Universiteit
Leiden
The Netherlands

Recognition of foreign bank resolution actions

Guo, S.

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

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

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

Cover Page

Universiteit Leiden

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

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

7 Financial Stability and Resolution Objectives

7.1 Introduction

This chapter examines financial stability and resolution objectives in cross-border bank resolution. As the Financial Stability Board (FSB) highlighted, '[t]he objectives of an effective resolution regime is to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claim in liquidation'.[1] In cross-border cases, resolution authorities are supposed to 'duly consider the potential impact of its resolution actions on financial stability in other jurisdictions'.[2] In reality, however, national authorities dominate the resolution decision-making process, and thus foreign interests can be overlooked. The same applies to the recognition process in which host authorities are inclined to only consider host interests and decide to refuse to recognise foreign resolution actions. This chapter thus examines, in the context of recognition of foreign resolution actions, how to interpret financial stability and other resolution objectives in the global context.

§7.2 starts with the general theoretical framework discussing financial stability from both domestic and international dimensions. It illustrates the *status quo* of the concept of financial stability, which is a legal objective under national laws but only a 'soft law' goal in international financial regulation. §7.3 compares the financial stability in the selected jurisdictions and generalises that financial stability is a resolution objective in the European Union (EU), the United States (US) and China. None of the jurisdictions takes into account foreign interests. §7.4 further evaluates several critical questions: (i) Why should financial stability be invoked as a reason not to recognise foreign resolution actions? (§7.4.1) (ii) How should local financial stability (and local critical functions) be interpreted? (§7.4.2) (iii) How should national fiscal policies be evaluated? (§7.4.3) National fiscal policies in this section is understood as government spending, especially bail-out measures for saving banks. Finally, §7.5 concludes. The discussion in this chapter applies to all scenarios listed in Figure 2.1.

---

1 FSB KA Preamble.

2 KA 2.3 (iii) and (iv). Also, FSB KA Preamble (v) and (vii).

7.2 Theoretical framework

7.2.1 Financial stability as an overarching objective of international financial regulation

7.2.1.1 Financial stability and rule of law

Financial stability is an overarching objective of financial regulation.[3] From an economic policy perspective, financial stability is a main policy goal. In the selected jurisdictions, financial stability forms a core work theme among the financial regulatory and supervisory authorities and is a key indicator for the health of the whole economy. In 1996, the Bank of England (BOE) took the lead in conducting an overall assessment of the stability of the financial system and issued a Financial Stability Review (FSR).[4] As of 2004, the European Central Bank (ECB) publishes a Financial Stability Review twice a year.[5] The European Commission (EC) also publishes an annual European Financial Stability and Integration Review, as it has done since 2010.[6] In the US, the Dodd-Frank Act established the Financial Stability Oversight Council (FSOC),[7] which monitors the stability of the US financial system and has published an annual report since 2011,[8] and the Office of Financial Research (OFR)[9] has published a Financial Stability Report since 2015.[10] In China, the People's Republic of China (PBOC) has published a Financial Stability Report every year since 2005.[11]

Authorities have also been endeavouring to define financial stability. The World Bank, for example, provides that financial stability is the 'absence of system-wide episodes in which the financial system fails to function

3 John Armour and others, *Principles of Financial Regulation* (OUP 2016) 64-66, 608-614.

4 Appearing twice a year, the FSR highlights developments affecting stability of the financial system, and promote the latest thinking on risk, regulation and market institutions. In 2006, to reflect a change in content and aims, the name was changed to the Financial Stability Report. See BOE, 'Historical Financial Stability Report' <http://www.bankofengland.co.uk/archive/Pages/digitalcontent/historicpubs/fsr.aspx> accessed 25 February 2020.

5 ECB, 'Financial Stability Review' <https://www.ecb.europa.eu/pub/fsr/html/index.en.html> accessed 25 February 2020.

6 European Commission, 'European Financial Stability and Integration Review (EFSIR)' <https://ec.europa.eu/info/publications/european-financial-stability-and-integration-report-efsir_en> accessed 25 February 2020.

7 12 US Code §§5321-5333.

8 FSOC, 'Studies and Reports' <https://www.treasury.gov/initiatives/fsoc/studies-reports/Pages/default.aspx> accessed 25 February 2020.

9 12 US Code §§5341-5346.

10 OFR, 'Reports' <https://www.financialresearch.gov/reports/> accessed 25 February 2020.

11 PBOC, 'Financial Stability' <http://www.pbc.gov.cn/english/130736/index.html> accessed 25 February 2020.

(crisis)'.[12] The ECB interprets financial stability as 'a state whereby the build-up of systemic risk is prevented', and 'systemic risk' is described as 'the risk that the provision of necessary financial products and services by the financial system will be impaired to a point where economic growth and welfare may be materially affected.'[13] The PBOC describes financial stability as

> a condition in which the financial system is able to function effectively in all key aspects. Under such a condition, the macro economy operates soundly, monetary and fiscal policies remain prudent and effective, financial ecosystem continues to improve, financial institutions, market and infrastructure are able to fulfil their functions such as resources allocation, risk management and payment and settlement, and more importantly, the financial system is able to function smoothly while facing internal and external shocks.[14]

In the US, there is no one accepted definition of financial stability. However, the FSOC, in the document 'Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies',[15] defines a relevant concept, 'threat to the financial stability of the United States', as 'an impairment of financial intermediation or of financial functioning that would be sufficiently severe to inflict significant damage on the broader economy'.[16] Although without a consensus on its definition, financial stability is usually used to describe a state where the financial system is stable and is resilient enough to withstand market failures or economic turbulences.[17] Looking at financial stability intuitively, Andrew Crockett made the following observation:

> There can be little doubt that financial stability, properly defined, is a 'good thing.' It creates a more favorable environment for savers and investors to make intertemporal contracts, enhances the efficiency of financial intermediation, and helps improve allocation of real resources. It provides a better environment for

12 World Bank, 'Financial Stability' <http://www.worldbank.org/en/publication/gfdr/gfdr-2016/background/financial-stability> accessed 25 February 2020.

13 ECB, 'Financial Stability Review' <https://www.ecb.europa.eu/pub/fsr/html/index.en.html> accessed 25 February 2020.

14 PBOC, *China Financial Stability Report* (2005) 3.

15 77 Fed. Reg. 21637.

16 12 CFR Part 1310, Appendix A to Part 1310 - Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations, II(a).

17 Hilary J Allen, 'What Is Financial Stability - The Need for Some Common Language in International Financial Regulation' (2014) 45 Geo J Int'l L 929. For different definitions, see, e.g. Garry J Schinsi, 'Defining Financial Stability' (2004) IMF Working Paper WP/04/187; Oriol Aspachs and others, 'Searching for A Metric for Financial Stability' (2006) LSE Financial Markets Group Special Paper Series No 167; William A Allen and Geoffrey Wood, 'Defining and Achieving Financial Stability' (2006) 2 Journal of Financial Stability 152; Michael D Bordo, 'An Historical Perspective on the Quest for Financial Stability and the Monetary Policy Regime' (2018) Hoover Institution Economics Working Paper 17108.

> the implementation of macroeconomic policy. Instability, on the other hand, can have damaging consequences, from the fiscal costs of bailing out troubled institutions to the real GNP losses associated with banking and currency crises.[18]

The policy goal of financial stability can be understood from two correlated perspectives. On the one hand, financial stability is a public good essential to economic growth.[19] The financial sector plays a fundamental role as an intermediary between borrowers and lenders, which is critical to the modern economy. Financial stability is thus necessary for the continuity of the provision of financial services. Banks, for example, as the primary provider of the payment system – a public good service,[20] can only function properly in a stable financial system. Similarly, financial markets also depend on a stable financial environment in order to deliver services like intermediation as well as risk assessment and management.

On the other hand, financial instability has adverse external effects that would impede the smooth and healthy operation of the financial system or even the whole society. Financial instability is associated with systemic risks and financial crisis,[21] which is detrimental to the financial system and to the fundamental role the financial sector plays in the welfare of the whole society. Disruption to the financial services and financial system would lead to economic decline, including massive insolvencies.

In terms of financial stability and the rule of law, two main generalisations are summarised: (i)financial stability justifies financial regulation, and (ii) financial stability constitutes one of the main objectives of financial law.

First, in relation to the justification of financial regulation, economic analysis regarding government regulation is examined. One lasting debate in the economics literature is about to what extent the governments/central banks should interfere with the economic activities. Starting from Adam Smith and his The Wealth of Nations,[22] it was generally believed that the intervention into economic activities should be restricted, which is the main argument of the classical and neoclassical economists.[23] At the time

---

18 Andrew D Crockett, 'Why is Financial Stability a Goal of Public Policy?' (1997) 82 Economic Review 5, 14.

19 See, e.g. Robert G King and Ross Levine, 'Finance and Growth: Schumpeter Might Be Right' (1993) 108 The Quarterly Journal of Economics 717; Robert G King and Ross Levine, 'Finance, Entrepreneurship and Growth' (1993) 32 Journal of Monetary Economics 513.

20 See Armour and others (n 3) 59-60.

21 See Steven L Schwarcz, 'Systemic Risk' (2008) 97 Geo LJ 193.

22 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Рипол Классик 1817).

23 See, e.g. Alfred Marshall, *Principles of Economics* (Macmillan 1890); Friedrich A Hayek, *The Road to Serfdom* (The University of Chicago Press 1944); Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press 1962).

of the financial crisis in the 1930s, John Maynard Keynes challenged the traditional view and proposed the new Keynesian Economics, which laid the foundation for government intervention.[24] The debate has been ongoing since then and is expected to continue.

A similar debate exists in the financial sector. A fundamental theory for modern finance is the efficient market hypothesis (EMH), which believes that prices fully reflect available information.[25] In other words, investors can rely on the prices to make reasonable decisions, and regulatory intervention should be limited. However, the EMH is only a hypothetical economic model. A relevant critique is that the underlying assumption of the EMH cannot reflect the reality of financial activities because of the asymmetric information available in the market, and this is when lawyers come into play and make sure there is a legal obligation to disclose valuable information in order to achieve 'relative efficiency'.[26] It should be noted that this does not refute the EMH. Instead, the EMH forms the economic basis for the view that regulatory intervention into the market should be limited, because the market, with sufficient disclosed information guaranteed by supervision, can maintain in an efficient and stable status.

An opposite theory is Minsky's financial instability hypothesis (FIH) based on the Keynes' view and the heterodox assumption that the financial market is inherently unstable.[27] The fundamental propositions of the FIH are: (i) '[c]apitalist market mechanisms cannot lead to a sustained, stable-price, full-equilibrium' and (ii) '[s]erious business cycles are due to financial attributes that are essential to capitalism'.[28] According to Minsky, 'business cycles of history are compounded out of (i) the internal dynamics of capitalist economies, and (ii) the system of interventions and regulations that are designed to keep the economy operating within reasonable bounds'.[29] This theory explicitly mentions government intervention in financial activities.

