Recognition of foreign bank resolution actions

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Part IV

Conclusions

9 A Future Framework for Recognition of Foreign Resolution Actions

9.1 FSB standards and implementation in national law instruments

As introduced in Chapter 1, the Financial Stability Board (FSB) has been endeavouring to promote cross-border effectiveness of resolution actions. The FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes, or KAs) stipulate KA 7 on the establishment of a general framework for cross-border resolution, KA 8 on the establishment of crisis management groups (CMGs) and KA 9 on the formulation of institution-specific cooperation agreement (CoAgs). The FSB *Principles for Cross-border Effectiveness of Resolution Actions* specifically advocate recognition as a means to give effect to foreign resolution actions.

The FSB standards, as well as other international organisations' resolutions, are of the 'soft law' nature and do not have a binding effect. However, as explained in Chapter 7, soft law is the main form of international financial regulation. This is because soft law can provide flexibility in the implementation of international standards tailored to national practices and avoid lengthy treaty negotiation procedures. Although the FSB, as the successor of the Financial Stability Forum (FSF), is empowered with an expansionary mandate, namely 'a wider range of member commitments and strengthened peer review and external monitoring mechanism',[1] the soft law nature of FSB standards has not been changed. The FSB standards still have no binding effects on G20 jurisdictions.[2] The G20 jurisdictions have a delegated, wide range of discretion as to whether or not to implement FSB standards as well as how to implement FSB standards.

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1 Douglas W Arner and Michael W Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 UNSW Law Journal 488, 512. See also Stavros Gadinis, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2012) 48 Tex Int'l L J 157.

2 See, e.g. Jan Wouters and Jed Odermatt, 'Comparing the "Four Pillars" of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' (2014) 17 Journal of International Economic Law 49; Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension' (2017) 5 Penn St JL & Int'l Aff 302.

Jurisdictions usually have internal incentives to follow these international standards to pursue 'welfare objectives'.[3] As explained by Posner and Sykes, national authorities adopting the Basel Accord have the straightforward 'welfare objective' to 'limit undue risk taking by financial institutions and to ensure that banks remain capable of meeting their obligations to depositors'.[4] The same logic applies to FSB Key Attributes, given that the new resolution regime is supposed to resolve failing financial institutions while maintaining financial stability without the need for recourse to taxpayers' money, that is, bail-out. As introduced at the beginning of this dissertation, the incorporation of the FSB resolution regime is in steady progress in G20 jurisdictions, especially in global systemically important bank (G-SIB) home jurisdictions and key host jurisdictions.[5] For instance, the European Union (EU) adopted the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR), the United States (US) enacted Dodd-Frank, even China is in the process of drafting a new regulation and has published SIFI Guiding Opinions.

However, also identified by the FSB, establishing an effective cross-border resolution framework is slow. As explained by Posner and Sykes, '[i]nternational law is endogenous to the interests of the states rather than an exogenous force that compels states to act contrary to their interest'.[6] In other words, national authorities may not participate in international cooperation if it is not in their interests. In the context of international financial regulation, national authorities have more incentives to protect their own national financial system rather than the global financial system including the financial system in other jurisdictions.[7] Particularly in cross-border bank resolution, authorities would prefer to take unilateral actions, even when it may cause negative externalities to other jurisdictions and impede international resolution.[8]

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3 See Eric A Posner and Alan O Skyes, 'International Law and the Limits of Macroeconomic Cooperation' (2013) 86 Southern California Law Review 1025.

4 Posner and Skyes (n 3) 1037.

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

6 Ibid, 1027. See also Eric A Posner and Alan O Skyes, *Economic Foundations of International Law* (Belknap Press of Harvard University Press 2013) 12-15.

7 Lupo-Pasini extensively discusses the 'financial nationalism' phenomenon, see Federico Lupo-Pasini, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017).

