorised to make decisions of (non-)recognition and (non-)enforcement is national authorities. The SRB can only assess and issue a recommendation letter to national resolution authorities.[160] National resolution authorities usually should implement the recommendation, but can refuse to implement with a reasoned statement explaining their considerations.[161] Therefore, procedures for recognition under the SRM are subject to national laws of the Member States.

In the US, under Chapter 15, a foreign representative should apply for recognition following the requirements of §1515. Here, foreign representatives could be foreign resolution authorities or other natural or legal persons appointed by foreign resolution authorities. The court should decide in accordance with §1516 and §1517. The prerequisites are discussed above. One particular feature of Chapter 15, also the MLCBI, is the relief granted. When a foreign proceeding is recognised as a foreign main proceeding, automatic relief should be granted under §1520. While for other reliefs, more discretion is allowed. For instance, upon filing a petition for recognition, the court can discretionally grant certain reliefs prescribed in §1518. Also, additional relief can be discretionally granted for both foreign main proceedings and foreign nonmain proceedings per §1521. It is noted that in determining reliefs, unlike in the recognition process where the criteria are entirely objective, it 'turns on subjective factors that embody principles of comity''.[162]

157 Articles 93-98 BRRD.
158 Article 94(2) BRRD.
159 Article 94(3) BRRD.
160 Article 33(2) BRRD.
161 Article 33(4) BRRD.
162 *In re Bear Sterns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

In China, the EBL only regulates recognition and enforcement of foreign judgments.[163] This recognition request is submitted to an Intermediate People's Court through a judicial deciding process.[164] If a foreign judgment, in this case, a resolution decision, needs to be enforced in China, after recognition, the court shall issue an enforcement order to commence the enforcement process.[165] Chinese law does not prescribe the recognition of a foreign proceeding, yet it is possible to recognise an appointed foreign representative.[166] In resolution cases, the foreign resolution representative can act as a company representative, subject to the Chinese Company Law.

6.4 Comparison and evaluation

6.4.1 Should reciprocity be a pre-condition for recognition?

After the above comparison, this section continues to examine several particular issues. The first question relates to the reciprocity requirement. As mentioned above, reciprocity can be a prerequisite for recognition of foreign judgments and foreign insolvency proceedings.[167] Similarly, in cross-border resolution cases, reciprocity can also be a prerequisite for recognition of foreign resolution actions. This is the case in China. However, the FSB expressed the opinion that recognition of foreign resolution measures 'should in principle not be contingent on reciprocity', and this is because 'such a condition could unnecessarily constrain the circumstances in which recognition could be granted and even prevent recognition where it would clearly be in the jurisdiction's interest to grant it'.[168]

This chapter supports the view that reciprocity should not be a prerequisite for recognition. In recognition of foreign judgments cases, a strong argument, just as the FSB mentioned, is that the rights confirmed in foreign judgments should not be denied simply because of the lack of reciprocity between the jurisdictions.[169] Requiring reciprocity is demonstrated as unlikely to generate benefit for nationals, because adding reciprocity will make it more difficult for domestic creditors to recognise and enforce

163 Article 5 EBL.
164 Article 281 CPL.
165 Article 282 CPL.
166 *Sino-Environment Technology Group Limited, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling. See comments Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 International Insolvency Review 57.
167 Article 5 EBL. See also American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statue (2006). Also the explanation expressed by its reporter, Silberman (n 19) 259-262.
168 FSB Principles, 12.
169 See, e.g. Reese (n 28); Smit (n 26). See also n 23.

foreign judgments but has little impact on foreign countries' recognition and enforcement practice.[170] Also, the presence of reciprocity may lead to retaliation, or a 'reciprocity dilemma', if the rendering jurisdiction and the receiving jurisdiction both require reciprocity and neither of them is sufficiently convinced that the other party would grant recognition.[171] More specifically, in cross-border insolvency cases, reciprocity is detrimental to an international administration of insolvent debtors.[172] In cross-border resolution cases, reciprocity serves no function except for impeding expedited international resolution, which may endanger to global financial stability. In addition, reciprocity does not need to concern itself with the protection of public interest.[173] Public policy exceptions explained in the following Chapters 7 and 8 can address public interest considerations.

Current international developments also demonstrate a trend to abolishing reciprocity. [174] For example, Switzerland abolished reciprocity in its 1987 Switzerland's Federal Code on Private International Law (CPIL),[175] except for insolvency proceedings.[176] More recently, Belgium abolished reciprocity in its 2004 private international law code.[177] Similarly, in the US, where the *Hilton v Guyot* case firstly established the reciprocity rule, the subsequent cases, such as the *Johnston v Compagnie Generale Transatlantique* case[178] and the *Erie Railroad v Tompkins* case rendered by the Supreme Court,[179] gradually abandoned the reciprocity requirement. On a global scale, Elbalti summarised that reciprocity no longer plays a significant role as 'the test for establishing reciprocity has now become so relaxed that the requirement will normally be met if it is shown that the courts of the rendering State are likely to recognize the enforcing State's judgments'.[180]

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170 John F Coyle, 'Rethinking Judgements Reciprocity' (2013) 92 NCL Rev 1109.

171 He and Wang (n 21).

172 Keith D Yamauchi, 'Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 International Insolvency Review 145.

173 Coyle (n 170); Dutta (n 14).

174 Baumgartner (n 13) 193.

175 Articles 25-32 CPIL. Bundesgesetz über das Internationale Privatrecht (IPRG), vom 18. Dezember 1987. An English translation is available at <https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20%D0%B2%20%D1%80%D0%B5%D0%B4.%202007%20(%D0%B0%D0%BD%D0%B3%D0%BB.).pdf> accessed 25 February 2020.

176 Article 166 CPIL.

177 Articles 22-31 Loi du 16 juillet 2004 portant le Code de droit international privé, Moniteur Belge 27 July 2004, ed 1, 57344-57374. An English translation is available at <https://sociedip.files.wordpress.com/2013/12/belgica-the-code-of-private-international-law-2004.pdf> accessed 25 February 2020.

178 *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121 (N.Y. 1926).

179 *Erie Railroad v Tompkins*, 304 U.S. 64 (1938).

180 Béligh Elbalti, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite' (2017) 13 Journal of Private International Law 184.

Also, in China, as a typical jurisdiction requiring reciprocity, there is a new development regarding the application of reciprocity. In the context of the Belt and Road Initiative (BRI), China is expanding its overseas investment.[181] Accordingly, the judicial system is expected to handle more international commercial cases. The Supreme People's Court of China (SPC) emphasised in the Opinions of Providing Judicial Service and Guarantee for Belt and Road Initiative[182] that the courts may also consider giving judicial assistance first to other foreign jurisdictions and expand the scope of international judicial assistance. This indicates the possibility that a Chinese court may recognise foreign insolvency proceedings without requiring the other jurisdiction to have previously recognised a Chinese judgment or ruling.