Another view about the nature of the financial market is that of imperfect knowledge economics (IKE), which considers the financial market as inherently unstable, and investors can only conduct transactions with 'imper-

24 John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Palgrave Macmilan 1936).

25 Burton G Malkiel and Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 The Journal of Finance 383.

26 Ronald J Gilson and Reinier H Kraakman, 'The Mechanisms of Market Efficiency' (1984) 70 Virginia Law Review 549.

27 Hyman P. Minsky, *Stabilizing an Unstable Economy* (Yale University Press 1986); Hyman P Minsky, 'The Financial Instability Hypothesis' (1992) The Jerome Levy Economics Institute of Bard College Working Paper No 74.

28 Minsky, *Stabilizing an Unstable Economy* (n 27) 173.

29 Minsky, 'The Financial Instability Hypothesis' (n 27) 8.

fect knowledge'.[30] Given that 'profit-seeking market participants do not internalize the huge social costs associated with excessive upswings and downswings in these markets', regulation is necessary.[31]

These theories are based on opposite perspectives about whether the financial system is inherently stable. However, they share a common notion that the financial sector needs regulation, pursuing the same policy goal of maintaining a stable financial system. Financial stability concern exists in almost every field of financial regulation. The International Monetary Fund (IMF), for example, organised the 'Law and Financial Stability' conference in 2016, during which a variety of topics were discussed such as bank resolution, central clearing counterparties (CCPs) resolution, macroprudential policy, and corporate debt restructuring and economic recovery.[32] Simply put, financial regulation, as an interference in the free market, is justified on the basis that market failure is inevitable and the maintenance of financial stability needs government intervention.

Second, with regard to the objectives of financial law, financial stability is one of many financial regulation goals, for instance, protection of investors and other users of the financial system, consumer protection in retail finance, market efficiency, competition as well as preventing financial crime.[33] The previous part illustrates that financial stability is a policy goal, and it exists in various policy documents. The economic rationale behind the policy choice, namely, financial stability is a public good, also applies to the law-making process. The lessons learned from the latest crisis even make some scholars set financial stability as a primary goal of financial regulation, which 'is understood to be capable of taking precedence over the others'.[34] The post-crisis financial regulation regime puts financial stability in a higher hierarchy as the response to global crisis prevention. A typical example is the post-crisis establishment of the resolution regime.

---

30 Roman Frydman, Ian Duncan and Michael D Goldberg, *Imperfect Knowledge Economics: Exchange Rates and Risk* (Princeton University Press 2007); Roman Frydman and Michael D Goldberg, *Beyond Mechanical Markets: Asset Price Swings, Risk, and the Role of the State* (Princeton University Press 2011).

31 Frydman and Goldberg (n 30) Chapter 12.

32 Sean Hagen and Ross Leckow, 'The Role of Law in Preserving Financial Stability' (*IMF Blog*, 1 July 2016). <https://blogs.imf.org/2016/07/01/the-role-of-law-in-preserving-financial-stability/> accessed 25 February 2020. In the following years, the IMF continues to focus on financial stability and rule of law. See IMF, '2018 Law and Financial Stability High-Level Seminar' <https://www.imf.org/en/News/Seminars/Conferences/2018/07/24/2018-seminar-on-law-and-financial-stability> accessed 25 February 2020(titled 'the Rule of Law in a Digital World').

33 Armour and others (n 3) 61-72.

34 Armour and others (n 3) 608-609. see also Michael W Taylor, 'Regulatory Reform After the Financial Crisis: Twin Peak Revisited' in Robin Hui Huang and Dirk Schoenmaker (eds), *Institutional Structure of Financial Regulation: Theories and International Experiences* (Routledge 2015) 24-26.

The objective of resolution is mainly financial stability. More importantly, the recent global financial crisis (GFC) demonstrated how the failure of the banking system in one jurisdiction could lead to massive disruption in the global economy. The international dimension of financial stability is thus worth more attention, and is examined below.

7.2.1.2 Financial stability and international financial regulation

Financial stability is not only a national financial regulation objective but also an objective for international financial regulation. Like domestic financial stability, international financial stability is an international or global public good.[35] In other words, 'the benefits of stability are available to all states, and the enjoyment of stability by one state does not reduce its availability to others'.[36] On the one hand, international financial stability provides a stable environment for global economic growth.[37] On the other hand, international financial instability would cause damages to all the nations as a result of contagious effects across borders, exemplified by several banking crises such as Lehman Brothers.[38] In this chapter, international stability refers to the stability of more than one jurisdiction, which includes both regional stability of several countries, and global stability of all the countries across the world.

At the earliest, after the establishment of the Bretton Woods system, the IMF and the World Bank were the primary international financial organisations. However, at that time, financial stability was not a major concern. In the IMF Agreement,[39] only 'exchange stability' is mentioned, which is listed as one of the IMF purposes: 'to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation'.[40] Similarly, Section 1 of Article IV prescribes that 'each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system

35 See, e.g. Charles Wyplosz, 'International Financial Stability' in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999); Armour and others (n 3) 616; Stephany Griffith-Jones, 'International Financial Stability and Market Efficiency as a Global Public Good' in Inge Kaul and others (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003).

36 Joel P Trachtman, 'The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Coordination' (2010) 13 Journal of International Economic Law 719, 721; Joel P Trachtman, 'Global Regulation of Finance' in *The Future of International Law Global Government* (CUP 2013) 170.

37 Ibid.

38 Ibid. See also, e.g. Barry Eichengreen and Richard Portes, *The Anatomy of Financial Crises* (1987) 2; Hervé Hannoun, *Towards a Global Financial Stability Framework* (BIS 2010); JR Barth, DG Mayes and MW Taylor, 'Safeguarding Global Financial Stability, Overview' in *Handbook of Safeguarding Global Financial Stability* (Elsevier 2013) 226.

39 Articles of Agreement of the International Monetary Fund.

40 Article I (iii) of the IMF Agreement.

of exchange rates'.[41] It is understandable that the IMF was established in 1946 with the aim of maintaining a stable exchange/monetary market, without additional consideration of financial stability issues at that time.[42] The World Bank, established in 1944, aims to promote economic growth and end poverty, and there were no stability purposes in any of its sub-organisations' Articles of Agreement, including those of the International Bank For Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).[43] Later, the IMF and World Bank expanded their mandates and jointly initiated the Financial Sector Assessment Program (FSAP) in 1999 to assess financial stability.[44]

The international financial stability discussion emerged alongside the expansion of the international financing system and came to attention against the background of the outburst of financial crises.[45] The leading organisation is the Bank for International Settlements (BIS), which aims to promote global monetary and financial stability,[46] and the Basel Committee on Banking Supervision (BCBS), which is 'the primary standard setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters' and empowered with a financial stability mandate.[47] The BCBS specifically conducts activities including 'addressing regulatory and supervisory gaps that pose risks to financial stability' as well as 'coordinating and cooperating with other financial sector setters and international bodies, particularly those involved in promoting financial stability'.[48] 'BCBS members are committed to … promote the interests of global financial stability and not solely national interests'.[49] As introduced in the previous chapters, Basel Accord and Basel Concordat are major

41 Article IV Section 1 of the IMF Agreement.

42 See, e.g. Douglas W Arner, 'Law, Financial Stability and the International Financial Architecture' in Douglas W Arner (ed), *Financial Stability, Economic Growth, and the Role of Law* (CUP 2009) 54-56; Cornelia Manger-Nestler, 'Impacts of International Law on the Restructuring of the Global Financial System' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 15 (Brill 2011) 178-183.

43 For all these organizations' Articles of Agreements, see WB, 'Articles of Agreement' <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> accessed 25 February 2020.

44 IMF, 'Financial Sector Assessment Program (FSAP)' (8 March 2018) <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program> accessed 25 February 2020.

45 See, e.g. Roger Walton Ferguson and others, *International Financial Stability* (Centre for Economic Policy Research 2007) 57-75; Hannoun (n 38) 25; Barth and others (n 38) 226.

46 BIS, 'The BIS: Promoting Global Monetary and Financial Stability' <https://www.bis.org/about/profile_en.pdf> accessed 25 February 2020.

47 Article 1 BCBS Charter.

48 Article 2 BCBS Charter.

49 Article 5 BCBS Charter.

international standards with a international financial stability objective.[50] The BIS and BCBS jointly created the Financial Stability Institute (FSI) in 2008 to assist supervisors around the world to improve and strengthen their financial systems.[51]

The latest GFC in 2007/2008 led to the creation of the FSB as the successor of the Financial Stability Forum (FSF), which is an enhanced approach to directly regulate financial stability issues. The general task of the FSB is to '[promote] global financial stability by coordinating the development of regulatory, supervisory and other financial sector policies and conducts outreach to non-member countries.'[52] The objectives of the FSB include: '[i]n collaboration with the international financial institutions, the FSB will address vulnerabilities affecting financial systems in the interest of global financial stability';[53] also, '[t]he Association shall have its purpose to promote international financial stability. In particular, it has the purpose to further the objectives stipulated in the FSB Charter in its respective current version'.[54] Based on these statements, the FSB is supposed to be the guardian of 'global financial stability', a term repeated several times in the FSB's mandates.

Despite the continuous emphasis of its importance, international financial stability does not create a mandate for (national) financial regulators, in a way domestic financial stability does. A comprehensive international financial regulation framework is missing, [55] and the present international financial regulation is of 'soft law' nature and cannot impose compulsory obligations on national authorities.[56] This reality makes the regulation of international financial activities, such as cross-border bank resolution, unpredictable.

For one thing, compared to other international regulatory regimes such as international trade law or international investment law, international financial regulation 'does not provide a dispute settlement mechanism, is not administered by international organisations with a specific mandate, does

50 See also BCBS, 'History of the Basel Committee' (14 April 2018) <https://www.bis.org/bcbs/history.htm?m=3%7C14%7C573%7C76> accessed 25 February 2020.

51 BIS, 'About the FSI' <https://www.bis.org/fsi/index.htm?m=3%7C17%7C629> accessed 25 February 2020.

52 FSB, 'What We Do' <http://www.fsb.org/what-we-do/> accessed 25 February 2020.

53 Article 1 of the Charter of the FSB.

54 Article 2 of the Articles of Association of the FSB.

55 See, e.g. Thomas Cottier and Rosa M Lastra, 'The Quest for International Law in Financial Regulation and Monetary Affairs' (2010) 13 Journal of International Economic Law 527; Rosa M Lastra, 'Do We Need a World Financial Organization?' (2014) 17 Journal of International Economic Law 787.