8 Federico Lupo-Pasini, 'Financial Stability in International Law' (2017) 18 Melbourne Journal of International Law 45, 12; Yulia Makarova and others, *Bankers without Borders? Implications of Ring-fencing for European Cross-border Banks* (International Monetary Fund 2010); Federico Lupo-Pasini, 'Cross-border Banking' in *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law* (CUP 2017). *Cf* Thomas C Baxter Jr, Joyce M Hansen and Joseph H Sommer, 'Two Cheers for Territoriality: An Essay on International Bank Insolvency Law' (2004) 78 American Bankruptcy Law Journal 57.

A typical example is China, which still relies on a simple Article 5 of the Enterprise Bankruptcy Law (EBL) to resolve cross-border insolvency cases. The strict rules prescribed in Article 5, namely, international agreements or reciprocity, plus several public policy exceptions, make recognition of foreign insolvency/resolution actions extremely difficult. Previous cases show that Chinese authorities prefer to adopt a territorial approach to protect local interests.

Although some jurisdictions have shown intention to adopt international standards, the current international rules only prescribe general and vague principles without specific implementing details. This results in the insufficiency of national rules, for example, the EU resolution laws. Articles 94 to 96 BRRD regulate recognition of foreign resolution actions. The BRRD adopts an administrative recognition approach, which is quite advanced and adapted to the new administrative resolution regime. However, these provisions are overly simple. A variety of issues are left unaddressed, such as recognition of foreign representatives, or granting reliefs like moratorium.

Even a mature legal instrument – the United States Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (MLCBI), which is tailored to international insolvency, cannot adequately address cross-border bank resolution cases. This is the current situation in the US. Chapter 15 of the US Bankruptcy Code adopts the MLCBI but is not adequate to tackle cross-border bank resolution issues. A major issue is that Chapter 15 does not apply to foreign banks with branches or agencies in the US, thus these foreign banks do not fit into a proper recogntition regime. Also, most available reliefs under Chapter 15 are discretionarily decided by judges and may not cover resolution cases, which could impede the effectiveness of cross-border bank resolution.

Simply put, none of the selected jurisdictions has clear rules to address all issues for recognition of foreign resolution actions. There are two reasons. First, some jurisdictions may have no incentives to participate in international cooperation and thus do not design comprehensive rules. Second, some jurisdictions may have incentives for international cooperation but did not formulate adequate rules, as international standards are not specific enough to instruct national legislative bodies. To address the second concern, this dissertation proposes ten principles as a more detailed guidance, in response to ten questions raised in Chapters 6, 7 and 8: (i) there should be no reciprocity request; (ii) the jurisdictions should be identified as home and host jurisdictions, based on the supervisory model; (iii) a foreign resolution proceeding should be recognised as an ongoing process, with the effects of recognising foreign representatives and moratorium; (iv) a foreign resolution measure should be recognised with an immediate effect, through either direct enforcement or supportive measures; (v) financial stability

should be able to be invoked as a public policy exception; (vi) the interpretation of financial stability, including critical functions, should be conducted narrowly; (vii) material fiscal implications should also be able to be invoked as a public policy exception, but with a narrow interpretation; (viii) any discriminatory actions should be the reason for refusal of recognition; (ix) different national laws are not sufficient reasons for refusal of recognition; and (x) a choice of governing law should also not be the reason to refuse to recognise foreign resolution actions. These principles are supposed to be incorporated into national laws to be directly applicable in recognition of foreign resolution actions and are more extensively summarised in Chapter 10.

9.2 Choice of international instruments

National law instruments are used by national authorities unilaterally. To enhance international cooperation, international instruments are also needed. This section explains the roles of three international instruments: international agreements, model laws and customary international law. As a matter of fact, the ten principles can also be applied in these international instruments.

9.2.1 International agreements

The international instrument discussed first is international agreements. As a general principle of public international law, the binding force of international instruments derives from either the consent of the parties, or from meta-legal principles such as justice, equity, and fairness.[9] International agreements, such as conventions or treaties, establish 'rules expressly recognized by the contesting states' as a source of international law.[10] In other words, the binding force of international agreements traces back to the consent expressed by the contracting parties.[11]

In the field of private international law, there have been many endeavours to formulate international agreements to facilitate mutual recognition and enforcement of judgments. One of the typical examples is the Hague Conference on Private International Law (HCCH),[12] which formulated

9 Rüdiger Wolfrum, 'Sources of International Law' in *Max Planck Encyclopedia of Public International Law* (OUP 2011).

10 Article 38(1)(a) Statute of the International Court of Justice (United Nations [UN]) 33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevans 1179, 59 Stat 1055, 145 BSP 832, TS No 993 (ICJ Statue).