6.4.2 How should jurisdiction be determined?

6.4.2.1 The shift to home/host distinction

As one of the three pillars of private international law, recognition and enforcement is closely related to the jurisdiction issue.[183] Rules for jurisdiction determine which country/jurisdiction has competent power to commence an international dispute. And when a judgment is rendered, it can only be recognised when the court in the receiving jurisdiction agrees that the foreign court from which the judgment is delivered has jurisdiction over the dispute.[184] Similarly, in cross-border corporate insolvency cases, jurisdiction is an essential factor. The CIWUD and the EIR make a distinction between COMI and establishment.[185]

In terms of cross-border bank resolution, the current laws in the selected jurisdictions differ. The EU and China do not make a clear distinction on jurisdiction. The US, adopting the MLCBI, continues to use COMI/establishment concepts. This chapter argues that, in cross-border resolution cases, a distinction should be made between home and host jurisdictions, and the home authority should be the primary authority to take resolution actions.[186] As defined in Chapter 1 at §1.3, home jurisdiction is where the consolidated supervision is conducted, and host jurisdiction is where subsidiaries, branches, assets are located, or the law of which is chosen

181 For a more detail introduction of the BRI, please see the BRI official website <http://english.gov.cn/beltAndRoad/> accessed 25 February 2020.

182 Several Opinions of the Supreme People's Court on the People's Courts Providing Judicial Service and Guarantee for Belt and Road Initiative, Fa Fa [2015] No.9.

183 n 1.

184 Dicey (n 1) para 14-055; Restatement (Third) of Foreign Relations Law §482 cmt. C.; Juenger (n 2) 13-30; Silberman (n 19) 245-259.

185 See §6.2.2.1.1.

186 Guo (n 111) 489-492. See also, e.g. Jonathan M Edwards, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122, 141-143; Jay L Westbrook, 'SIFIs and States' (2014) 49 Tex Int'l L J 329, 349-352; Mevorach (n 59) 252.

as the governing law.[187] The FSB also makes the distinction: '[t]he need to give cross-border effect to resolution actions may arise with respect to a firm undergoing resolution in its *home jurisdiction* that operates a branch or controls a subsidiary in a foreign jurisdiction; or a firm that holds assets, liabilities or contracts located or booked in, or subject to the law of, another jurisdiction in which the firm is not established'.[188]

Such home/host distinction is closely related to the special features of banks' authorisation and supervision models. At the international level, the Basel Committee on Banking Supervision (BCBS) formulated a series of documents on cross-border bank supervision.[189] The first BCBS guidance, the *Report on the Supervision of Bank's Foreign Establishments* (Basel Concordat 1975),[190] came into existence after the closure of a German bank – Bankhaus Herstatt, which subsequently disrupted the New York foreign exchange market.[191] The document established a general rule that 'no foreign establishment escapes supervision' and 'this supervision is adequate'.[192] And this document also distinguished home and host jurisdictions. In 1982, the Concordat 1975 was tested and proved to be insufficient in the course of resolution of the Italian bank Banco Ambrosiano.[193] Subsequently, in May 1983, the Concordat 1975 was replaced by the new *Principles for the Supervision of Bank's Foreign Establishments* (Basel Concordat 1983), accepting the principle that 'banking supervisory authorities cannot be fully satis-

187 See Chapter 1 at §1.3.

188 FSB Principles, 5.

189 These documents are archived under the topic 'concordat and cross-border issues' in the BCBS publications, see BCBS <www.bis.org/bcbs> accessed 25 February 2020.

190 BCBS, 'Report to the Governors on the supervision of bank's foreign establishments BS/75/44e' (26 September 1975).

191 When the West German authorities closed Bankhaus Herstatt at 4 pm CET on 26 June 1974, they followed normal domestic procedures and waited until the end of the business day. But it was in the morning in New York, where the dollar leg of $625 million of Herstatt's foreign exchange contracts remained to be settled. The closure of Herstatt thus resulted in abrogation of these foreign exchange contacts in New York and caused a prolonged disruption in foreign exchange trading and dislocations in the market. See, e.g., Richard J. Herring, 'Conflicts Between Home and Host Country Prudential Supervisors' in Douglas D. Evanoff, George G. Kaufman and John R.; LaBrosse (eds), *International Financial Instability: Global Banking and National Regulation* (World Scientific Publishing 2007) 202; Charles Goodhart, 'Concordat' in *The Basel Committee on Banking Supervision: A History of the Early Years 1974-1997* (CUP 2011) 96; Katia D'hulster, 'Cross-border Banking Supervision: Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors' (2012) 13 Journal of Banking Regulation 300

192 BCBS (n 190).

193 The Italian authorities bailed out creditors of the parent bank, but declined to bail out the creditors of the Luxembourg subsidiary. The Luxembourg subsidiary, Banco Ambrosiano Holdings, was regarded as a non-bank holding company by the Luxembourg authority and therefore not subject to banking supervision. Moreover, Luxembourg corporate secrecy laws protected it from scrutiny by the Italian authorities. See Herring (n 191) 203; Goodhart (n 191) 104-105.

fied about the soundness of individual banks unless they can examine the totality of each bank's business worldwide through the technique of consolidation.'[194] The 1983 Concordat was tested in case, and again, problems arose in cross-border bank supervision. In 1992, in response to the collapse of the Bank of Credit and Commerce International (BCCI),[195] the BCBS updated the Concordat and issued the *Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishments* as a supplement to the Concordat, reinforcing the consolidated supervision of the home authorities.[196] In addition, the *Core Principles for Effective Banking Supervision* (the Basel Core Principles)[197] sets out guidance for both domestic and international supervision.[198] Regarding cross-border issues, the Core Principles require that 'an essential element of banking supervision is that the supervisor supervises the banking group on a consolidated basis, adequately monitoring and, as appropriate, applying prudential standards to all aspects of the business conducted by the banking group worldwide'[199] and 'home and host supervisors of cross-border banking groups share information and cooperate for effective supervision of the group and group entities, and effective handling of crisis situations. Supervisors require the local operations of foreign banks to be conducted to the same standards as those required of domestic banks.'[200] Accordingly, a 'home country control' model for international bank supervision was established, and home authorities mainly conduct consolidated supervision.[201]

194 BCBS, 'Principles for the Supervision of Banks' Foreign Establishments' (May 1983). The principles of consolidated supervision is that parent banks and parent supervisory authorities monitor the risk exposure – including an overview of concentrations of risk and of the quality of assets – of the banks or banking groups for which they are responsible, as well as the adequacy of their capital, on the basis of the totality of their business where conducted.

195 Similar to the Banco Ambrosiano, the BCCI escaped supervision by setting up separate non-bank holding companies in Luxembourg and Grand Cayman, with the result that no single supervisor had the capacity and the will to enforce effective consolidation. See Herring (n 191) 204-2015; Goodhart (n 191) 107-108.

196 BCBS, 'Minimum Standards for the Supervision of International Banking Group and Their Cross-border Establishments' (July 1992).

197 The Core Principles were first published in 1997, and was later amended in 2006 and 2012. The series of documents are archived under the topic 'Core Principles' in the BCBS publications.