56 See, e.g. Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (CUP 2015).

not rest on international treaties, or provides a global regulator'.[57] This is because, first, financial regulation is mostly about the exercise of sovereign powers, such as regulation and supervision of financial institutions, which a nation can hardly give to an international organisation; and second, financial matters are mostly national, and it is only until recently that financial matters have become international and increasingly so.[58]

In addition, international financial regulation is mostly 'soft law', for example, the Basel standards[59] and the FSB Key Attributes.[60] 'Soft law' is used to describe 'norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties'.[61] Soft law is the dominant approach for international financial regulation, which may be because of its flexibility and effectiveness. Simply put, jurisdictions are more willing to reach consensus and to follow international recommendations with adequate discretion, rather than being bound by 'hard law' from formal international law sources such as treaties or conventions.[62] National authorities cannot concede their sovereign rights to regulate their national financial institutions and financial market, which are critical to the domestic governance.

57 Carlo de Stefano, 'Reforming the Governance of International Financial Law in the Era of Post-Globalization' (2017) 20 Journal of International Economic Law 509, 518-519.

58 For international financial regulation vis-à-vis other fields of international economic law, see, e.g. R Michael Gadbaw, 'Systemic Regulation of Global Trade and Finance: A Tale of Two Systems' (2010) 13 Journal of International Economic Law 551; Chris Brummer, 'Why Soft Law Dominates International Finance - And Not Trade' (2010) 13 Journal of International Economic Law 623; Andrew D Mitchell, Jennifer K Hawkins and Neha Mishra, 'Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 Journal of International Economic Law 787.

59 See, e.g. Lawrence LC Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision' (1998) 39 Va J int'l L 1; Patrick Van Roy, 'The Impact of the 1988 Basel Accord on Banks' Capital Ratios and Credit Risk-taking: An International Study' (2005) EFMA 2004 Basel Meetings; Daniel K Tarullo, *Banking on Basel: The Future of International Financial Regulation* (Peterson Institute 2008); David S Bieri, 'Financial Stability, the Basel Process and the New Geography of Regulation' (2009) 2 Cambridge Journal of Regions, Economy and Society 303; Thomas Cosimano and Dalia Hakura, 'Bank Behavior in Response to Basel III: A Cross-Country Analysis' (2011) IMF Working Papers 2011/119; Cottier and Lastra (n 55).

60 Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302, 309-311.

61 RR Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 The International and Comparative Law Quarterly 549, 549. See also, e.g., Charles Lipson, 'Why are Some International Agreements Informal?' (1991) 45 International Organization 495; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421; Andrew T Guzman and Timothy Meyer, 'Soft Law' in Eugene Kontorovich and Francesco Parisi (eds), *Economic Analysis of International Law* (Edward Elgar 2016)

62 Crespo (n 60) 309-311. See also Brummer (n 58) 631-632.

However, without an international organisation that can exercise global financial governance and binding hard law international treaties, national financial authorities are inclined to take into account only national interests and not international financial stability.[63] This is particularly the case in financial crisis times as shown in below §7.2.2.2, where national authorities only intend to orderly resolve national banks but often neglect foreign ones. This problem can be explained from the perspective of domestic government accountability. Financial regulators and supervisors are part of national governments and, according to each jurisdiction's constitution, are only accountable to national constituencies.[64] Domestic financial authorities usually have the mandate to be accountable to the legislature/parliament as the elected delegating principal, to the executive branch that appoints and dismisses (head of) financial authorities, to domestic constituencies including financial institutions and financial consumers like investors or depositors; they are also subject to national judicial review which determines their legal liability of their wrongdoings.[65] However, without a clear reference in national law, national financial regulators and supervisors are not burdened with the obligation to duly consider international or foreign financial stability.

The EU is an exception, which has a hard-law supranational 'financial stability' objective. [66] Around two decades ago, the ECB started to realise that '[t]he institutional framework for financial stability in the EU and in the euro area is based on national competence and international co-operation'.[67] This statement was made when national banks dominated financial market, and '[i]n the decentralized financial safety net, each member country's national authorities remain responsible for supervising financial institutions …'.[68] Article 127(5) of the Treaty on the Functioning of the European Union (TFEU) prescribes the financial stability mandate:

> The ESCB [European System of Central Banks] shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.[69]

63 See §7.2.2.2.

64 See, e.g. Adam Przeworski, Susan C Stokes and Bernard Manin (eds) *Democracy, Accountability, and Representation* (CUP 1999); Mark Bovens, Robert E Goodin and Thomas Schillemans (eds) *The Oxford Handbook of Public Accountability* (OUP 2014).

65 See, e.g. Eva Hüpkes, Marc Quintyn, and Michael W. Taylor, 'The Accountability of Financial Sector Supervisors: Principles and Practice' (2005) IMF Working Paper WP/05/51; Julia Black and Stéphane Jacobzone, 'Tools for Regulatory Quality and Financial Sector Regulation: A Cross-Country Perspective' (2009) OECD Working Papers on Public Governance No.16.

66 See Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Wolters Kluwer 2017).

67 ECB, 'Annual Report' (1999) 98. <https://www.ecb.europa.eu/pub/pdf/annrep/ar1999en.pdf?94f617e383ca3cf41a839372bf8c8bb3> accessed 25 February 2020.

68 Gillian G Garcia and Maria J Nieto, 'Preserving Financial Stability: A Dilemma for the European Union' (2007) 25 Contemporary Economic Policy 444, 446.

69 Article 127(5) TFEU.

Similarly, the ESCB and ECB Statute[70] echoes Article 127(5) and restates the financial stability purpose of the ESCB.[71] This financial stability mandate is imposed upon the ESCB, which consists of the ECB at the Union level and the central banks at the national level. It is acknowledged, however, that '[a]t the time the Treaties were drafted, financial stability and the potential differences between financial and business cycles were not a primary consideration'.[72] Yves Mersch also explained that the ECB only has a 'price stability' mandate, but not a 'financial stability' mandate; the ECB only has a contributory role in maintaining financial stability.[73] However, these statements do not undermine the objective of financial stability at the European level. In fact, the ECB has constantly put emphasis on the importance of financial stability.[74] The establishment of the Banking Union reinforced the European financial stability objective. The Single Supervisory Mechanism (SSM), as the first pillar,[75] is 'with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member States'.[76] Also, the Capital Requirements Directive (CRD IV) package within the Single Rulebook explicitly repeats the financial stability objective.[77] As shown below, the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR) also contain a European stability objective as well as Member State stability.

Other evidence is a new paragraph added to Article 136 TFEU in 2011, which reads:

> The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.[78]

---

70 PROTOCOL (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, OJ C 326/230.

71 Article 3.3 the ESCB and the ECB Statute.

72 Yves Mersch, 'Financial Stability and the ECB' (6 September 2018) <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180906.en.html> accessed 25 February 2020.

73 Ibid.

74 'Financial stability and macro-prudential supervision: objectives, instruments and the role of the ECB: Speech by Lucas Papademos, Vice-President of the ECB at the conference "The ECB and Its Watchers XI" Frankfurt' (4 September 2009) <https://www.ecb.europa.eu/press/key/date/2009/html/sp090904_3.en.html> accessed 25 February 2020.

75 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

76 Article 1 SSMR.

77 Recitals (50) and (67) CRD IV; Recitals (3), (7), (14), (16), (20), (31), (51), (76) and (123) CRR.

78 European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91/1; Article 136(3) TFEU.

The wording 'to safeguard the stability of the euro area as a whole' confirms the financial stability objective. A direct action related to this Article is the establishment of the European Stability Mechanism (ESM).[79] The purpose of the ESM is 'to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[80] According to this statement, financial stability is the ultimate goal for both the Euro Area as a whole and the Member States. A relevant judgment regarding the legitimacy of such action also states that '… a higher objective, namely maintaining the financial stability of the monetary union' exists.[81] This statement reaffirms the financial stability objective at the Union level.

The EU financial stability objective is based on common constitutional documents and the existence of the internal market, which form both legal and economic foundation for a supranational regulatory approach. Other parts of the world, however, do not share such a close relationship, and it is questionable whether international financial stability can be a common legal term for all the jurisdictions.

7.2.2 Financial stability and resolution objectives

7.2.2.1 Financial stability: an orderly resolution objective

Financial stability is one of the main objectives of the resolution process. According to the FSB, the resolution authority should 'pursue financial stability and ensure continuity of systemically important financial services, and payment, clearing and settlement functions'.[82] The understanding of financial stability in bank resolution cases goes back to the discussions in Chapter 2 on the special treatment of banks under the insolvency law regime. In short, banks differ from other enterprises in that they take upon social functions such as payment and settlement, and the failure of banks

79 Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the federal Republic of Germany, The Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (ESM Treaty).

80 Article 3 ESM Treaty.

81 Judgement of 27 November 2012, *Thomas Pringle v Government of Ireland and others*, C-370/12 EU:C:2012:765, para 135. This case decides on the validity and legitimacy of the above-mentioned Council decision.

82 KA 2.3(i).

would cause contagion effects such as bank runs.[83] Financial stability, therefore, in the resolution context, aims to act as a guiding objective to avoid contagion effects.[84]

In particular, in terms of the social functions that banks perform, it is important to 'ensure continuity of systemically important financial services, and payment, clearing, and settlement functions'.[85] In 2013, the FSB published the *Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services* (Critical Function Guidance).[86] Critical functions are defined as 'activities performed for third parties where failure would lead to the disruption of services that are vital for the functioning of the real economy and for financial stability due to the banking group's size or market share, external and internal interconnectedness, complexity and cross-border activities'.[87] Accordingly, preserving critical functions is necessary to preserve financial stability. The FSB continued to adopt a three-step assessment for critical functions: (i) 'analysis of the impact of the sudden discontinuance of the function' (impact assessment); (ii) 'evaluation of the market for that function' (supply side analysis); and (iii) 'assessment of the impact of a failure of a specific G-SIFI [globally systemically important financial institution] that performs that function' (firm-specific test).[88] Functions that could be critical are, for example, deposit-taking, lending and loan services, payment, clearing, custody and settlement, wholesale funding markets, and capital markets and investment activities.[89] A relevant term is 'critical shared services', which is defined as 'activities performed within the firm or outsourced to third parties where failure would lead to the inability to perform critical functions and, therefore, to the disruption of functions vital for the functioning of the real economy or for financial stability'.[90] Critical shared services can be finance-related shared services, and operational shared services.[91]

83 See Chapter 2, §2.1.1.

84 See, e.g. Michael Schillig, 'Financial Stability, Systemic Risk, and Taxpayers' Money - The Rationale for a Special Resolution Regime' in *Resolution and Insolvency of Banks and Financial Institutions* (OUP 2016); Nikoletta Kleftouri, 'European Union Bank Resolution Framework: Can the Objective of Financial Stability Ensure Consistency in Resolution Authorities' Decisions?' (2017) 18 ERA Forum 263.

