EU bank resolution framework: A comparative study on the relation with national private law

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Part I

Introductory chapters

1 Introduction[1]

1 European convergence of national bank resolution frameworks

Over the last decades, financial globalization has led to the emergence of banks that operate through a multinational network of numerous entities and provide a full range of financial services.[2] Because of the interconnected structures of these banks, also the systemic risks associated with their failure transcend national boundaries. In 1998, after an examination of the 'issues surrounding the insolvency of a global financial institution',[3] the Group of Thirty (G30) concluded that 'supervisors, legislators, the financial services industry and insolvency and legal professionals have a great deal of work to do.' Its study was triggered by the failure of the bank Barings in the United Kingdom (UK) in 1995 and published during a widespread banking crisis in Asia. The G30 continued that '[t]here is no international framework for dealing with the supervisory, legal and financial problems that would arise in a cross-border insolvency of any kind, and a major cross-border insolvency in the financial sector could therefore pose a substantial risk to the international financial system.'[4]

Twenty years later, indeed, the global financial crisis tested the bank insolvency frameworks around the world and the lack of adequate tools to deal with bank failures forced many authorities to rescue banks with public funds. The European Commission, for instance, approved EUR 4.38 trillion of state aid measures to banks in the European Union (EU) over the period 2008-2010.[5] In response to these developments, the leaders of the Group of Twenty (G20) countries called for compatible national bank resolution

1 This chapter contains and builds on the following work previously published by the author: Janssen 2018.

2 *See* Claessens, Herring & Schoenmaker 2010, p. 7, noting that 'the structure of the world's financial services industry has been transformed by two trends. One is the marked rise in the importance of large financial institutions and the consolidation of national financial markets, so that in most countries the financial system is now dominated by a small number of large institutions. The second is the internationalization of these institutions – many of the largest institutions in the world today operate across multiple borders.'

3 Group of Thirty 1998, p. 1.

4 Group of Thirty 1998, p. 3.

5 European Commission's 'State Aid Scoreboard', available at http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

regimes and cross-border coordination amongst authorities to resolve cross-border operating banks in financial distress. They endorsed a set of global standards to which all national bank resolution frameworks should adhere.[6]

In the EU, the Bank Recovery and Resolution Directive[7] (BRRD) transposed these global standards into EU law and required the legislatures of all Member States to implement its rules into their national laws by 1 January 2015. It aimed to both strengthen and harmonize the existing national bank resolution frameworks. Each Member State designated a resolution authority that is empowered to intervene in a failing bank in an administrative, non-judicial procedure to mitigate risks to financial stability and ensure continued access to the critical functions of the bank. Other primary policy goals of the BRRD are reducing the costs of bank failures for taxpayers and minimizing moral hazard, i.e., excessive risk-taking by banks, confident that they will be bailed-out in the event of default. Under the Single Resolution Mechanism (SRM) Regulation[8] the decision on the resolution of significant and cross-border operating banks in the Euro Area is since 1 January 2016 taken by a resolution authority at the EU level, in cooperation with the resolution authorities of the Member States.

The BRRD provides for a bank resolution procedure as an alternative to an insolvency procedure under national insolvency law. Nonetheless, private law of the Member States plays an essential role in the EU bank resolution framework. Many rules in the BRRD and SRM Regulation only require specific results in national law and refer to national private law for their application and interpretation, such as to substantive insolvency law, property law, and company law.[9] For example, the BRRD and SRM Regula-

6 In 2009, the G20 leaders called for a review of bank resolution and insolvency laws. In 2011, they endorsed the 'Key Attributes of Effective Resolution Regimes for Financial Institutions' of the Financial Stability Board. *See* Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012, 2012/0150 (COD)), p. 4.

7 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

8 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

9 *See* Haentjens 2014b, p. 73.

tion provide that the resolution measures taken by the resolution authorities have to respect the priority amongst shareholders and creditors under the applicable insolvency law.[10] Resolution authorities may not exercise their statutory power to write-down a liability or convert debt into equity if the claim of the creditor is secured *in rem* under national property law.[11] Moreover, in a resolution procedure, the shareholders and creditors of the bank may not incur greater losses than they would have incurred if the bank had been liquidated under national insolvency law. This so-called no creditor worse off-principle requires resolution authorities to compare the actual treatment of shareholders and creditors in the resolution procedure with the position of these stakeholders in a hypothetical insolvency procedure. If the shareholders and creditors have incurred greater losses in resolution, they are entitled to payment of the difference.[12]