198 BCBS, 'Core Principles for Effective Banking Supervision' (September 2012).

199 Principle 12 Consolidated supervision.

200 Principle 13 Home-host relationships.

201 See, e.g. Eva HG Hüpkes, 'Insolvency – Why a Special Regime for Banks?' in IMF (ed), *Current Developments in Monetary and Financial Law*, vol 3 (IMF 2005); Michael Krimminger, 'Banking in a Changing World: Issues and Questions in the Resolution of Cross-Border Banks' in Douglas D Evanoff, George G Kaufman and John R LaBrosse (eds), *International Financial Instability Global Banking and National Regulation*, vol 2 (World Scientific Publishing 2007) 260; Federico Lupo-Pasini, 'The Perils of Home-Country Control' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

For cross-border bank resolution, the home-country control supervision model places the home resolution authority in a leading position to take resolution actions. As Edwards summarised, 'G-SIFIs [global systemically important financial institutions] are significantly regulated by one country on a consolidated basis, making it easier to design a rule that predictably identifies the home country of the corporate group', and this home country can designate a resolution authority to resolve failing banks.[202] Such quick identification forms the jurisdiction rule in cross-border bank resolution, that is, home resolution authority is the primary authority.

An existing example is the EU CIWUD mentioned in Chapter 3, where the home Member State authority is the sole authority to open insolvency proceedings for banks.[203] As explained in the Virgós-Schmit Report, this jurisdiction rule was formulated because of the 'home country control' supervision models.[204] This principle is clearly prescribed in the EU financial regulation,[205] namely, the home country – where authorisation is granted – conducts consolidated supervision.[206] This view is also accepted in the BRRD. Within the EU, the BRRD follows the mechanism prescribed under the CIWUD, adopting the home Member State jurisdiction in parent-branch cases.[207]

When a non-EU third country is involved, this situation becomes more complicated. It is reminded that the terminology used in the EU context and global context is different.[208] Nevertheless, terminology should not be an obstacle to applying the home/host distinction. Instead, one might argue that the EU adopts a 'passport' mechanism, which grants financial service providers access to the whole EU market; however, the 'passport' mechanism is only effective within the EU, but not outside.[209] In practice, the EU Commission may adopt an 'equivalence' test, sparing third-country institutions from additional compliance burden, as long as 'a third country's

202 Edwards (n 186) 141-143. See also Mevorach (n 59) 252.
203 Articles 3 and 9 CIWUD. See, e.g. Enrico Galanti, 'The New EC Law on Bank Crisis' (2002) 11 International Insolvency Review 49; Bob Wessels, 'Directive on the Reorganization and Winding-up of Credit Institutions' (2005) American Bankruptcy Institute Journal 34; Bob Wessels, 'Banks in Distress under Rules of European Insolvency Law' (2006) 21 Journal of International Banking Law and Regulation 301; Bob Wessels, 'Commentary on Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions' in Gabriel S. Moss, Bob Wessels and Matthias Haentjens (eds), *EU Banking and Insurance Insolvency* (OUP 2017).
204 Virgós-Schmit Report, para 54.
205 Recital (25) CRD IV.
206 Matthias Haentjens and Pierre de Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2015) 101-108.
207 Article 117 BRRD.
208 See Chapter 1, §1.3.
209 Haentjens and de Gioia-Carabellese (n 206) 98-100.

regulatory, supervisory and enforcement regime is equivalent to the corresponding EU framework'.[210] Most core retail banking activities, such as deposit-taking and lending, are not subject to the equivalence test.[211] A separate legal entity must be established for these services in an EU Member State unless national laws specify otherwise. On the other hand, wholesale businesses, such as alternative investment funds, clearing, and investment services for professional clients and eligible counterparts, can be conducted by a third-country institution without establishing a legal entity in the EU.[212] Such equivalence test is different from the passport mechanism within the EU.

The lack of a passport mechanism for non-EU countries does not undermine the application of home country control. The Underpinnings Contact Group in the Bank for International Settlements (BIS) specifically explained the underlying prudential supervision basis for insolvency issues under the CIWUD, in particular, the principle of home-country control, rather than the passport mechanism.[213] Given that the principle of home country control is more widely applicable globally, thanks to the above-mentioned BCBS's international standards,[214] this dissertation therefore argues that a home-country resolution authority should be the leading authority in deciding cross-border bank resolution cases. And host jurisdictions should allow courts or authorities to recognise actions taken by home resolution authorities.[215]

This section also argues that in cases where the COMI/establishment distinction still applies, for instance, in terms of bank holding companies or banks without branches or agencies in the US, the COMI can be interpreted as where home authority is located. Two factors are essential to the identification of COMI, namely: (i) 'where the central administration of the debtor takes place', and (ii) 'which is readily ascertainable by creditors'.[216] For an international bank, the home authority conducts consolidated supervision, the headquarter conducts central administration, and it is ascertainable by third parties – meeting all the requirements for COMI. The COMI identification, therefore, does not constitute an obstacle for identifying home resolution actions and recognising the effects thereof.

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210 See European Parliament, 'Third country equivalence in EU banking and financial regulation', 1 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614495/IPOL_IDA(2018)614495_EN.pdf> accessed 25 February 2020.

211 Ibid, 3.

212 Ibid, 3-4.

213 BIS, 'Insolvency Arrangements and Contract Enforceability' (9 December 2002).

214 See, e.g. Hüpkes (n 201); Krimminger (n 201) 260; Lupo-Pasini (n 201).

215 n 186.

216 MLCBI Guide, para 145. See also Article 3(2) EIR 2015 Recast.

6.4.2.2 *Recognition of a secondary proceeding?*

Under the CIWUD, insolvency proceedings for a European bank can only be opened in one home Member State; there is no possibility of opening secondary proceedings. At the global level, a single resolution authority is desirable for resolving large international banks, but sometimes a territorial action is inevitably preferred by host authorities. As explained in Chapters 4 and 5, national authorities in the US and China tend to take unilateral actions against branches, ring-fencing the local assets.[217] In the EU, EU authorities also have the power to resolve branches of third-country institutions when there is no third-country action imposed on the branches, or the EU authorities refuse to recognise third-country actions.[218] The question raised in this section is: can a host proceeding have extraterritorial effect by way of being recognised in a third country?

This is a rare case, but not impossible. In a hypothetical situation where a host authority in jurisdiction C takes actions, such as bail-in or temporary stay on early termination rights, on liabilities of the branch, governed by the law of a third jurisdiction (E), such actions need to be effective in this jurisdiction E.[219] Can the court or authority in jurisdiction E accept the effect of this action, even though it is not taken by the home authority in jurisdiction A?

In compliance with the general objective of this dissertation, that is, making resolution actions effective across borders, this dissertation argues that the dual proceedings mechanism in international insolvency law may also apply in cross-border bank resolution cases. As mentioned, allowing the co-existence of main and nonmain/secondary proceedings is the feature of the modified universalism principle, embedded in both the MLCBI and the EIR.[220] Secondary proceedings serve the purpose of balancing the conflict of interests in different jurisdictions, such as the different purposes of laws, for example, rankings of claims, or the different concerns of authorities, for instance, protection of local creditors.[221] A secondary proceeding is based on the concept of 'establishment', which refers to 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.[222] An operating banking branch in jurisdiction C can, therefore, be deemed as an establishment. The third jurisdic-

217 See Chapter 4, §4.3.1.2.2 and Chapter 5, §5.3.1.2.2.
218 See Chapter 3, §3.3.1.2.2.
219 Figure 2.1.
220 See §6.2.2.1.1. See Article 17 MLCBI; 11 US Code §1517. Also Article 34 EIR 2015 Recast.
221 Guo (n 111) 492-496.
222 Article 2(f) MLCBI; 11 US Code §1502(2). See also Article 2(10) EIR 2015 Recast.

tion E should not refuse to recognise the effects of actions in jurisdiction C simply because the parent is not in C. But when there are overlapping proceedings taken in both home and host jurisdictions, this section of this dissertation maintains the primary function of home authority, and third jurisdiction E should recognise home action with priority.