85 FSB KA Preamble (i).

86 FSB, 'Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Identification of Critical Functions and Critical Shared Services' (16 July 2013).

87 Ibid, 7.

88 Ibid, 8.

89 Ibid, 14-30.

90 Ibid, 7.

91 Ibid, 31-32.

In addition, resolution is supposed 'not [to] rely on public solvency support and not [to] create an expectation that such support will be available'.[92] This is to avoid bail-out, or 'too-big-to-fail' situations.[93] In order to ensure that the financial system is stable and banks can perform critical functions properly, states have incentives to prevent banks from entering into insolvency proceedings and to provide loans or direct capital injections to failing banks. In other words, bail-out also pursues the financial stability objective. However, this usually leads to moral hazard problems because the bank would reply on national bailout instead of effectively managing risks.[94] Resolution, as a coping mechanism for this phenomenon, requires that losses are allocated to 'firm owners (shareholders) and unsecured and uninsured creditors in a manner that respects the hierarchy of claims'.[95] In general, '[j]urisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms'.[96] However, funding in resolution is not completely prohibited; industry resolution funds, deposit insurance funds, temporary state loan or public ownership is still allowed, under the strict condition that shareholders and creditors have absorbed the losses first.[97]

92 FSB KA Preamble (iv).

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

94 FSB, 'Reducing the moral hazard posed by systemically important financial institutions FSB Recommendations and Time Lines' (20 October 2010). See also Martin Čihák and Erlend Nier, *The Need for Special Resolution Regimes for Financial Institutions: The Case of the European Union* (International Monetary Fund 2009); Kenneth Scott, George Shultz and John Taylor, *Ending Government Bailouts As We Know Them* (Hoover Institute 2010); Thomas F Huertas, *Safe to Fail* (Palgrave Macmillan 2014); Thomas F Huertas, 'Too Big to Fail: A Policy's Beginning, Middle and End (?)' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar Publishing 2015); Franklin Allen and others, 'Moral Hazard and Government Guarantees in the Banking Industry' (2015) 1 Journal of Financial Regulation 30.

95 FSB KA Preamble (iii).

96 FSB KA 6.1.

97 FSB KA 6. See Matthias Haentjens, Bob Wessels and Shuai Guo, *New Bank Insolvency Law for China and Europe Volume 3: Comparative Analysis* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing forthcoming) section 2.3.4.

7.2.2.2 Cross-border resolution context

Resolution is a restructuring process applied to a failing bank's business, and any measure imposed on the bank's foreign establishments is likely to have an impact on foreign jurisdictions.[98] The FSB requires that a resolution authority should 'duly consider the potential impact of its resolution actions on financial stability in other jurisdictions'.[99] Similarly, when it comes to critical functions, '[h]ome supervisors should communicate with relevant host authorities so that the assessment considers all relevant jurisdictions and markets where a G-SIFI is active. The assessments should take into account those functions and services deemed to be critical in host jurisdictions.'[100]

These are two-fold requirements. On the one hand, a home authority, as the active resolution decision-maker, should consider the interests of the other jurisdictions when the resolution actions may have an external effect on those jurisdictions. On the other hand, a host authority, as the passive resolution decision-taker, when deciding not to recognise home resolution actions, should also take into account the negative effects on the home jurisdiction's financial stability, or even global financial stability.

However, as discussed above in §7.2.1.2, the FSB only publishes international recommendations, and the Key Attributes are soft laws that do not have binding effects on national authorities. Also, as specifically shown below in §7.3.2, the selected jurisdictions do not impose legal obligations on their national authorities to consider foreign interests, except for intra-EU situations, and national authorities are only accountable to their domestic public.

Additional two theories can help explain the situation and why national authorities do not have incentives to take into account foreign interests, in particular, foreign financial stability. The first one is Dirk Schoenmaker's 'financial trilemma' theory. Accordingly, three financial policies, namely, financial stability, financial integration and national financial policies, are incompatible: 'any two of the three objectives can be combined but not all three; one has to give'.[101] For instance, national financial policies need to be compromised to preserve financial stability and financial integration,

98 See, e.g. Federico Lupo-Pasini and Ross P. Buckley, 'International Coordination in Cross-Border Bank Bail-ins: Problems and Prospects' (2015) 16 European Business Organization Law Review 203; Federico Lupo-Pasini, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

99 KA 2.3(iv).

100 FSB Critical Functions Guidance, 8.

101 Dirk Schoenmaker, 'The Financial Trilemma' (2011) 111 Economics Letters 57, 57. See also Dirk Schoenmaker, *Governance of International Banking: The Financial Trilemma* (OUP 2013).

by way of, for example, establishing a supranational regulatory body[102] or concluding a binding burden-sharing agreement.[103] For another example, reversing international banks can be the counter measure in response to the integration of financial markets and the merger of financial institutions.[104] As Schoenmaker identified, the EU has formed joint and shared regulation by establishing the Banking Union (giving up national financial policies), while the UK and Switzerland are downsizing their banks (giving up financial integration).[105] Between the two, empirical research shows that coordination among governments is more efficient, while breaking up international banks might not be feasible.[106] However, it cannot be overlooked that another solution to address the financial trilemma is the sacrifice of financial stability.[107] In other words, when banks want to stay international and national authorities do not waive their authority, inevitably, (international) financial stability is at stake.

Another theory is the financial nationalism doctrine put forward by Lupo-Pasini, who explained why national authorities would opt to maintain current regulatory policies and international banking operations, at the expense of sacrificing international financial stability.[108] Accordingly, contemporary financial regulators are still dominated by national authorities, which are accountable to domestic stability but not international stability.[109] Besides, national regulators only have powers delegated by national laws, but limited influence over international affairs.[110] He also points out the inherent conflict between national financial stability and international financial stability.[111] And, according to his financial nationalism doctrine, international financial stability is in a subordinated position. Both theories can help illustrate why national authorities would put domestic policy goals over international financial stability.

---

102 An extreme hypothesis is establishing a global federalism. See Dani Rodrik, 'How Far Will International Economic Integration Go?' (2000) 14 The Journal of Economic Perspectives 177.

103 Dirk Schoenmaker, 'Is Burden Sharing Needed for International Financial Stability' in Philipp Hartmann, Haizhou Huang and Dirk Schoenmaker (eds), *The Changing Fortunes of Central Banking* (CUP 2018).

104 Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 90-114.

105 Dirk Schoenmaker, 'Resolution of International Banks: Can Smaller Countries Cope?' (2018) 21 International Finance 39.

106 Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 113.

107 Michael Schillig, 'Global Solutions' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019).

108 Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

109 Ibid 41 ff.

110 Ibid.

111 See, e.g. Dirk Schoenmaker, 'Firmer Foundations for A Stronger European Banking Union' (2015) Breugel Working Paper 2015/13; Federico Lupo-Pasini, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45.

7.3 Financial stability in the selected jurisdictions

7.3.1 Resolution objectives in domestic resolution

7.3.1.1 Resolution objectives stated in the law

In the EU, the BRRD clearly lists five resolution objectives: (a) 'to ensure the continuity of critical functions'; (b) 'to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline'; (c) 'to protect public funds by minimising reliance on extraordinary public financial support'; (d) 'to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC'; (e) 'to protect client funds and client assets'.[112] The objectives (a)-(c), namely, ensuring the continuity of critical functions, avoiding adverse effect on the financial system, and protecting public funds, all reflect different aspects of the financial stability requirement. The SRMR contains similar resolution objectives, with point (b) clearly stated as 'to avoid significant adverse effects on financial stability'.[113]

In the US, the Dodd-Frank Act is the coping mechanism for the latest GFC. The full title of the Dodd-Frank Act reflects resolution objectives, and it is stated as 'An Act To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.'[114] In addition, Title I of the Dodd-Frank Act is named as 'Financial Stability',[115] with the establishment of the FSOC to monitor the overall financial stability in the US.[116] In relation to Title II Orderly Liquidation Authority, which regulates resolution process in the US, section 204 states that the purpose of the Orderly Liquidation Authority (OLA) is 'to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.'[117] Additional purposes include: (a) 'creditors and shareholders will bear the losses of the financial company'; (b) 'management responsible for the condition of the financial company will not be retained'; and (c) 'the [Federal Deposit Insurance Corporation (FDIC)] and other appropriate agencies will take all steps necessary and appropriate to assure that all parties, including management,

112 Article 31(2) BRRD.
113 Article 14(2) SRMR.
114 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173.
115 12 US Code §5311 et seq.
116 12 US Code §5321 et seq.
117 12 US Code §5384(a).

directors, and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility'.[118]

In China, the current legal regime lacks specific resolution laws. The existing legislation is only about the assumption of control proceedings that can be taken when a bank is in a credit crisis and seriously jeopardises the interests of depositors and other clients.[119] However, a new bank resolution regulation is in the legislative process, and it is expected that the new regulation would follow the FSB's Key Attributes and pursue similar resolution objectives.[120] In addition, the Deposit Insurance Regulation (DIR) in 2015, which closely relates to resolution, also states in the first Article that the purpose of the DIR includes preventing and resolving finance risks and maintaining financial stability.[121] Most recently, the SIFI Guiding Opinions list the resolution objectives, including ensuring a safe, swift and effective resolution, preserving critical businesses and services, and avoiding too-big-to-fail risks.[122] Notably, the SIFI Guiding Opinions emphasise that central banks can only act as lender of last resort, and bail-in and recourse to industry resolution funding should be in a priority position.[123]

As a brief summary, all these jurisdictions acknowledge the importance of resolution, and particularly, its role in preserving financial stability, including safeguarding critical functions; also, these jurisdictions intend to minimise recourse to bailout and to make shareholders and creditors absorb the losses first.

7.3.1.2 Resolution assessment

In the EU, three conditions have to be met in order to take a resolution action:

> (a) the determination that the institution is failing or is likely to fail has been made by the competent authority, after consulting the resolution authority or; subject to the conditions laid down in paragraph 2, by the resolution authority after consulting the competent authority;
> (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the

118 Ibid.
119 Article 64 CBL; Article 38 RSBIL.
120 CBRC, Responses to the Fifth Meeting of the Twelfth NPC Recommendation No 2691 (《对十二届全国人大五次会议第2691号建议答复的函》), Yin Jian Shen Han [2017] No 105.
121 Article 1 DIR.
122 Article 3(2) SIFI Guiding Opinions.
123 Article 29 SIFI Guiding Opinions.

> write down or conversion of relevant capital instruments in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;
> (c) a resolution action is necessary in the public interest pursuant to paragraph 5.[124]

In sum, in order to put an institution into resolution, (i) the institution has to be failing or likely to fail; (2) there is no alternative solution to prevent the failure; and (3) resolution has to be in the public interest. The third criterion – the public interest test – is further explained in the same provision that

> a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.[125]

In addition, another resolution objective – continuity of critical functions – is also correlated with financial stability consideration. 'Critical functions' is defined as

> activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations.[126]

Drawn from this definition, critical functions reflect the requirements of financial stability. In other words, discontinuity of a financial institution's critical functions may lead to negative effect on the overall financial stability.