11 See Lassa Oppenheim, 'The Science of International Law - Its Task and Method' (1908) 2 American Journal of International Law 313.

12 See HCCH <https://www.hcch.net/en/home> accessed 25 February 2020.

the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971 Recognition and Enforcement Convention). This Convention only had five Contracting Parties[13] and did not achieve the expected outcome, because the Brussels Convention and Lugano Convention superseded the HCCH 1971 Convention within the European countries.[14] The HCCH continues to work on a 'Judgments Project' that aims to promote cross-border movement of judgments on a wider global level.[15] The first result of this project – the Hague Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention) – provides the legal basis for contracting parties in relation to recognition and enforcement when a choice of court agreements exists.[16] An additional Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention), with a wider applicable scope, was officially published in 2019.[17]

In the selected jurisdictions, bilateral agreements exist between China and several European countries. As mentioned in above in Chapter 5, as of September 2018, China has entered into legal assistance treaties with 76 countries, among which 19 treaties on legal assistance in civil and criminal matters are effective, and 18 out of 20 treaties on legal assistance in civil and commercial matters are effective.[18] There are 11 EU Member States that have entered into legal assistance agreements in civil or commercial matters with China, namely, Bulgaria, Belgium, Poland, France, Lithuania, Romania, Cyprus, Spain, Greece, Hungary and Italy.[19]

There is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.[20] It is explained that 'a principal stumbling

13 The contracting parties were Albania, Cyprus, Kuwait, the Netherlands, and Portugal. See HCCH, 'Status Table, 16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters' <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78> accessed 25 February 2020.

14 HCCH, 'Some Reflections of the Permanent Bureau on a General Convention of Enforcement of Judgments' (Prel. Doc. No 17 of May 1992 in Proceedings of the Seventeenth Session (1993), Vol I, 231).

15 HCCI, 'The Judgments Project' <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 25 February 2020.

16 Convention of 30 June 2005 on Choice of Court Agreements.

17 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters.

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

19 See Chapter 5 at §5.3.1.1.

20 Travel.State.Gov, 'Enforcement of Judgments' <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html> accessed 25 February 2020.

block appears to be the perception of many foreign states that U.S. money judgments are excessive according to their notions of liability'.[21] Therefore, the US does not rely on international agreements to recognise and enforce foreign judgments.

In the field of international insolvency law, bilateral and multilateral agreements have also been facilitating cross-border insolvency.[22] For example, conventions between the EU Member States played an important role in cross-Europe insolvency until the entering into force of the European Insolvency Regulation (EIR).[23] Additional international agreements include the Treaty of Montevideo 1889, Treaty of Montevideo 1940, Code Bustamante 1928, and the Nordic Bankruptcy Convention 1933.[24]

International agreements can form a binding instrument for mutual recognition of resolution actions between contracting parties. Article 93 BRRD explicitly acknowledges the role of international agreements as legal basis for giving effect to third-country resolution actions. Accordingly, the European Commission may 'submit to the Council proposals for the negotiation of agreements with one or more third countries regarding the means

21 Ibid.

22 See a general overview, Bob Wessels and Gert-Jan Boon, *Cross-Border Insolvency Law: International Instruments and Commentary* (2nd edn, Kluwer 2015).

23 Article 44 EIR 2000 (the EIR replaced: (a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899; (b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969; (c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925; (d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979; (e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979; (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930; (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977; (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962; (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934; (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933; (k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.) See also Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer 2015) paras 10060-10061.