6.4.3 What are the conditions for and effects of recognition of a foreign resolution proceeding?

6.4.3.1 Conditions for recognition of a foreign resolution proceeding

Under the current international insolvency law framework, recognition of a foreign insolvency proceeding is not about recognising a final decision, as is usual case in judgment recognition proceedings. [223] As pointed out by UNCITRAL, this is partly why insolvency proceedings are excluded from judgment recognition regimes.[224] The purpose of recognising an insolvency proceeding is to 'admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down'.[225] The *res judicata* principle bars creditors from initiating repetitious proceedings.[226] Under this principle, a court may 'decline to exercise jurisdiction in favour of a pending foreign proceeding', where 'the foreign tribunal has taken jurisdiction but not yet issued a judgment'.[227] The MLCBI makes it clear that the cross-border insolvency mechanism under the MLCBI intends to 'provide[] the person administrating a foreign insolvency proceeding … with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space"', also it 'allow[s] the courts in the enacting State to determine what coordination among the jurisdictions or other reliefs is warranted for optimal disposition of the insolvency'.[228]

These purposes and effects should also apply to resolution proceedings. The EU and China do not have comprehensive rules on recognition of foreign resolution proceedings. The EU, although with a long Article 94 BRRD, does not provide the conditions for recognition nor the effects of recognition. Simply, Article 94 only touches upon the power allocation between resolution colleges and national resolution authorities. In China, Article 5 of the EBL only requires international agreements or reciprocity, without additional detailed rules. Under US law, Chapter 15 applies. However, certain

223 For finality, see below §6.4.4.1.1.
224 n 53.
225 Virgós-Schmit Report, para 143.
226 Text to n 102 and n 118.
227 Dodge (n 100) 2106.
228 MLCBI Guide, para 3(a).

technical issues need to be addressed. This chapter argues, in this §6.4.3 and the next §6.4.4, that a more comprehensive mechanism mirroring the MLCBI should be in place for cross-border bank resolution. In particular, recognition of a foreign resolution proceeding should allow foreign representatives to take reorganisation actions within the host territory and produce the effects, such as moratorium, in order to facilitate an orderly resolution.

6.4.3.1.1 Formality requirements

As a general rule, according to the MLCBI, an application for recognition made by a foreign representative[229] to a competent court (either judicial or administrative)[230] must be accompanied by (a) '[a] certified copy of the decision commencing the foreign proceedings and appointing the foreign representative'; or (b) '[a] certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative'; or (c) '[i]n the absence of evidence referred to in subparagraph (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative; an application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative',[231] as well as 'a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative'.[232]

Similarly, in cross-border bank resolution, foreign representatives should be able to know which documents to file. Particularly, documents should be submitted demonstrating the identity of foreign representatives, either a foreign resolution authority or a foreign administrator appointed,[233] and the actions taken by foreign authorities and the actions sought to be recognised. Formality documents usually should be submitted when active recognition is needed. For passive recognition taking place in litigation, the standard court rules should apply.

6.4.3.1.2 Administrative recognition or judicial recognition?

As summarised in above Section 6.3.1, the administrative nature of resolution should not be an obstacle for recognition. In the EU, the BRRD and the SRMR adopt a special administrative recognition regime, which empowers resolution authorities to directly recognise foreign administrative resolution

229 Articles 15(1) and 17(1)(b) MLCBI; 11 US Code §§1515(a) and 1517(a)(2).
230 Article 17(1)(d) MLCBI.
231 Article 15(2) and (3) MLCBI; 11 US Code §1515(b) and (c).
232 Article 15(3) MLCBI; 11 US Code §1515(c).
233 Text to n 241.

actions. While in the US, without such a special administrative mechanism, US judges take up the responsibility to recognise foreign resolution actions, in accordance with Chapter 15 US Bankruptcy Code, which applies to insolvency proceedings of both judicial and administrative nature, including resolution actions. The most uncertain jurisdiction is China, which does not have a comprehensive resolution law and does not have a clear reference on whether foreign resolution actions can be deemed as foreign insolvency proceedings or whether foreign resolution decisions can be deemed as foreign judgements. Without a substantive resolution law, this dissertation urges China to take the same position of the US and make traditional international insolvency law applicable by interpreting resolution under the general framework of insolvency.

Given the different approaches chosen by the three jurisdictions, this dissertation further raises the question of which approach should prevail. There is no concrete answer to this question, as the FSB stands, no preference is made in relation to either administrative recognition or judicial recognition.[234] As long as the approaches can produce the same effect, both administrative recognition and judicial recognition are acceptable. This is a choice that should be made by national legislators and thus are not further discussed in this dissertation.

Regardless of administrative authorities or courts, the principles proposed in this dissertation should be taken into account when making a decision. For administrative authorities, they should learn to weigh different values, such as the need for recognition vis-à-vis protection of local interests. For judges, they may be good at balancing different interests, but they also need additional training on the special characteristics of resolution to enhance their competence to handle financial cases.[235] For example, the US has been training judges with additional financial knowledge to decide on bank resolution actions.

234 FSB Principles, 11.

235 See, e.g. Mark Roe and Stephen Adams, 'Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio' (2015) 32 Yale Journal on Regulation 363; Bruce Grohsgal, 'Case in Brief Against "Chapter 14"' (2014) ABI Journal 44; Mark Roe, 'Don't Bank on Bankruptcy for Banks' (Project Syndicate, 18 October 2017) <https://www.project-syndicate.org/commentary/bank-bankruptcy-regulations-by-mark-roe-2017-10?barrier=accesspaylog> accessed 25 February 2020.

6.4.3.2 *Effects for recognition of a decision to commence a foreign resolution proceeding*

6.4.3.2.1 The authority of foreign representatives

Recognition of foreign insolvency proceedings concerns recognition of the authority of foreign representatives,[236] including participation in host proceedings,[237] initiating antecedent transaction avoidance proceedings,[238] and intervening in any proceedings in which the debtor is a party.[239] Comity, which is usually in conjunction with the cooperation principle, provides a legal basis to grant relief to foreign representatives, particularly in the US judicial practices.[240]

When a bank is put into resolution, as in general corporate insolvency proceedings, the previous legal representative no longer serves as the representative of the bank. Instead, a resolution authority could serve, or by appointing a staff, as the representative of the bank,[241] or a third person, a natural person or a legal entity could be appointed to administer the failing bank and thus serve as the new representative.[242] Therefore, these persons can be seen as foreign representatives and be allowed to participate in cross-border resolution cases. For instance, in a recent insurance company resolution case, although not for banks, the Central Bank of Curaçao and St. Maarten (CBCS) appointed a Dutch lawyer as a foreign representative to commence a Chapter 15 case in the US.[243] These foreign representatives are of great importance in bringing Chapter 15 cases and serving the functions mentioned above.[244]

Even in jurisdictions not adopting the MLCBI or other specific international insolvency instruments, foreign representatives can be recognised. A Chinese case, *Sino-Environment Technology Group v Thumb Env-Tech Group* case,[245] discussed above in Chapter 5, demonstrates that in China, a foreign insolvency practitioner can be treated as the representative of a foreign