The European Banking Authority (EBA) published Guidelines on factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of business tool under Article 39 (4) of Directive 2015/59/EU, which identifies several circumstances where financial stability is at risk, such as the risk of systemic crisis based on the number, size or significance of institutions, or the risk

124 Article 32(1) BRRD; see also Article 18(1) SRMR.
125 Article 32(5) BRRD; see also Article 18(2) SRMR.
126 Article (2)(1)(35) BRRD.

of discontinuance of critical functions.[127] This document is not direct guidance for resolution assessment, although it does help clarify what financial stability is.

The SRMR further elaborates the meaning of 'significant adverse consequence for the financial system' or 'threat to financial stability', which refers to 'a situation where the financial system is actually or potentially exposed to a disruption that may give rise to financial distress liable to jeopardise the orderly functioning, efficiency and integrity of the internal market or the economy or the financial system of one or more Member States'.[128] The Single Resolution Board (SRB) published a guiding document on public interest assessment in 2019.[129] This document built on the cases decided by the SRB before, namely, Banco Popular, Banca Popolare di Vicenza and Veneto Banca, and ABLV Group.[130]

Among the four banks which were all determined to be 'failing or likely to fail' and there were no alternative measures to prevent bank failures, only Banco Popular was put into resolution because the resolution was determined to be in the public interest.[131] The public interest test took several steps. The SRB determined that Banco Popular had critical functions including deposit taking, lending to SMEs, and payment and cash services. [132] In addition, resolution could 'avoid significant adverse effects on financial stability' based on the considerations like the size and relevance of the institution – for example, if it is classified as a significant institution of a systemic nature, and the nature of the business, basic financial services provided to individuals and companies as well as potential contagion effects on other banks.[133]

127 EBA, Guidelines on factual circumstances amounting to a material threat to financial stability and on the elements related to the effectiveness of the sale of business tool under Article 39(4) of Directive 2014/59/EU, EBA/GL/2015/04 (7 August 2015).

128 Article 10(5) SRMR.

129 SRB, 'SRB Publishes Paper on Public Interest Assessment' (3 July 2019) <https://srb.europa.eu/en/node/799> accessed 25 February 2020.

130 The information is accessible on the SRB website. See SRB, 'Resolution Cases' <https://srb.europa.eu/en/content/resolution-cases> accessed 25 February 2020.

131 SRB, 'Banco Popular' <https://srb.europa.eu/en/content/banco-popular> accessed 25 February 2020.

132 Decision of the Single Resolution Board in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (the "Institutions") with a Legal Entity Identifier: 80H66LPTVDLM0P28XF25, Addressed to FROB (SRB/EES/2017/08), Title 1 (Placing the Institution under Resolution and Conditions for Resolution) Article 4 (Public Interest).

133 Ibid.

By contrast, the SRB decided that resolution was not warranted for Banca Popolare di Vicenza and Veneto Banca, which were later placed under normal insolvency proceedings.[134] For Banca Popolare di Vicenza, the SRB deemed that the bank did not provide critical functions.[135] Also, the failure of the bank was not considered to 'result in significant adverse effects on financial stability in Italy' on the basis of its relatively small business size, low financial and operational interconnections with other financial institutions as well as its regional, but not national, impact on retail customers and SMEs.[136] In particular, when taking into account the simultaneous failure of Veneto Banca, the SRB further examined the potential effects and concluded that the impact on financial stability would not be significant as a result of low contagion risk, state funding and limited impact on the economy.[137] Similarly, the SRB made the decision that Veneto Banca would not enter into resolution proceedings on the basis of its non-critical function provided to the financial market and the unlikely adverse effect on financial stability given its small size and complexity and low interconnectedness to other financial institutions.[138] For the ABLV Group, including banks in Latvia and Luxembourg, the SRB also found that the banks did not provide critical functions, and their failure would not have a significant adverse impact on financial stability.[139]

Based on these cases, although there is no direct guidance on what should be considered when determining the financial stability status, several factors can be generalised in such determination: size, complexity, interconnectedness with other institutions, financial services provided in relation to deposit-taking, lending and payment and cash services, potential contagion effects and potential areas and number of clients affected, etc. All these factors are correlated and need to be assessed in a holistic way. Only massive disruption to the whole financial system can be deemed as having 'adverse effect on financial stability'.

---

134 SRB, 'Banca Popolare di Vicenza and Veneto Banca' <https://srb.europa.eu/en/content/banca-popolare-di-vicenza-veneto-banca> accessed 25 February 2020.

135 Decision of the Single Resolution Board in its Executive Session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A. (the "Institutions"), with the Legal Entity Identifier V3AFM0G2D3A6E-0QWDG59, addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/12) Article 4 (Public Interest).

136 Ibid.

137 Ibid.

138 Decision of the Single Resolution Board in its Executive Session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A (the "Institutions"), with the Legal Entity Identifier 549300W9STRUCJ2DLU64, addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/11) Article 4 (Public Interest).

139 Decision of the Single Resolution Board of 23 February 2019 concerning the assessment of the conditions for resolution in respect of ABLV Bank, AS (SRB/EES/2018/09); Decision of the Single Resolution Board of 23 February 2018 concerning the assessment of the conditions for resolution in respect of ABLV Bank Luxembourg S.A (SRB/EES/2018/10).

In the US, a similar pre-condition test, the so-called 'systemic risk determination', exists, which must be applied in order to commence a resolution proceeding.[140] The Secretary of the Treasury, in consultation with the President, shall take action on the basis of 'systemic risk determination' prescribed in Section 203 of the Dodd-Frank Act:

> (1) the financial company is in default or in danger of default;
> (2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability;
> (3) no viable private sector alternative is available to prevent the default of the financial company;
> (4) any effect on the claims or interest of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this title is appropriate, given the impact that any action take under this title would have on financial stability in the United States;
> (5) any action under section 5384 of this title would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company;
> (6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and
> (7) the company satisfies the definition of a financial company under section 5381.[141]

The US adopts a similar test to the three-steps test in the BRRD and SRMR,[142] namely, (i) failing or likely to fail, (ii) no alternative option, and (iii) public interest test, only with the exception that the US law requires that convertible debt instruments must be converted first before the commencement of resolution.

Prior to the decision of the Secretary, the FDIC and the Federal Reserve Board (FRB) shall make a written recommendation to the Secretary, which should take into acount similar considerations as thosed mentioned above should be taken into account. [143] After the determination by the Secretary, written notice of recommendations and determinations should be submitted, no later than 24 hours, to 'the Majority Leader and Minority Leader of the Senate, the Speaker and the Minority Leader of the House of Representatives, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives'.[144] The written notice 'shall consist of a summary of the basis for

140 12 US Code §5383.
141 12 US Code §5383(b).
142 Text to n 124.
143 12 US Code §5383(a).
144 12 US Code §5383(c)(2).

the determination', including: (A) 'the size and financial condition of the covered financial company'; (B) 'the sources of capital and credit support that were available to the covered financial company'; (C) 'the operations of the covered financial company that could have had a significant impact on financial stability, markets, or both'; (D) 'identification of the banks and financial companies which may be able to provide the services offered by the covered financial company'; (E) 'any potential international ramifications of resolution of the covered financial company under other applicable insolvency law'; (F) 'an estimate of the potential effect of the resolution of the covered financial company under other applicable insolvency law on the financial stability of the United States'; (G) 'the potential effect of the appointment of a receiver by the Secretary on consumers'; (H) 'the potential effect of the appointment of a receiver by the Secretary on the financial system, financial markets, and banks and other financial companies'; and (I) 'whether resolution of the covered financial company under other applicable insolvency law would cause banks or other financial companies to experience severe liquidity distress'.[145]

Section 203 on systemic risk determination does not provide further detailed analysis of what constitutes a systemic risk.[146] Other provisions in the same Act may help in understanding the meaning of this term. For example, when the FSOC decides that a nonbank financial company is of systemic risk and thus subject to FRB's prudential supervision, it should consider that 'material financial distress … or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the [company] could pose a threat to the financial stability of the United States'.[147] In addition, the FSOC 'may provide for more stringent regulation of a financial activity', taking into consideration 'the conduct, scope, nature, size, scale, concentration, or interconnectedness of such activity or practice'.[148] These specific factors may help determine the financial stability status of an institution or the potential effect that may be the result from a resolution proceeding.

In sum, both the EU and the US have a similar test as a pre-condition for resolution, and only massive disruption to the whole financial system can be deemed as a necessary criterion for entering into a resolution action. Although neither of the jurisdictions provides a concrete financial stability/public interest test, it can be inferred that several factors need to be considered, including size, scale, complexity, nature, interconnectedness, etc. Only when the potential impact exceeds a certain level can the authority determine that financial stability is at stake. Given that China does not have

145 12 US Code §5383(c)(2).
146 12 US Code §5383.
147 12 US Code §5323(a)(1) and (b)(1).
148 12 US Code §5330(a).

a comprehensive resolution law, at least for now, there is no concrete resolution assessment under Chinese law, only with an abstract provision that resolution takes place when a financial institution is at significant risk.[149]

7.3.2 Foreign interest consideration in cross-border cases

As mentioned above, the current international financial organisations cannot impose hard-law international legal obligations on a resolution authority to duly take into account foreign interests. This is an issue that purely relies on national laws. This section continues to study each jurisdiction's national laws with regard to foreign interests and foreign financial stability when making resolution decisions.

The EU legal framework is quite complicated because of the dual EU/Member State relationship. The intra-EU relationship can be divided into three different levels. First, the Union resolution authority, the SRB, should consider the financial stability of the Member States when making decisions.[150] Second, the national resolution authority needs to take into consideration the financial stability of the Union as a whole.[151] Third, the national resolution authority needs to consider the financial stability of the other Member States. For instance, in the group resolution, group-level authority should take into account the financial stability of the other Member States concerned,[152] and the dissenting Member State departing from the group resolution plan should duly consider the financial stability in the other Member States.[153] Although financial stability in the EU has supranational dimensions, the BRRD and SRMR only regulate the inter-Member States relationship and Member State-Union relationship. In other words, outside the EU when third countries like the US and China are involved, there is no legal obligation or legal liability for either the Union or the national (Member State) authorities to duly consider the financial stability of third countries.