24 Wessels (n 23) paras 10064 ff.

of cooperation between the resolution authorities and the relevant third country authorities'.[25] A particular advantage of international agreements is that they can regulate the actions of both home and host jurisdictions as contracting parties. One concern that has been raised in the previous chapters is that home authorities do not have legal obligations to duly consider host interests, so that host authorities may refuse to recognise home resolution actions for the purpose of protecting host interests. With a proper international agreement in place, both parties can agree in advance on how to take actions in a future resolution process and balance both parties' interests.

Currently, there is no international convention or treaty that specifically applies to cross-border resolution matters. In some jurisdictions, for instance, China, judgment recognition agreements can apply in cross-border resolution cases. As concluded in Chapter 5, there is no difference between the recognition of foreign judgments and recognition of foreign insolvency judgments. Thus, the above applicable international agreements between China and other European countries apply also, with the exception that the China-Spain agreement explicitly excludes recognition of judgments related to insolvency proceedings.[26] In fact, the very first case of China recognising a foreign judgment, that is in the *B&T Ceramic Groups s.r.l.* case, is one recognising a judgment related to insolvency proceedings.[27] The same should apply to cross-border bank resolution cases, given that resolution is categorised as one of the insolvency proceedings. However, in certain judgment recognition agreements, resolution is explicitly excluded from judgment recognition agreements. For example, the Judgments Convention explicitly excludes 'resolution of financial institutions' from the applicable scope.[28]

Some non-binding international agreements have been concluded, such as memorandums of understanding (MOU)[29] or cooperation agreements (CoAgs).[30] However, the non-binding nature means there is no legal obligation, nor any legal consequences, if a party decides to depart from the provi-

25 Article 93(1) BRRD.

26 Treaty on legal assistance in civil and commercial matters between the People's Republic of China and the Kingdom of Spain, signed on 2 May 1992, came into effect on 1 January 1994.

27 (2000) Fo Zhong Fa Jing Chu Zi No.663 Civil Decision.

28 Article 2(1)(e) Judgments Convention.

29 For example, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Resolution of Insured Depository Institutions with Cross-border Operations in the United States and the United Kingdom, signed on 10 January 2010 (FDIC-BOE Resolution MOU).

30 For example, Cooperation Arrangement Concerning the Resolution of Insured Depository Institutions and Certain other Financial Companies with Cross-border Operations in the United Stated and the European Banking Union, singed in September 2017 (FDIC-SRB Resolution CA).

sions agreed in arrangements.[31] Reaching these non-binding arrangements is easier than concluding hard-law international agreements. However, their effectiveness cannot be ensured. It seems to be a long process before any binding cross-border bank resolution agreements come into effect.

9.2.2 Model law (soft law)

A model law is a form of soft law that does not have binding effects on any international actors. However, a model law can provide national legislators with detailed guidance on how to formulate national rules. Two particular instruments in the field of international insolvency law are the MLCBI and the Model Law on Insolvency-related Judgments (MLJ) mentioned in Chapter 6.

The MLCBI was published in 1997 and, as of September 2019, has been adopted in 46 States in a total of 48 jurisdictions.[32] Its purpose is to 'assist States to equip their insolvency laws with a modern harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency'.[33] It is also confirmed that the MLCBI 'is a legislative text that is recommended to States for incorporation into their national law'.[34] And it has the advantage of flexibility, namely, 'a State may modify or leave out some of its provisions', although it is recommended that 'States make as few changes as possible in incorporating the Model Law into their legal systems' in order to 'achieve a satisfactory degree of harmonization and certainty'.[35] Many commentators find that the MLCBI contributes to more willingness in

31 Article 2(5) FDIC-BOE Resolution MOU; Section 2(6) FDIC-SRB Resolution CA. See also Shuai Guo, 'Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law' (2018) 27 Norton Journal of Bankruptcy Law and Practice 481, 500-501.

32 UNCITRAL, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 25 February 2020. See comments, e.g. Andre J Berends, 'The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview' (1998) 6 Tulane Journal of International and Comparative Law 309; Ronald J Silverman, 'Advances in Cross-border Insolvency Cooperation: the UNCITRAL Model Law on Cross-border Insolvency' (1999) 6 ILSA Journal of International & Comparative Law 265; Look Chan Ho, *Cross-border Insolvency: A Commentary on the UNCITRAL Model Law* (Global Law and Business 2017); Neil Hannan, *Cross-border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017).