236 MLCBI Guide, 29. See also Dicey (n 1) para 30R-100.
237 Article 13 MLCBI; 11 US Code §1513.
238 Article 23 MLCBI; 11 US Code §1523.
239 Article 24 MLCBI; 11 US Code §1524.
240 *In re Ionica PLC*, 241 B.R. 829, 841 (Bankr. S.D.N.Y. 1999); *In re Arcapita Bank B.S.C. (c)*, 575 B.R. 229, 238 (Bankr. S.D.N.Y. 2007); *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114-115 (Bankr. S.D.N.Y. 2012); *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009); *In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014).
241 For example, the FDIC as the receiver under Section 204(b) Dodd-Frank Act. 12 US Code §5384(b).
242 For example, a special manager appointed by Article 35 BRRD.
243 See the case *In re ENNIA Caribe Holding N.V.*, 594 B.R. 631, 637 (Bankr. S.D.N.Y. 2018).
244 Text to n 237 to 239.
245 *Sino-Environment Technology Group Limited, Singapore v Thumb Env-Tech Group (Fujian) Co, Ltd*, see (2014) Min Si Zhong Zi No 20 Civil Ruling.

company.[246] Similarly, in the *Yukos* case, the Dutch Supreme Court recognised a Russian insolvency practitioner as the representative of a Russian company, even though Dutch law does not have explicit authorisation for such 'recognition'.[247] Such recognition is of additional value when the host jurisdiction does not have a complete resolution law, especially when it lacks a legitimate transfer tool. By allowing the foreign representative to take the position of a company representative, the representative can take actions, such as transferring the assets to a third institution, without the need for a foreign resolution proceeding to be recognised, as long as the host law allows.

6.4.3.2.2 Reliefs (moratorium)

According to the MLCBI, recognition is granted when a court decides that a foreign proceeding is an insolvency proceeding and the foreign proceeding takes place in either the COMI jurisdiction or an establishment jurisdiction.[248] Upon recognition of a foreign main proceeding, (i) '[c]ommencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed'; (ii) '[e]xecution against the debtor's assets is stayed'; and '(iii) [t]he right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended'.[249] As further explained by UNCITRAL, these effects are to 'allow steps to be taken to organise an orderly and fair cross-border insolvency proceeding'.[250]

Additional relief is also provided in the MLCBI. For example, a court may discretionally grant relief of a provisional nature upon application for recognition of a foreign proceeding, including '[s]taying execution against the debtor's assets'; and '[e]ntrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court', for the purpose of 'protect[ing] and preserv[ing] the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation

246 Tu and Li (n 166).

247 See ECLI: NL: HR: 2013: BZ5668. See also e.g. Ilya Kokorin and Bob Wessels, 'Recognition of Foreign Insolvency Judgments: The Case of Yukos' (2017) 14 European Company Law 226; Bob Wessels, 'International Insolvency Law and EU Bank Resolution Rules' in M. Haentjens and B Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019). It should be noted that in a later judgment in January 2019, the Dutch Supreme Court refused to recognise the Russian bankruptcy proceeding due to public policy exceptions; the latter judgment does not affect the recognition of a foreign representative. See ECLI:NL:HR:2019:54. See also an English summary at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Russian-courts-declaration-of-Yukos-Oil-bankruptcy-not-recognised-in-the-Netherlands--final-judgment.aspx?pk_campaign=rssfeed&pk_medium=rssfeed&pk_keyword=Nieuws-van-de-Hoge-Raad-der-Nederlanden> accessed 25 February 2020.

248 Article 17 MLCBI; 11 US Code §1517.

249 Article 20 MLCBI; 11 US Code §1520.

250 MLCBI Guide, para 178.

or otherwise in jeopardy'.[251] This is because 'relief of a collective nature may be urgently needed before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors'.[252] Other reliefs can also be granted under Article 7 and Article 21, and are at the discretion of the courts.

These reliefs are also needed in resolution proceedings. In particular, stay of proceedings that can be automatically imposed upon recognition of a foreign main proceeding and be discretionally imposed in other situations is an important feature of cross-border insolvency law and fundamental to cross-border cooperation and coordination.[253] It is explained that a stay of proceedings is to 'prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.'[254] Resolution, as a special insolvency proceeding, is a collective proceeding, and therefore a stay of proceedings is essential to ensure a fair resolution by preventing individual debt-collecting actions outside the home resolution proceeding.

6.4.4 What are the conditions for and effects of recognition of a foreign resolution measure?

6.4.4.1 Conditions for recognition of a foreign resolution measure

As explained in Chapter 1 at §1.3, the difference between a resolution proceeding and a resolution measure is that a resolution proceeding refers to process that takes place over a period of time, while a resolution measure is a single decision. In this way, recognition of a resolution measure is more similar to the recognition of a foreign judgment, both of which have their purpose to recognise the effectiveness of a foreign decision that confirms a new creditor-debtor relationship.

6.4.4.1.1 Finality

In many jurisdictions, finality is a prerequisite for judgment recognition and enforcement, thus, in this part, the finality issue is first examined. The finality issue arises in the situation where a judgment 'is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired', and the Judgments Convention[255] of the Hague Conference

251 Article 19 MLCBI; 11 US Code §1519.
252 MLCBI Guide, para 172.
253 See, e.g. *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36; [2015] A.C. 1675 at [54]; *In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr.E.D.N.Y. 2009).
254 *Assoc. of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982).
255 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters.

on Private International Law (HCCH) provides that '[r]ecognition or enforcement may be postponed or refused', although '[a] refusal does not prevent a subsequent application for recognition or enforcement of the judgments' .[256] This provision reflects the reality that different jurisdictions have different mechanisms for achieving this finality condition, and this is why the Draft Judgments Convention does provide different options.[257]

In common law jurisdictions, deriving from the English law tradition, the above-mentioned *res judicata* principle leads to a 'final and conclusive' prerequisite for recognition.[258] However, there are differences about whether a decision subject to additional review or appeal could be 'final and conclusive'. The leading English case, *Nouvion v Freeman,* makes the following illustration:

> In order to its receiving effect here, a foreign decree need not to be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the court which pronounced it; and if appealable the English court will only enforce it, subject to conditions which will save the interest of those who have the right of appeal.[259]

In short, in English law, a foreign judgment subject to appeal in the foreign jurisdiction can still be recognised.

However, this principle is interpreted differently in other common law jurisdictions, for example, Hong Kong, where the courts believe that a judgment that can be revisited by the original court rendering the judgment is not 'final and conclusive'.[260]

In China, only a legally effective judgment can be recognised and enforced.[261] There is an opinion stating that this condition is not clearly prescribed in the law.[262] However, it is argued in this Chapter that Article 155 of the Chinese Civil Procedural Law (CPL) stipulates that a judgment or ruling rendered

256 Article 4(4) Judgments Convention.

257 For further explanation, see Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018.

258 Dicey Rule 42-(1)(b). See Dicey (n 1) paras 14-023 ff. See also S.1(2)(a) Foreign Judgments (Reciprocal Enforcement) Act 1933.

259 *Nouvion v Freeman* (1889) 15 App. Cas. 1, 13. See also *Re McCartney* [1921] 1 Ch. 522, 531-532; *Westfal-Larsen AS v Ikerigi Naviera SA* [1983] 1 All E.R. 382, 389.