In the US, financial stability is a major concern for US resolution authorities, but only limited to the territory of the United States. The purpose of the OLA is clearly stated as that it only addresses the significant risk to 'the financial stability of the United States'.[154] The systemic risk determination prescribed in Section 203 of the Dodd-Frank Act also makes this point

149 Article 29 SIFI Guiding Opinions.
150 Recitals (39) and (55); Article 6(3) SRMR.
151 Effective resolution is considered to be an essential element of completing the internal market, and Member States are required to contribute to the financial stability of the whole Union financial market. Recital (108) BRRD.
152 Recitals (97) (132) BRRD; Articles 87(e) -(g) and (k), 88(5)(e) and 92(2)(b) BRRD.
153 Recitals (99), Articles 91(8) and 92(4) BRRD.
154 See text to n 117.

clear,[155] that is, among the conditions the Secretary must consider, the financial stability test appearing in conditions (2) and (4) is limited to 'financial stability in the United States'.[156]

Another scenario relates to funding in resolution. When the FDIC deems necessary, it can make available of resolution funds, subject to the conditions listed in Section 206 of the Dodd-Frank Act,[157] which reads that the FDIC shall (i) 'determine that such action is necessary for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company'; (ii) 'ensure that the shareholders of a covered financial company do not receive payment until after all other claims and the Fund are fully paid'; (iii) ensure that unsecured creditors bear losses in accordance with the priority of claim provisions in section 5390 of this title'; (iv) 'ensure that management responsible for the failed condition of the covered financial company is removed (if such management has not already been removed at the time at which the Corporation is appointed receiver)'; (v) 'ensure that the members of the board of directors (or body performing similar functions) responsible for the failed condition of the covered financial company are removed, if such members have not already been removed at the time the Corporation is appointed as receiver'; and (vi) 'not take an equity interest in or become a shareholder of any covered financial company or any covered subsidiary'.[158] As can be seen, condition (i) makes it explicit that the consideration of financial stability is limited to that of the US but not foreign jurisdictions, and the intention of providing government funding is only to protect US interests.

Among the duties and powers of the FDIC as receiver, two provisions relate to international cooperation. For one, the FDIC should 'coordinate, to the maximum extent possible, with the appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations in a country other than the United States'.[159] For another, the FDIC may request assistance from foreign financial authorities and provide assistance to foreign financial authorities, or 'maintain an office to coordinate foreign investigations or investigations on behalf of foreign financial authorities'.[160] The wording, however, does not show any intent of the legislators to impose legal responsibilities on the FDIC to duly consider foreign interests when making resolution decisions, let alone foreign financial stability.

155 See text to n 141.
156 12 US Code §5383(b)(2) and (4).
157 12 US Code §5384(d).
158 12 US Code §5386.
159 12 US Code §5390(a)(1)(N).
160 12 US Code §5390(k).

In China, when an assumption of control – the Chinese version of resolution – is taken, there is no mention of the stability of the Chinese market, let alone foreign financial stability.[161] The SIFI Guiding Opinions, nevertheless, mention maintaining financial stability and preserving critical functions, but only in the domestic context and without considering foreign interest. The latest DIR is presumed to focus solely on Chinese financial stability, as indicated by the scope of the Regulation, which is limited to covered financial institutions within the territory of China, excluding foreign branches of Chinese institutions and Chinese branches of foreign institutions.[162]

An interesting exception is the UK, where the resolution authority, the Bank of England (BOE), is required to 'have regard to … the potential effect … on the financial stability of third countries (particularly those third countries in which any member of that group is operating)'.[163] However, for other jurisdictions, no legal responsibility is imposed on home authorities to take into account host interests.

7.4 Comparison and evaluation

7.4.1 Why should financial stability be invoked as a reason not to recognise foreign resolution actions?

The FSB considers any adverse effect on local financial stability as one of the reasons not to recognise foreign resolution actions.[164] The FSB further enumerates several circumstances that can be considered as having adverse effect on local financial stability, such as 'the measure would affect the continuity of economic functions that are critical to the local financial system' or ' inconsistent with or undermine the implementation of local resolution actions undertaken or planned by the host authority'.[165] Similarly, the BRRD and SRMR make it explicit that recognition of third-country resolution actions cannot have adverse effect on EU financial stability.[166] In relation to the US and China, even if there is no specific mention of financial stability as a reason for refusal of recognition, there is the public policy exception embedded in the legislation.[167] This first question attempts to explore the rationale behind such a mechanism. The answer seems to be straightforward. A simple logic follows that the home authority does not need to take

161 See text to n 119.
162 Article 3 DIR.
163 S. 7A(2)(c) Banking Act 2009 (Effect on other group members, financial stability in EU etc). Kleftouri (n 84) 206.
164 FSB Principles, 12.
165 Ibid.
166 Article 95(a) BRRD; Article 33(3)(a) SRMR.
167 11 US CODE §1506; Article 5 EBL.

into account the host jurisdiction's interest, thus the host authority should be able to invoke the financial stability exception in a case where the host interest is at stake.

It is desirable in cross-border bank resolution that home authorities should have regard to foreign stability. The FSB also emphasised that '[w]here a resolution authority takes discretionary national action it should consider the impact on *financial stability in other jurisdictions*.'[168] However, as stated above, the present international financial regulation does not prescribe international financial stability obligations. This is because, simply put, for one thing, a comprehensive international financial regulation framework is missing, and there is no internatioanl financial organisation that conducts global financial governance. For another, the current international financial regulation is of a 'soft law' nature and cannot impose compulsory obligations on national authorities.

One may argue that even if there is no international obligation for national authorities to duly consider international financial stability, there is no legal obstacle to incorporate international financial stability into national laws. Jurisdictions can still choose to impose obligations to consider foreign interests. For example, as mentioned above, the UK legislation – the Banking Act 2009 duly considers financial stability of other jurisdictions, including the EU, the European Economic Area (EEA) and third countries. However, such an approach is not widely taken in other countries. Even the EU Member States, which are burdened with the obligation to consider the financial staiblity of other EU Member States, do not need to consider that of non-EU third-countries. Similarly, the US and China do not concern themselves about foreign jurisdictions. [169] From the legal liability perspective, national resolution authorities are only accountable to domestic constituencies, and they have no incentives to take into account foreign interests.

A few cases also demonstrated that in the times of crisis, national authorities would not consider foreign interests. A representative example is the insolvency of Lehman Brothers. In this process, the US authorities decided to put the global holding company (Lehman Brothers Holding Inc, LBH) under the Bankruptcy Code, leading to the follow-up crisis, including the failure of its subsidiary in the UK (Lehman Brothers International Europe, LBIE), although the US authorities did support the US broker-dealer subsidiary

168 FSB KA 7.2 (emphasis added).

169 US-China hegemony, see John Eatwell, Jean-Baptiste Gossé and Kern Alexander, 'Financial Markets and International Regulation' in John Eatwell, Terry McKinley and Pascal Petit (eds), *Challenges for Europe in the World, 2030* (Routledge). See also Schoenmaker (n 103) 213.

(Lehman Brothers Inc) before it was acquired by Barclays.[170] It is suspected that US authorities did not intend to save Lehman's businesses outside the US.

Another case is the failure of several Icelandic banks. In this process, only the deposits of local Icelandic depositors were transferred to a new bank and fully covered by state funding when the Icelandic national deposit insurance scheme was not sufficient; depositors in the UK and the Netherlands were not reimbursed by the Iceland government.[171] A case, *The European Free Trade Area (EFTA) Surveillance Authority v Iceland*, was later brought before the EFTA Court, and the court concurred with Iceland and maintained that Iceland did not have a legal obligation to pay to foreign depositors.[172] Similarly, in the process of resolving the Fortis Group, a financial conglomerate with presence in Belgium, the Netherlands and Luxembourg, national authorities took unilateral actions within national borders, including nationalisation measures, even though authorities in these three jurisdictions initially had a joint plan.[173] As the BCBS concluded, '[t]he Fortis case illustrates the tension between the cross-border nature of a group and the domestic focus of national frameworks and responsibilities for crisis management'.[174]

The above-mentioned financial trilemma and financial nationalism theories explain why authorities do not have incentives to consider foreign interests. And when the host jurisdiction is required to recognise foreign resolution actions and its own interest is not adequately protected, it seems reasonable that it should have the authority to refuse to recognise foreign resolution actions.

170 Paul Davies, 'Resolution of Cross-border Groups' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 263-264.

171 Regarding the Icelandic financial crisis, see, e.g. BCBS, 'Report and Recommendations of the Cross-border Bank Resolution Group' (March 2010) 12-14; Stijn Claessens and others, *A Safer World Financial System: Improving the Resolution of Systemic Institutions* (International Center for Monetary and Banking Studies 2010) 51-53; IMF, 'Cross-border Bank Resolution: Recent Developments' (June 2014) 30-31.

172 Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013, paras 117-185.

173 See, e.g. BCBS (n 171) 10-11; Claessens and others (n 171) 49-50; IMF (n 171) 27-29; Matthias Haentjens, Lynette Janssen and Bob Wessels, *New Bank Insolvency Law for China and Europe Volume 2: European Union* (Matthias Haentjens, Qingjiang Kong and Bob Wessels eds, Eleven International Publishing 2017) 156.

174 BCBS, ibid, 11.

7.4.2 How should local financial stability (and local critical functions) be interpreted?

The next question examines the method used to interpret financial stability, as well as critical functions. As shown in §7.2.1.1, financial stability is a complex term without a consensus definition. The analysis is usually conducted on a case-by-case analysis. Bornemann pointed out that any guideline for identifying circumstances where financial stability is at risk should be supplemented by a 'broad, open and unspecific catch-all provision' in preparation for various situations and possibly unprecedented cases.[175] Given the complexity in interpreting financial stability, this section only proposes a general principle that should be applied: a narrow interpretation method.

There are three reasons. First, the financial stability exception falls under the public policy exception, which should be narrowly interpreted under international insolvency law. Article 6 of the Model Law on Cross-border Insolvency (MLCBI) states that '[n]othing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State'.[176] The MLCBI Guide further explains that 'the public policy exception is construed as being restricted to fundamental principles of law, in particular, constitutional guarantees', and it 'should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State'.[177] This narrow interpretation has been applied across the world.[178]

The selected jurisdictions all accept that the public policy exception can only be invoked under exceptional circumstances. For example, in the EU, Article 33 of the European Insolvency Regulation (EIR) prescribes the public policy exception.[179] The Virgós-Schmit Report explains that '[p]ublic policy operates as a general clause as regards recognition and enforcement, covering fundamental principles of both substance and procedure.'[180] The *Eurofood* case extensively analysed the application of this Article, and stated that recourse to the public policy exception should be 'reserved for exceptional cases', only when recognition and enforcement 'would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle'.[181]

---

175 Alexander Bornemann, 'Resolution Regimes for Financial Institutions and the Rule of Law' in Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution A Conference Book* (Eleven International Publishing 2014), 100.