33 MLCBI Guide, para 1.

34 Ibid, para 19.

35 Ibid, para 20.

international cooperation in cross-border insolvency cases.[36] However, some proposed additional reforms. For one thing, due to its limited contents and coverage, the MLCBI does not address all the problems, such as jurisdiction rule[37] or recognition of foreign insolvency-related judgments.[38] For another, as a result of its soft law nature, the MLCBI does not have binding effects on all the jurisdictions and therefore cannot ensure consistent incorporation in each jurisdiction. For example, some jurisdictions that have incorporated the MLCBI still apply the reciprocity test, such as South Africa, even though the MLCBI does not require reciprocity, which may impede recognition of foreign insolvency proceedings.[39]

Similarly, the new MLJ[40] aims to 'assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement … the MLCBI'.[41] Also, the new MLJ needs to be incorporated into national laws with sufficient flexibility for national legislators to take into account local legal systems.[42] In sum, soft law instruments, including the model law approach, have the above-mentioned

36 See, e.g. Jenny Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 Tulane Journal of International and Comparative Law 307; Bob Wessels, 'Will UNCITRAL Bring Changes To Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will' (2006) 3 International Corporate Rescue 200; Irit Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 European Business Organization Law Review 517; Jay L Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (2013) 87 American Bankruptcy Law Journal 247; Jenny Clift, 'UNCITRAL: Clarifying the Model Law: a senior legal officer at the UN explains recent developments in the pioneering framework on cross-border insolvency' (2016) International Financial Law Review (28 April 2016) <https://www.iflr.com/Article/3549923/Uncitral-Clarifying-the-Model-Law.html?ArticleId=3549923>accessed 25 February 2020.

37 Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review.

38 Inga West, 'UNCITRAL Cross-border Insolvency Model Laws: And Then There Were Two' (2019) 16 International Corporate Rescue 82.

39 Keith D Yamauchi, 'Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16 International Insolvency Review 145; S Chandra Mohan, 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 International Insolvency Review 199, 208-210.

40 See comments, e.g. Lia Metreveli, 'Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency' (2017) 51 Columbia Journal of Law and Social Problems 315; Rosalind Mason, 'Cross-border Insolvency: Recognition of Insolvency-Related Judgments and Choice of Law Characterization ' (2018) 27 Norton Journal of Bankruptcy Law and Practice 639; Florian Bruder, 'Recognition and Enforcement of Insolvency-Related Judgments' (2018) Eurofenix 32.

41 MLJ Guide para 1.

42 Ibid paras 15-19.

advantages such as flexibility incorporation and less political obstacles; however, it should not be overlooked that these instruments are non-binding in nature, which may result in the inconsistent interpretation of the provisions.[43]

In the field of cross-border bank resolution, several authors have proposed formulating a model law to help guide national regulators to formulate rules on recognition of foreign resolution actions.[44] The International Insolvency Institute is also funding a project on 'A Framework for Cross-border Resolution of Financial Institutions', which intends to formulate a model law and 'serve as proof of concept of the proposed systematic treatment given to the many critical issues needing resolution, providing for a fair, efficient, predictable, and transparent regime for recognition and enforcement across borders of the recovery and resolution of financial institutions'.[45] For the time being, the FSB regards the MLCBI as a source for use in cross-border bank resolution. Yet, it also acknowledges that the MLCBI 'allows jurisdictions to exclude from the recognition framework entities such as banks that are subject to special insolvency regimes' and does not include specific rules tailored to resolution actions.[46] Therefore, an additional model law is needed for a special cross-border bank resolution regime. It is also acknowledged that the adoption of a model law does not guarantee that each jurisdiction would incorporate the model law, or that each jurisdiction can interpret the model law in a consistent way. Therefore, the adoption of a model law can be only one of the approaches to addressing cross-border bank resolution issues.