260 See *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*, [1996] S H.K.L.R. 395, 399 (H.C.). See a critical analysis of this approach, Jie Huang, 'Conflicts between Civil Law and Common Law in Judgment Recognition and Enforcement: When is the Finality Dispute Final' (2011) 29 Wis Int'l LJ 70.

261 Articles 281-282 CPL.

262 See, e.g. Xiongbing Qiao, 'On the Finality Problems in the Recognition and Enforcement of Foreign Judgments' (2017) Wuhan University International Law Review 70.

by the Supreme Court, a judgment or ruling that cannot be appealed or has not been appealed within the prescribed time limit, shall be considered as a 'legally effective judgment'.[263] Following this definition, judgments subject to appeal cannot be recognised, which is the same position as in Hong Kong.

The EU, consisting of many civil law jurisdictions, does not include a finality test in the Brussels Regulation, although '[t]he court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if …the judgment is challenged in the Member State of origin'.[264] This at least confirms that a judgment under appeal can be stayed from a recognition proceeding.[265]

Another approach is in the United States, where the determination of finality is, as confirmed in the leading case *Paine v Schenectady Insurance*, based on the law of the judgment-rendering state.[266] Put differently, the US law does not explicitly make a choice about finality. As can be seen, although finality is recognised on a wide basis, the determination of finality is quite different around the world.

In terms of insolvency-related judgments, the new MLJ allows a recognition request to be refused on the condition that the judgment is 'the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired'.[267] Judges also have discretionary authority to continue to recognise and enforce the insolvency-related judgments.[268] In short, the MLJ does not restrict recognition simply because a judgment is under review.

This section does not further examine the finality test in judgment recognition, which is beyond the scope of this dissertation. Instead, the following part continues with the discussion of resolution finality. A special feature of resolution, as has been emphasised repetitively throughout this dissertation, is its administrative nature. From an administrative law point of view, resolution decisions rendered by resolution authorities are subject to judicial

263 Article 155 CPL. See also similar opinion, Huang (n 260).
264 Article 38(a) Brussels Regulation 2012 Recast.
265 See more analysis of the law of European countries, see, e.g. Baumgartner (n 13); Tanja Domej, 'Chapter R. 3: Recognition and Enforcement of Judgments (Civil Law)' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017).
266 Paine v Schenectady Ins. Co., 11 R.I. 411, 412 (R.I. Sup. Ct. 1876).
267 Article 10 MLJ.
268 MLJ Guide, 45.

review.[269] In addition, there may be an administrative review. A particular mechanism under the EU bank resolution regime is the establishment of the Single Resolution Board (SRB) Appeal Panel,[270] which is responsible for reviewing appealable decisions,[271] including assessment of the resolvability and impediments to resolvability of a failing institution,[272] applying simplified obligations in relation to the drafting of resolution plans,[273] determination of the minimum requirement for own funds and eligible liabilities,[274] relevant penalties,[275] determination of the contributions to the administrative expenditure of the Board[276] and extraordinary ex-post contributions,[277] and decisions regarding access to documents in the context of processing of confirmatory applications.[278] Applying resolution tools is not subject to an administrative appeal review.

Whether a resolution measure subject to an appeal review is recognisable is the central question in this part. The UK Supreme Court, in the case *Goldman Sachs v Novo Banco*, expressed the view that the existence of an administrative proceeding against the debtor in Portugal (the jurisdiction where the resolution decision was made) 'does not matter for [recognition in the UK] whether its factual premise was right or wrong'.[279] The judge further explained the rationale underlying Article 85(4) of the BRRD, namely, 'the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision'.[280] As Lord Sumption SCJ states:

269 Article 85 BRRD; Article 86 SRMR. See, e.g. Jouke T Tegelaar and Matthias Haentjens, 'Judicial Protection in Cross-border Bank Resolution' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-border Bank Resolution* (Edward Elgar 2019); Qingjiang Kong, *New Bank Insolvency Law for China and Europe Volume 1: China* (M. Haentjens, Qingjiang Kong and B. Wessels eds, Eleven International Publishing 2017) Chapter 8; Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) Chapter 8.

270 Article 85 SRMR.

271 See a general description, Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming) chapter 8.

272 Article 10(10) SRMR.

273 Article 11 SRMR.

274 Article 12(1) SRMR.

275 Articles 38-41 SRMR.

276 Article 65(3) SRMR.

277 Article 71 SRMR.

278 Article 90(3) SRMR; Article 8 Regulation (EC) No 1049/2001.

279 *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 [33], on appeal from [2016] EWCA Civ 1092.

280 Article 84(4)(a) BRRD.

> This is because a banking reconstruction under the [BRRD] requires decisive steps to be taken, often as a matter of urgency, which the authorities in other member states can act on. The scheme of the Directives would be undermined if the acts of a designated national Resolution Authority were open to challenge in every other member state simply because they were open to challenge in the home state.[281]

This chapter argues for the same position. As identified by Lord Sumption in the above citation, one vital feature of resolution is the swift action taken by resolution authorities. A concern related to not recognising a judgment that is not final or conclusive is that the receiving court fears that *res judicata* has not been established and it is not appropriate and efficient to recognise the creditor-debtor relationship that could be altered later. In resolution, it is clearly established that public interest overrides private rights and the creditor-debtor relationship is not the priority concern. The main objective of resolution, instead, is to ensure the implementation of resolution decisions. An example is the EU review system. Resolution measures discussed in the EU context are not subject to administrative appeal but only judicial review. The commencement of a judicial review proceeding does not affect the implementation of resolution measures, namely, 'the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision', and 'the decision of the resolution authority shall be immediately enforceable and it shall give rise to a rebuttable presumption that a suspension of its enforcement would be agiant public interest'.[282] An appeal process is only an *ex-post* remedy for infringement of private rights, which cannot impede the implementation of resolution actions with a more prominent public interest purpose. In conclusion, host jurisdictions should not refuse to hold home resolution measures effective merely because a proceeding against the decision is brought in the home jurisdiction. Otherwise, it would largely hamper a smooth and expedited resolution.

6.4.4.1.2 Debt discharge

A typical result of insolvency (liquidation and reorganisation) is the reformulation of creditors' rights, mostly in the form of debt discharge. Debt discharge also exists in resolution proceedings, especially in the case of exercising bail-in, where the creditors' rights are affected. As mentioned in Chapter 3, a controversial principle is the English *Gibbs* rule, which stated that '[a] party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled'.[283] The question raised here is whether a foreign court can use foreign law to discharge an English-law-governed debt.

281 *Goldman Sachs* (n 279) [34].