176 Article 6 MLCBI.

177 MLCBI, paras 102 and 104.

178 See H.R.Rep. No. 109-31, at 109 (2005), as *reprinted in* 2005 U.S.C.C.A.N. 88, 172.

179 Article 33 EIR 2015 Recast. Also Article 26 EIR 2000.

180 Virgós-Schmit Report, para 206.

181 Judgment of 2 May 2006, *Eurofood IFSC Ltd*, C-341/04 EU:C:2006:281, paras 62-63.

In the US, after the adoption the MLCBI in its Bankruptcy Code Chapter 15, the narrow interpretation method advocated was acknowledged and confirmed in various cases.[182] The *Qimonda* case extensively analyses the application of this public policy exception and generalises three principles: (1) '[t]he mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception'; (2) '[d]eference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections'; (3) [a]n action should not be taken in Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding'.[183]

In China, recognition could be refused based on 'sovereignty and security of the State or public interest', and 'the legitimate rights and interests of the creditors'.[184] These are believed to be the Chinese version of the illustration of the public policy exception.[185] However, no case can indicate Chinese courts' attitude towards the interpretation of public policy in international insolvency cases, as the request is often denied as a result of lack of international agreement or reciprocity. In a broader area of recognition of foreign civil and commercial judgements, no case was found that refused a

182 See, e.g., *In re* Tri-Cont'l Exch. Ltd. 349 B.R. 627 (Bankr. E.D. Cal. 2006); *In re* Ran, 607 F.3d 1017 (5th Cir. 2010); *In re* British American Isle of Venice (BVI), Ltd., 441 B.R. 317 (Bankr. S.D. Fla. 2010); *In re* Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88 (S.D. N.Y. 2012); *In re Vitro SAB de CV*, 701 F.3d 1031 (5th Cir. 2012); *In re* Irish Bank Resolution Corporation Ltd., 538 B.R. 692 (D. Del. 2015); *In re* Petroforte Brasileiro de Petroleo Ltda., 542 B.R. 899 (Bankr. S.D. Fla. 2015); *In re* Creative Finance Ltd., 543 B.R. 498 (Bankr. S.D. N.Y. 2016); *In re* Oi Brasil Holdings Coöperatief U.A., 578 B.R. 169 (Bankr. S.D. N.Y. 2017). For literature, see, e.g. Scott C Mund, '11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 Wisconsin International Law Journal 325; Elizabeth Buckel, 'Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 Georgetown Journal of International Law 1281; Michael A Garza, 'When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy' (2015) 38 Fordham International Law Journal 1587.

183 *In re* Qimonda AG, 433 B.R. 547 (E.D.Va. 2010), 570. Regarding the first principle, see also, e.g. *In re* British American Isle of Venice (BVI), Ltd., 441 B.R. 317 (Bankr.S.D.Fla. 2010); *In re* Qimonda AG, 462 B.R. 165 (Bankr.E.D.Va. 2011); *In re* Rede Energia S.A., 515 B.R. 69 (Bankr.S.D.N.Y. 2014). Regarding the second and third principle, see also, e.g., *In re* Qimonda AG, 462 B.R. 165 (Bankr.E.D.Va. 2011); *In re* ABC Learning Ctrs., 728 F.3d (3d Cir. 2013); *In re* Ashapura Minechem Ltd., 480 B.R. 129 (S.D.N.Y. 2012); *In re* Manley Toys Limited, 580 B.R. 632 (Bankr.D.N.J. 2018).

184 Article 5 EBL.

185 See, e.g. X Gong, 'A Balanced Way for China's Inter-Regional Cross-Border Insolvency Cooperation' (Leiden University 2016).

recognition request by invoking public policy as of March 2018.[186] However, the academic community generally confirms that public policy should be narrowly applied only in exceptional cases.[187]

Second, various researchers show that a global resolution is needed to achieve the optimal goal of maintaining financial stability.[188] Therefore, resolution actions should be effective across borders, and host authorities should recognise home resolution actions. In this context, financial stability should not be an obstacle to a global resolution strategy, at least financial stability should not be interpreted in a way of impeding the implementation of global resolution. Local financial stability, including local critical functions, in host jurisdictions, should be interpreted narrowly. This corresponds to the second layer of the FSB's requirement, as explained in §7.2.2.2, that host authorities should take into account foreign stability and uphold a global resolution.

Some might ask, why, since home authorities do not consider host interests, should host authorities consider home interests? There are three different perspectives. For one, a home jurisdiction's law that does not impose legal obligations for home authorities to take into account foreign interests does not mean that home authorities are prohibited from doing so, and there is no legal liablity for home authorities when they also protect host interests unless such actions infringe home jurisdictions' domestic interests. It is still possible that a home authority does consider host interests, and host stability is protected by home resolution actions. Under this circumstance, host authorities do not need to invoke public policy exceptions. In other words, public policy exceptions do not need to be invoked whenever host interests are missing in the home jurisdictions' black-letter laws.

186 Li Liu, 'The Reason and Rule for Recognition and Enforcement of Court Judgments among the 'One Belt and One Road' Countries "一带一路"国家间法院判决承认与执行的理据与规则' (2018) Journal of Law Application 40, 45.

187 See, e.g. Xiaoli Gao, 'On the Application of Public Policy in Private International Law 论国际私法上的公共政策之运用' (University of International Business and Economics 2005); Decai Ma, 'A Study of the Order Public in Private International Law 国际私法中的公共秩序研究' (Wuhan University 2010); Dan Ye, *On the Public Policy in Chinese Foreign Judicial Practice Relating to Civil and Commercial Matters* (Law Press 2012).

188 See Chapter 6 at §6.2.3.1. See, e.g. Thomas F Huertas, 'Safe to Fail' (2013) Special Paper 221 LSE Financial Markets Group Special Paper Series; Simon Gleeson, 'The Importance of Group Resolution' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Charles Randell, 'Group Resolution under the EU Resolution Directive' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive: Europe's Solution for "Too Big To Fail"?* (Walter de Gruyter 2013); Thomas F Huertas, 'Safe to Fail' in *Safe to Fail* (Palgrave Macmillan 2014).

For another, the new resolution regime has the unintended external effects of protecting foreign host stability, and the need to invoke the host stability exception to protect host interest is minimised. In the traditional corporate insolvency law proceedings, national authorities intend to take unilateral actions for the maximisation of debtors' assets within national borders; while in the traditional bail-out cases, national authorities intend to take unilateral actions for the minimisation of government spending.[189] Under the new resolution regime, however, losses are borne by shareholders and creditors first, instead of by recourse to taxpayers' money, and resolution authorities would have fewer political costs of putting forward a global resolution strategy.[190] The loss absorption at the parent level would benefit both home and host entities, even if home authorities do not have incentives to protect host entities, and the maintenance of host financial systems is only a manifest of (unintended) externalities of home resolution actions.[191] In other words, host financial stability may also be preserved despite the lack of incentives of home authorities in resolution, which helps reinforce the argument that the financial stability exception should be limited.

Last but not least, the intentions and actions of home resolution authorities should not affect the will and action of host resolution authorities. Even though home resolution authorities may have no incentives to protect host interests, it does not mean that host resolution authorities should take retaliatory actions to actively hamper a global resolution. Narrow interpretation does not equal to prohibition. Local interest can always be protected by invoking public policy exceptions where the interest would otherwise be severely undermined.

The narrow interpretation of financial stability also exists in the public interest test when authorities are deciding to put a bank under resolution. This is the third argument that financial stability should apply a narrow interpretation, and only when massive disruption to the whole financial system occurs. As confirmed in §7.3.1.2, the public interest test is required in the EU and US resolution decisions, and resolution decisions only take effect when massive disruption to the financial system is threatened, namely, public interest is at stake.[192] Following a consistent interpretation method, invoking financial stability to refuse to recognise foreign resolution actions can only occur when massive disruption to the financial system is at risk. This also reflects the narrow interpretation principle.

---

189 Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 492-493. See also below §7.4.3.1.

190 Lupo-Pasini (n 108) 109-111. See also Lupo-Pasini and Buckley (n 98). Lupo-Pasini also acknowledges that other problems may exist in cross-border bail-in, for example, incoherence with national insolvency law. These problems are discussed in Chapter 8.

191 Ibid.

192 See §7.3.1.2.

A specific example concerns safe harbour provisions, which allow financial counterparties to exercise early termination rights in normal company insolvency proceedings.[193] The rationale behind such a mechanism is that, without legitimate tools to exercise early termination rights, financial counterparties are vulnerable to financial risks, which may lead to larger contagious effects on markets.[194] However, in the new resolution regime, financial counterparties are also restricted to early termination rights, namely, disapplying safe harbour provisions.[195] A hypothetical scenario is: if a home resolution authority adopts actions to restrict early termination rights, can a host authority refuse to recognise home actions on the mere basis that such action is contradictory to safe harbour provisions and thus jeopardises host financial stability, provided safe harbour provisions are available in the host law? Following the reasons listed above, this dissertation proposes that the financial stability exception should not be invoked simply because of the legal text differences; instead, a detailed analysis for the impact on the host jurisdiction should be conducted. An additional argument is provided in this specific situation: the GFC led to questions about the financial stability objective of safe harbour provisions, and new observation showed that massive termination of financial contracts disrupts an orderly resolution of a bank and can adversely destabilise the market.[196] Restrictions of safe harbour provisions, along with other resolution actions, are for the purpose of financial stability, and it would be absurd to invoke the financial stability exception to undermine a stability-oriented resolution action.

7.4.3 How should national fiscal policies be evaluated?

Both the FSB and the EU list material fiscal policies as a reason to refuse to recognise foreign resolution actions.[197] What are national fiscal policies? As Kleftouri identified, '[t]he fiscal impact and systemic implications will potentially be caused by the need to use public funds in the form of the resolution and deposit guarantee funds, and even as a backstop for those funds.'[198] This dissertation refers to national fiscal policies as government spending. This section discusses two scenarios: national bail-out and funding in resolution.

193 See, for example, sections 362, 365(e) and 547 of the US Bankruptcy Code. See Chapter 4 n 87 to n 89.

194 For literature, see Chapter 2 n 103.

195 For example, in the EU, Articles 69-71 BRRD; in the US, Dodd-Frank Act, 12 US Code §5390(c)(10)(B)(i), also 12 US Code §1821(e)(10)(B)(i). See also Chapter 8, §8.4.2.3.