9.2.3 Customary international law

Irit Mevorach recently proposed, in her book *The Future of Cross-Border Insolvency*, that modified universalism can be elevated to a concept of customary international law (CIL).[47] CIL, according to the International Court of Justice (ICJ) Statute, is a source of international law 'as evidence of

43 See, e.g. Bob Wessels and Gert-Jan Boon, 'Soft Law Instruments in Restructuring and Insolvency Law: Exploring Its Rise and Impact' (2019) Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur 2.

44 See, e.g., Jonathan M Edwards, 'A Model Law Framework for the Resolution of G-SIFIs' (2012) 7 Capital Markets Law Journal 122; Irit Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-border Resolution Gap' (2015) 10 Brook J Corp Fin & Com L 183; Matthias Lehmann, 'Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders' (2016) 66 International and Comparative Law Quarterly 107.

45 Correspondence email of International Insolvency Institute to its Members on 25 July 2019.

46 FSB Principles, 18.

47 See Irit Mevorach, 'Modified Universalism as Customary International Law' in *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018); Irit Mevorach, 'Modified Universalism as Customary International Law' (2018) 96 Texas Law Review 1043.

a general practice accepted as law'.[48] Although the theory is not confirmed in national statues or cases, it provides an alternative solution for recognition. If the courts accept this theory, the modified universalism approach can form a new legal basis to address cross-border insolvency cases.[49] The same theory can also be applied in cross-border bank resolution cases. This dissertation proposes that the principle of recognition of foreign resolution actions, subject to certain exceptions, can be regarded as CIL and, therefore, forms the legal basis for recognition.

The discussion starts with the International Law Commission's 2018 publication *Draft conclusions on identification of customary international law with commentaries* (CIL 2018), which adopts a traditional two-element approach, namely, formation of a customary international law must meet two elements, that is, 'a general practice' and 'acceptance as law' (*opinio juris*).[50]

First, a general practice is a material or objective element, which 'refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law';[51] and '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.[52] State practice 'consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions'.[53] It can be 'diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.'[54]

In relation to resolution, a distinct evidence is the adoption of the FSB Key Attributes, which was subsequently endorsed by the G20 Heads of State and Government at the Cannes Summit in November 2011 as 'a new

48 Article 38(1)(b) ICJ Statute.

49 n 47.

50 Draft conclusions on identification of customary international law, with commentaries, 2018, adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* para 77; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* para 27; Jurisdictional *Immunities of the State (Germany v Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* para 55. *Cf* Theodor Meron, 'International Law in the Age of Human Rights' (2003) 301 General Course on Public International Law 21 (arguing for a 'core values' approach).

51 CIL 2018, 130, Conclusion 4(1).

52 CIL 2018, 130, Conclusion 4(2).

53 CIL 2018, 132, Conclusion 5.

54 CIL 2018, 133, Conclusion 6(2).

international standard for resolution regimes'.[55] These actions in relation to international organisations or international conferences can be deemed as state practice, including KAs 7-9 on cross-border issues. Another FSB resolution – the FSB Principles, however, is not endorsed by G20 jurisdictions but simply a decision made by the FSB.[56] But such a decision can still 'provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development'.[57]

Within each selected jurisdiction, some evidence can be invoked to demonstrate CIL. For example, in the EU, the most direct evidence is the legislative acts BRRD and SRMR, both of which clearly prescribe the conditions and procedures to recognise foreign resolution actions.[58] In the US, Chapter 15 practices also confirm that the US can recognise foreign resolution actions.[59] In China, although there is no direct legislation or case law, the legislative plan mentioned that the new bank resolution regulation should be in compliance with the Key Attributes that contain the basic principle to give effect to foreign resolution actions.[60]

However, to constitute 'a general practice', the practice must be general, 'meaning that it must be sufficiently widespread and representative, as well as consistent'.[61] Given that this dissertation only examines three jurisdictions, albeit representative, it is sceptical about the concluding of this generality requirement. Even though G20 jurisdictions adopting the FSB Key Attributes can contribute to generality,[62] the actual interpretation might still be uncertain.