282 Article 85(4) BRRD.

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

Actually, for over a century, the *Gibbs* rule was heavily debated by judges, lawyers and academics. For instance, Fletcher criticised this rule as '[a] doctrine [that] belongs to an age of Anglocentric reasoning which should be consigned to history'.[284] He pointed out 'the contrast between the narrow limits within which a foreign bankruptcy is held to give rise to a discharge of liability, and the unconfined claims made by English law for the effects of a discharge under English bankruptcy proceedings', the latter of which 'is considered to release all liabilities which qualify as bankruptcy debts, irrespective of their applicable law.'[285] Also, Look Chan Ho criticised the *Gibbs* rule as 'philosophically incompatible and practically irreconcilable'.[286] As he noted, debt discharge is a judgment *in rem*, and the original contractual characterisation is changed.[287] He further explained that 'the common law rule hinges on characterising bankruptcy discharge solely as a contractual matter which is thus logically within the scope of the governing law',[288] but he questioned this basis and contended that 'the contractual characterisation of bankruptcy discharge is highly suspect';[289] instead, '[b]ankruptcy discharge is about the post-insolvency treatment of the claimants' pre-insolvency entitlement',[290] and thus 'bankruptcy law is not and cannot be a consensual matter' as the feature of a contract.[291]

In the recent *Re OJSC International Bank of Azerbaijan* case, Henderson LJ maintained the application of the *Gibbs* rule, on the basis that 'it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far.'[292] However, Henderson LJ also acknowledged that, first, 'the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much cross-border cooperation in insolvency matters', and second, 'the rule may be thought to sit rather uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders'.[293]

284 Fletcher (n 54) para 2.129.
285 Ibid para 2.127.
286 Ho (n 54) 169.
287 Ibid 224-225. See also cases cited, *Local Loan Co v Hunt*, 292 U.S. 234, 241; *Tennessee Student Assistance Corp v Hood*, 541 U.S. 440, 447-448 (2004); *In re Cordray*, 347 B.R. 827, 837 (Bankr. N.D. Tex. 2006).
288 Ho (n 54) 217.
289 Ibid.
290 Ibid 223.
291 Iibid 224.
292 *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2018] 12 WLK 286 [29], on appeal from [2018] EWHC 59 (Ch).
293 Ibid [31].

For debt discharge governed by foreign law, the EU and US take different approaches from the English tradition. In the EIR, 'the effects of insolvency proceedings on current contracts to which the debtor is a party' should be governed by the law of the State of the opening of proceedings (*lex concursus*).[294] The Virgós-Schmit Report explains that

> Insolvency law may have an impact on current contracts. Thus … the liquidator may be empowered to decide either on the performance or termination of the contract. The aim of rules of this kind is to protect the estate from the obligation to perform contracts which may be disadvantageous in these new circumstances.[295]

The US courts have a long-established the history of recognising foreign bankruptcy proceedings related to US-law-governed contracts.[296] It is held by the US courts that '[a] debtor-in-possession or trustee, or by implication a committee whose authority derives from them, is not bound by a forum selection clause'.[297] Moreover, 'every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation of which he voluntarily contracts'.[298]

In the *Goldman Sachs v Novo Banco* case, the issue of the *Gibbs* rule was also examined in resolution proceedings. Lord Sumption JSC considered the *Gibbs* rule applicable to debt discharge in resolution proceedings, although in this particular case, the *Gibbs* rule cannot impede recognition because of the special arrangement of cross-border resolution within the EU under the CIWUD and the BRRD. [299]

This chapter argues, concurring with most academic opinions but contrary to Lord Sumption JSC, that the Gibbs rule should no longer be a guiding principle in insolvency, including resolution, proceedings. Entering into contracts with a foreign bank entails the acknowledgement that the foreign party might enter into resolution that might not be governed by the mutually chosen law. And placing a bank in resolution alteres the previous private contractual relationship. Furthermore, in cross-border resolution cases, only a swift and expedited recognition can facilitate a successful

294 Article 7(2)(e) EIR.
295 Virgós-Schmit Report, para 116.
296 See, e.g. *Canada Southern Railway Co v Gebhard*, 109 U.S. 527 (1883). For cases relating to debt discharge, see, e.g., *Qui Financing LLC v Dellar*, 2013 WL 5568732 (S.D.N.Y.2013).
297 *In re* Commodore International, Ltd, 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999). See also, e.g. *In re* Iridium Operating LLC, 285 B.R. 822, 837 (S.D.N.Y. 2002); *In re* Brown, 354 B.R. 591, 602 (D.R.I. 2006).
298 *Canada Southern Railway Co v Gebhard*, 109 U.S. at 537. See also, e.g., *In re Board of Directors of Multicanal SA*, 314 B.R. 486, 501-502 (Bankr. S.D.N.Y. 2004).
299 *Goldman Sachs* (n 279) [12] (citing *Adams v National Bank of Greece SA* [1961] AC 255).

international resolution, and the application of the *Gibbs* rule obviously would hamper the effectiveness of a home resolution measure abroad, particularly in the UK. Further analysis of the *Gibbs* rule is also provided in Chapter 8 regarding creditors' positions.

6.4.4.2 Effects for recognition of a foreign resolution measure

§2.2.3 in Chapter 2 categorises two types of recognition: active recognition and passive recognition. This section discusses the effects of recognition of foreign resolution measures based on these two different types of recognition. In passive recognition, exemplified by the case where a bail-in tool is applied, a foreign resolution measure does not need to be enforced in the host jurisdiction. Instead, only when a party challenges the resolution measure before a court in the host jurisdiction, would the measure be reviewed by the court. And if the court accepts the decision made by the foreign authority, the court would recognise the effect of the foreign measure. similar situations also exist in normal judgment recognition proceedings. For instance, recognition might be requested by a party to which the foreign judgment is in favour, with the aim of resisting the same proceeding brought by the other party in the receiving jurisdiction.[300] Also, recognition might be requested by a party the foreign judgment is against, with the aim of resisting further claims by the other party brought in a proceeding in the receiving jurisdiction.[301] In passive recognition, most commonly in litigation proceedings, recognition of a foreign resolution measure would confirm the status of the debtor-creditor relationship as a result of the foreign resolution measure.

What is more complicated is the active recognition, exemplified by the case where a transfer tool is applied, where a foreign resolution measure needs to be enforced in the host jurisdiction to be effective, such as transferring the shares of a subsidiary, or transferring the branch, to a third institution or a bridge institution. On the basis that resolution is a type of insolvency proceedings, enforcement of a resolution measure should be under the framework of granting reliefs to foreign insolvency proceedings, especially, recognising and enforcing foreign judgments related to insolvency proceedings. However, recognition of foreign judgments related to insolvency proceedings is a controversial issue in the insolvency field.[302] This is why UNCITRAL has formulated the new MLJ, with the concern that 'inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effec-

300 Dicey (n 1) para 14-005.
301 Ibid, para 14-006.
302 See, e.g. *Rubin v. Eurofinance* (n 98).

tive administration of cross-border insolvencies…'.[303] However, the MLJ is only an international model law and does not prescribe specific enforcement procedures for national legislators.

Before further analysis, different types of enforcement proceedings are summarised. First, a foreign judgment can be enforced as a foreign judgment without additional domestic proceedings. Usually, such enforcement is accompanied by an enforcement order.[304] In many civil law jurisdictions, this is the exequatur procedure;[305] 'exequatur' refers to 'the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad'.[306] Within the EU, there was pressure to abolish this type of exequatur requirement, for the purposes of improving economic efficiency and reducing intermediate costs, and facilitating the free movement of judgments within a single market.[307] The 2012 Brussels I Regulation Recast has officially abolished the exequatur procedure within the Member States.