196 See Chapter 2, text to n 105 to n 108.

197 FSB Principles, 12. Article 95(d) BRRD; Article 33(3)(c) SRMR.

198 Kleftouri (n 84) 268.

7.4.3.1 National bail-out

A premise is first clarified: national bailout is not entirely prohibited in resolution. Although the previous illustrations demonstrate that the new resolution regime intends to minimise the usage of taxpayers' money and attempts to resolve the moral hazard problem, the FSB acknowledges the legitimacy of using temporary public ownership by the government,[199] commonly known as nationalisation, or in industry-jargon, 'bail-out', which was a frequently applied tool during the period where no resolution powers were in place.[200] In the EU, for example, there are two government financial stabilisation tools:[201] (i) public equity support tool;[202] and (ii) temporary public ownership tool.[203] As the relevant BRRD provision says: 'The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability'. [204] To be more specific, the public equity support tool enables a Member State to participate in the recapitalisation by providing capital in exchange for capital instruments.[205] The temporary public ownership tool empowers a Member State to transfer shares to 'a nominee of the Member State' or 'a company wholly owned by the Member State'.[206] By comparison, the US Dodd-Frank prohibits the FDIC to take an equity interest in or become a shareholder of a failing bank.[207] In China, given most Chinese banks are state-owned, national bail-out in the form of equity holding is not a controversial issue.

In cross-border cases, national authorities prefer a territorial approach in national bail-out. Home authorities generally lack incentives to cooperate with host authorities, given that they are only accountable for their domestic financial stability.[208] A typical example is the resolution of an Icelandic bank – Landsbanki. As mentioned above, in this process, only the deposits of local Icelandic depositors were transferred to a new bank and fully covered by state funding when the Icelandic national deposit insurance scheme was not sufficient; depositors in the UK and the Netherlands

199 KA 6.5.
200 See, e.g. Čihák and Nier (n 94).
201 Article 56 BRRD.
202 Article 57 BRRD.
203 Article 58 BRRD.
204 Article 56(3) BRRD.
205 Article 57(1) BRRD.
206 Article 58(2) BRRD.
207 12 US Code §5386(6).
208 See, e.g. Zdenek Kudrna, 'Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual' (2012) 50 Journal of Common Market Studies 283, 283-299; Schoenmaker, *Governance of International Banking: The Financial Trilemma* (n 101) 27-33; Lupo-Pasini (n 108) 105-108.

were not reimbursed by the Iceland government.[209] In the dispute *EFTA Surveillance Authority v Iceland*,[210] the EFTA court ruled that Iceland did not have a legal obligation to repay foreign depositors.[211] Iceland submitted that 'the domestic branches of Landsbanki were essential to the rescue of the Icelandic financial system',[212] and 'any difference in treatment between the two groups would be objectively justified'.[213] Iceland emphasised that '[a]lthough pure economic aims cannot constitute a sufficient justification, clear public interest objectives may constitute a legitimate aim even where that public interest has economic ends'.[214] In other words, Iceland believed, which the court agreed, that only providing domestic depositors with state funding was justified by the aim of preserving Iceland's financial stability.

However, national bail-out usually does not lead to recognition issues, given that there is no action imposed on host entities. No additional recognition is needed.

7.4.3.2 Funding in resolution

One of the conditions of recourse to national bail-out is that other funding channels have been exhausted. The first funding strategy is bail-in, which requires shareholders and creditors to absorb the losses, namely, internal funding. A second strategy is industry funding, which is a privately-collected source of funding contributed by financial industries. The Key Attributes state that recourse to this type of funding is limited to the purposes of maintaining essential functions necessary to achieve an orderly resolution, including: (i) making up losses suffered by shareholders and unsecured creditors in resolution where the losses are larger than what they would have suffered in normal liquidation proceedings, and (ii) other necessary recovery purposes.[215] The sources of such funding can be from one or combination of the following: (i) 'a privately funded resolution fund'; (ii) 'a privately funded deposit protection scheme'; and (iii) 'a privately funded fund with combined deposit protection and resolution functions'.[216]

---

209 n 171.

210 Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013. See comments, e.g. Valia Babis, 'Abandoning Foreign Depositors in a Bank Failure? The EFTA Court Judgment in EFTA Surveillance Authority v. Iceland' (2013) 2 Global Markets Law Journal 1; M Elvira Méndez-Pinedo, 'The Icesave Saga: Iceland Wins Battle Before the EFTA Court' (2013) 1 MJIL Emerging Scholarship Project 101; Lupo-Pasini (n 108) 84-89.

211 Judgment of EFTA Court, *EFTA Surveillance Authority v Iceland*, E-16/11, 28 January 2013, paras 117-185.

212 Ibid, para 195.

213 Ibid, para 201.

214 Ibid.

215 FSB KA 6.2

216 FSB KA 6.3; KA EC 6.1(i)-(iii).

In the EU, the Single Resolution Fund (SFR) under the Single Resolution Mechanism (SRM) is raised at national level in accordance with agreements on the transfer and mutualisation of contributions to the SRF,[217] which can either be *ex ante* contributed by individual institutions, or by extraordinary *ex post* contributions when the funds are not sufficient.[218] The establishment of the SRF serves several objectives: (a) 'to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle'; (b) 'to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle'; (c) 'to purchase assets of the institution under resolution'; (d) 'to make contributions to a bridge institution and an asset management vehicle'; (e) 'to pay compensation to shareholders or creditors if … they have incurred greater losses that they would have incurred … in a winding up under normal insolvency proceedings'; (f) 'to make a contribution to the institution under resolution in lieu of the write-down or conversion of liabilities of certain creditors, when the bail-in tool is applied and the decision is made to exclude certain creditors from the scope of bail-in';[219] (g) 'to take any combination of the actions referred to in points (a) to (f)';[220] and additionally 'with respect to the purchaser in the context of the sale of business tool'.[221]

At the national level, EU Member States are also required to establish financing arrangements for the purpose of facilitating resolution.[222] These national financing arrangements can only be used for purposes similar to those of the SRF.[223] In particular, national deposit guarantee schemes (DGSs) can also be used for the purposes of covering losses that would have been borne by covered depositors without a DGS (i) should the deposits be written down by a bail-in tool, and (ii) should the depositors suffer losses because of other resolution tools.[224] National DGSs also apply in an SRB-led resolution case under the SRM.[225]

217 Articles 3(1)(36) and 67(1) SRMR.
218 Article 70 SRMR.
219 This action is subject to the condition that shareholders and creditors have to bear losses and costs first with the amount no less than 8% of the total liabilities; and SRF's contribution shall not exceed 5% of the total liabilities. Article 27(7) SRMR.
220 Article 76(1)(a)-(g) SRMR.
221 Article 76(2) SRMR.
222 Article 100 BRRD. For example, in the Netherlands, the National Resolution Fund (NRF) is established. See DNB, 'Resolution Funds' <https://www.dnb.nl/en/resolution/resolutiefonds/index.jsp> accessed 25 February 2020.
223 Article 101(1) BRRD.
224 Article 109 BRRD.
225 Article 79 SRMR.

In the US, there is the Orderly Liquidation Fund (OLF), which should be 'available to the Corporation to carry out the authorities …, for the cost of actions …, including the orderly liquidation of covered financial companies, payment of administrative expenses, the payment of principal and interest by the Corporation on obligations issued …, and the exercise of the authorities of the Corporation'.[226] Specifically, the fund should be used for (1) 'making loans to, or purchasing any debt obligation of, the covered financial company or any covered subsidiary'; (2) 'purchasing or guaranteeing against loss the assets of the covered financial company or any covered subsidiary, directly or through an entity established by the Corporation for such purpose'; (3) 'assuming or guaranteeing the obligations of the covered financial company or any covered subsidiary to 1 or more third parties'; (4) 'taking a lien on any or all assets of the covered financial company or any covered subsidiary, including a first priority lien on all unencumbered assets of the covered financial company or any covered subsidiary to secure repayment of any transactions conducted under this subsection, except that, if the covered financial company or covered subsidiary is an insurance company or a subsidiary of an insurance company, the Corporation (A) shall promptly notify the State insurance authority for the insurance company of the intention to take such lien; and (B) may only take such lien (i) to secure repayment of funds made available to such covered financial company or covered subsidiary; and (ii) if the Corporation determines, after consultation with the State insurance authority, that such lien will not unduly impede or delay the liquidation or rehabilitation of the insurance company, or the recovery by its policyholders'; (5) 'selling or transferring all, or any part, of such acquired assets, liabilities, or obligations of the covered financial company or any covered subsidiary'; and (6) 'making payments pursuant to subsections (b)(4), (d)(4), and (h)(5)(E) of section 5390 of this title'.[227]

In China, the SIFI Guiding Opinions confirmed the possibility of utilising 'industry funds' provision as a secondary step for liquidity support and assistance after exhausting the private funds of the failing institution.[228] However, no additional conditions are specified. One particular funding source might be the deposit insurance fund (DIF) established by the 2015 DIR. Accordingly, the DIF can be used to provide a guarantee, loss-sharing or capital support for qualified institutions, in order to facilitate the institutions to acquire or assume all or part of the business, assets and liabilities of an insured institution that is under the assumption of control, cancellation, or application for bankruptcy.[229] The use of DIF must obey the minimum cost principle.[230]

226 12 US Code §5390(n).
227 12 US Code §5384(d).
228 Article 29 SIFI Guiding Opinions.
229 Article 18 DIR.
230 Article 18 DIR.

The funding in resolution, similar to the analysis of bail-out in the previous section, is only intended to cover national losses and to maintain national financial stability. An example of showing such a territorial approach is the debate about establishing a European single deposit guarantee scheme as a third pillar of the Banking Union. The political obstacle of establishing such a European centralised fund is the concern that economic resilient Member States may have to pay for the consequences of riskier Member States actions.[231] A state has no incentives or obligations to care for other state's stability.

In a hypothetical situation, to enforce a foreign resolution action, host authorities might need to have recourse to resolution funding resources, for example, when a host branch is transferred to a bridge institution but home authorities do not cover the costs. In this circumstance, host authorities might refuse to recognise foreign resolution actions upon the invocation of the material fiscal policies exception. However, in line with the restricted interpretation of public policy exceptions, such exception should not be arbitrarily invoked. Also explained in §7.4.2, a successful resolution in the home jurisdiction has unintended positive external effects which also benefit host authorities. Even though the coverage of resolution funding does not extend to host authorities, resolution actions taken in home jurisdictions alone might be able to manage the risks. Therefore, host authorities should have fewer incentives to blockage the effects of home resolution actions.

7.5 Concluding remarks

To conclude, financial stability is a global policy goal, and resolution objectives require that both home and host authorities consider foreign financial stability. Home authorities, when deciding resolution actions, should take in to account host interests; host authorities, when deciding not to recognise home resolution actions, should consider the potential adverse impact on the home financial market. Yet, the current regime lacks a mandatory legal requirement for national authorities to consider foreign financial stability. There is the possibility that a host financial stability interest might be jeopardised because of the home resolution actions. Therefore, a cross-border recognition framework should allow the host authorities to refuse to recognise home resolution actions if they forecast the measures would cause massive disruption to the host financial system. However, in order to effectuate a global resolution strategy, a public policy exception should be narrowly interpreted. As a matter of fact, the new resolution regime has an unintended positive external effect of maintaining global financial stability even when home authorities do not intentionally consider this factor. This reduces the need to invoke public policies to protect local interests.

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