Second, the identification of *opinio juris* requires that 'it is necessary … to be satisfied that there exists among States an acceptance as law … as to the binding character of the practice in question', which is a subjective or psychological element.[63] It means that 'the practice in question must be

55 FSB Key Attributes, 1; Communiqué G20 Leaders Summit - Cannes - 3-4 November 2011, Section 13.

56 FSB, 'New Measures to Promote Resolvability, Including Effective Cross-Border Resolution' (3 November 2015) <https://www.fsb.org/2015/11/new-measures-to-promote-resolvability-including-effective-cross-border-resolution/> accessed 25 February 2020.

57 CIL 2018, 147, Conclusion 12(2).

58 Articles 93-96 BRRD; Article 33 SRMR.

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

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

61 CIL 2018, 135, Conclusion 8(1).

62 n 55.

63 CIL 2018, 138.

undertaken with a sense of legal right or obligation'.[64] Forms of evidence of *opinio juris* can be 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference'.[65] The above-mentioned evidence can attribute to the identification of *opinio juris*, yet the obstacle is to establish a psychological premise that states are willing to be bound.[66]

In addition, customary international law cannot be applied to a persistent objector. 'Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection'.[67] The present study, fortunately, does not find any evidence that the selected jurisdiction object to recognise foreign resolution actions, although sometimes they might have few incentives to follow the principle.

Once a CIL is established, it has a binding effect on both international and national courts.[68] For example, many continental European countries incorporate CIL or general principles and norms of international law in their national legal systems.[69] The British common law also has a long tradition of directly applying CIL.[70] In the US, CIL is part of common law and has the

64 CIL 2018, 138, Conclusion 9(1).

65 CIL 2018, 140, Conclusion 10(2).

66 See, e.g. Anthony A D'amato and Richard Anderson Falk, *The Concept of Custom in International Law* (Cornell University Press 1971) 53, 66; Noora Arajärvi, 'From the "Demands of Humanity": The Formulation of Opinio Juris in Decisions of International Criminal Tribunals and the Need for a Renewed Emphasis on State Practice' in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 189-190.

67 CIL 2018, 152, Conclusion 15(1).

68 See, e.g. Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011); Cedric MJ Ryngaert and Duco WH Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 Netherlands International Law Review 1.

69 Dinah Shelton, 'Introduction' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 13. However, procedures may differ. See, e.g Hans-Peter Folz, 'Germany' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 244-245 (necessary to acquire a decision from the Federal Constitutional Court); Giuseppe Cataldi, 'Italy' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 342-344 (domestic courts have the competence to verify customary international law).

70 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [2977] 2 WLR 356, [1977] 1 ALL ER 881. See Stephen C. Neff, 'United Kingdom' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 626-628.

status of law.[71] In China, although the Constitution does not clearly identify the status of CIL, or international usage (国际惯例) in the Chinese language, lower legislative acts recognise the effects of international usage.[72] For cross-border bank resolution cases, particularly, national courts can rely on CIL and make it the legal basis to recognise foreign resolution actions. Nonetheless, as shown above, the identification of CIL can be a tricky process. The notion of applying CIL only provides an alternative to help facilitate cross-border bank resolution and recognition of foreign resolution actions.

9.3 Concluding remarks

This chapter discusses several possible legal instruments for recognition of foreign resolution actions. Although dealing with foreign actions, the recognition issue falls under the realm of national law and is the sole power of national authorities. Therefore, national law instruments are the most important ones that can ensure a smooth recognition process. The present international standards have provided guidance for national legislators. This dissertation proposes ten additional principles for national legislators to incorporate into national regimes for recognition of foreign resolution actions. At the international level, several international law instruments can be chosen as supplementary tools to promote international cooperation, including international agreements, model law and CIL. These international instruments can be used in parallel to enhance certainty for recognition of foreign resolution actions.

71 *The Paquete Habana*, 175 US 677, 700 (1900). See Paul R Dubinsky, 'United States' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 642-643.

72 For example, Articles 142 and 150 General Principles of Civil Law (《民法通则》). See Jerry Z Li and Sanzhuan Guo, 'China' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 183-186.