Second, a foreign judgment must be re-litigated in order to be enforced. For example, Article 431 of the Dutch Civil Procedure Code prescribes that judgments of a foreign court may not be executed within the Netherlands except for the circumstances where there exist international treaties or conventions. [308] Without an international agreement, a claim must be re-litigated to be enforced.[309] Under the English common law rules, the doctrine of obligation also requires the claimant to bring a new action in order to enforce the obligation confirmed in the foreign judgments.[310] The English statutory regimes

303 Decision of the United Nations Commission on International Trade Law (UNCITRAL), 1080th meeting, 2 July 2018.

304 For example, China, Article 282 CPL. See also Articles 985-994 Dutch Civil Procedure Code.

305 See Wessels (n 247). See also MLCBI Guide, paras 7-8; Domej (n 265) 1478; Adrian Briggs, 'Chapter R. 4: Recognition and Enforcement of Judgments (Common Law)' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1483..

306 European Commission, European Judicial Network in civil and commercial matters, 'Glossary' <http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Exequatur> accessed 25 February 2020.

307 Gilles Cuniberti and Isabelle Rueda, 'Abolition of Exequatur: Addressing the Commission's Concerns' (2011) 75 Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 286.

308 D Kokkini-Iatridou and JP Verheul, 'Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' (1987) Netherlands Reports to the Twelfth International Congress of Comparative Law 189.

309 Ibid. See also 'Enforcement of Foreign Judgments in the Netherlands' (Houthoff) <https://www.houthoff.com/-/media/Houthoff/Publications/mkoppenol/Lexology.pdf?la=en&hash=0BE9FD8030DB73924655928DFD2210607FDFFB0A> accessed 25 February 2020.

310 Hartley (n 25) 396-397. See also Dicey (n 1) para 14-011; Briggs, *Private International Law in English Courts* (n 1) para 6.209 ff.

adopt a special procedure, that is, a foreign judgment is registered under a national judgment registration system and subsequently enforced as if it were rendered in the receiving jurisdiction.[311]

Back to resolution, similarly, there could be two types of enforcement of foreign resolution measures: direct enforcement, or a supportive measure conducted by host authorities to produce the same effect of the resolution action taken by the home resolution authority.[312] Direct enforcement parallels enforcing foreign judgments without transforming them into domestic judgments; supportive measures mirror enforcing foreign judgments by transforming them into domestic judgments. This dissertation does not favour either approaches, as the choice should be based on national laws.[313] For instance, when transfer tools are applied, national laws are usually applicable because they involve specific arrangements under company law or contract law.

Both approaches should respect the principle that '[p]rocesses for giving effect to foreign resolution actions should be expedited',[314] and should not constitute a major impediment for recognition. Here, both direct enforcement and supportive measures are different from automatic enforcement, as the former two require time. Automatic enforcement is currently only available under the BRRD. There is no substantive data about how long it takes for a foreign resolution action to be effective in the host jurisdiction. Yet, when it is a corporate insolvency proceeding, for instance under Chapter 15, the decision can take months. A potential concern is that this lengthy proceeding may jeopardise the cross-border implementation of resolution actions. Therefore, it is suggested that a more limited timeline should be in place for resolution recognition.

An additional concern is, in the absence of a national resolution regime in the host jurisdiction, how a home resolution measure should be enforced. First, in this situation, it is impossible for host authorities to take supportive measures. Supportive measures are 'conditional on the commencement of domestic resolution proceedings and the resolution authority would be limited to the measures that are available under the domestic regime'.[315] Without a domestic resolution regime, it is impracticable for a host authority to take resolution measures.

311 1920 Act, s 9(1); 1933 Act, s 2(1).
312 The concept of 'supportive measures' is explained by the FSB, see FSB Principles, 6.
313 See the same position taken in FSB Principles. See also MLJ.
314 FSB Principles, Principle 5.
315 Ibid, 6.

Second, whether a relief, in the form of enforcement, could be granted in a direct enforcement proceeding depends on the court's discretion. The US case law confirms that the absence of a domestic rule on a certain relief request is not an obstacle for recognition. The discussion of this issue leads back to the comity principle. Section 1507 of the Bankruptcy Code 'grants the bankruptcy court authority to "provide additional assistance to a foreign representative under this title or under other laws of the United States" provided that such assistance is "consistent with the principles of comity" and satisfies the fairness considerations set forth in subsection (b) thereof'.[316] Based on the comity principle, '[t]he relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical'.[317] In the *Metcalfe and Mansfield* case, a US court granted relief to a Canadian third-party release, even though such relief is not available under the US Bankruptcy Code.[318] However, this kind of relief is not unconditional, as there are other provisions that protect local interest, such as the public policies,[319] and the interests of creditors,[320] and can overrise the relief.

A third solution depends on recognition of the actions taken by the foreign representatives. As long as a foreign representative can be recognised as a legal representative of the debtor, even in jurisdictions having not adopted the MLCBI,[321] the host authority should be able to recognise the legitimacy of these representatives, as well as the actions taken by this representative, on the conditions that local laws in the host jurisdictions are obeyed.

6.5 Concluding remarks

To conclude, this chapter discussed the grounds for recognition of foreign resolution actions. It has been argued that despite usually being excluded from the general framework of judgments recognition and insolvency recognition, resolution, as a special insolvency proceeding, shares the theoretical rationale for recognition of foreign judgment and foreign insolvency proceedings. Specifically, the comity and reciprocity principles pave the road for sovereign compromise and allow a foreign administrative act to be recognised, while the obligation doctrine and *res judicata* theory furthermore provide the basis for barring the initiation of local/host proceedings.

316 11 US Code §1507(a) and (b); *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 308, 810 (Bankr. S.D.N.Y. 2018), also *In Re Bear Sterns High-Grande Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (Bankr. S.D.N.Y. 2008).

317 *Metcalfe & Mansfield*, 421 B.R. at 697. See also case cited *In re Bd. of Dirs. of Multicanal S.A.*, 307 B.R. 384, 391 (Bankr. S.D.N.Y. 2004).

318 *Metcalfe & Mansfiled*, 421 B.R. at 685.

319 Article 6 MLCBI; 11 US Code §1506. See also below Chapter 7.

320 Article 22(a) MLCBI; 11 US Code §1522(a). See also below Chapter 8.

321 See the cases in China and the Netherlands, text to n 245 to 247.

In addition, the (modified) universalism doctrine prevails in international insolvency law and supports making resolution actions effective across borders.

The examination of the selected jurisdictions leads to the conclusion that the recognition procedures in different jurisdictions are quite distinct and overly simplistic. First, reciprocity exists in China but not in the EU and US, and it is argued that reciprocity requirement should be abolished. Second, recognition in the US still relies on Chapter 15 and requires the identification of COMI/establishment, while in the EU and China, the jurisdiction rule is not clear. This chapter argues that jurisdiction should be determined on the basis of home/host distinction. Third, conditions for and effects of recognising continuous resolution proceeding are not clearly prescribed in the selected jurisdictions. This Chapter proposes that formality requirements should be provided; a competent authority, either administrative or judicial, should be designated to process a recognition request; recognition of foreign resolution proceedings should lead to the effects of recognition of foreign representatives and granting of certain reliefs such as moratorium. Fourth, conditions for and effects of recognising immediate resolution measures are not clear either. This chapter continues to propose that a recognition request should not be refused merely because a resolution measure is subject to judicial review, or a resolution measure affects a contract governed by host law; and a recognised foreign resolution measure can be enforced either directly or by taking domestic supportive measures.