In contrast to the global and European origin of the rules in the BRRD and SRM Regulation, the regulation of private law areas such as substantive insolvency law and property law has always been largely left in the hands of the legislatures of the EU Member States. Therefore, the national bank resolution frameworks are currently based on a body of rules with mixed origin. Also, one has to interpret and apply the bank resolution rules in a way that is consistent with national private law. The European Commission acknowledged this in the legislative process for the BRRD. It noted that

> '[b]ecause the crisis management tools and powers are used at the point when an institution is failing or has failed, they inevitably interact with national insolvency regimes. Substantive insolvency law is not harmonised, and the measures proposed in the bank resolution framework need to be implemented in a way that is consistent with that national law. Furthermore, the application of the tools and exercise of the powers will almost certainly affect contractual and property rights, that are also rooted in national law.'[13]

According to the Commission, a directive was the appropriate legal instrument for the EU bank resolution framework to allow the national legislatures to transpose the bank resolution rules into the existing national legal orders. As a general rule, a directive requires the Member States to achieve a particular result and leaves to them the choice of form and methods.[14]

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10 Articles 34(1)(a)-(b) and 48(1) BRRD; Articles 15(1)(a)-(b) and 17 SRM Regulation.

11 Article 44(2) BRRD; Article 27(3) SRM Regulation.

12 Articles 34(1)(g) and 73-75 BRRD; Article 15(1)(g) and 20(16)-(18) SRM Regulation.

13 Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012), p. 79.

14 Article 288(3) Treaty on the Functioning of the European Union (TFEU).

The BRRD established a minimum harmonized framework with bank resolution tools and powers.[15] The SRM Regulation, by contrast, is binding in its entirety and directly applicable in the EU Member States.[16] Under the Regulation, resolution decisions are taken in a centralized decision-making procedure and then implemented by the national authorities on the basis of national law transposing the BRRD.[17]

It is not exceptional that national private law plays an essential role in an EU harmonized legal framework. Not only the BRRD and SRM Regulation but also other EU legislation affecting traditional areas of national private law, such as the Financial Collateral Directive[18] and the Settlement Finality Directive,[19] introduce rules that operate at the intersection of the harmonized legal framework and existing areas of national private law, and do not fully replace the latter. Other examples of such EU legislation that the literature has discussed include directives in the field of contract law.[20]

As regards the EU bank resolution framework, however, various studies have advocated further streamlining of the framework by introducing more uniform substantive rules, including by closer harmonizing specific areas of national private law for bank resolution. An important part of the recent academic and policy discussions has focused on the harmonization of substantive insolvency law in the EU. For example, much attention has been paid so far to (1) the further alignment of the national bank creditor hierarchies in resolution and insolvency,[21] (2) the introduction of harmonized collateral enforcement procedures that allow banks to recover value from secured non-performing loans,[22] and (3) the creation of a harmonized bank

15 Recital 44 BRRD.
16 *Cf*. Article 288 TFEU.
17 Articles 18, 23 and 29 SRM Regulation.
18 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43), which was amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 (OJ L 146, 10.6.2009, p. 37) and by article 118 BRRD.
19 Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45), which was amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 (OJ L 146, 10.6.2009, p. 37).
20 E.g., Hartkamp 2012, p. 191-248; Loos 2007, p. 524-531; Teubner 1998.
21 An EU directive that aims to harmonize a small part of the national creditor hierarchies in resolution and insolvency was adopted in December 2017 and has to be transposed into national law by 29 December 2018. *See* paragraph 5.3.4 of chapter 5.
22 Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral (14.3.2018, COM(2018) 135 final). The proposal is part of a package of measures to reduce the level of non-preforming loans of banks in the EU.

insolvency chapter within all national insolvency laws.[23] Some scholars even call for a single bank insolvency regime.[24] Proponents of harmonization say that the differences in specific areas of national private law and the discretion left for resolution authorities and legislatures create legal uncertainty for banks and investors and are likely to complicate the application of the bank resolution tools to cross-border operating banks.[25] Arguably, seeking greater convergence of bank resolution frameworks by harmonizing, for instance, specific aspects of substantive insolvency law for bank resolution, could help to enhance predictability and consistency of the treatment of creditors and other participants in bank resolution procedures.[26]

At the same time, it has been concluded that removing all disparities in specific parts of national private law is politically not feasible in the short term. Substantive insolvency laws and laws on security rights, for instance, are strongly intertwined with other areas of national legislation and are deeply rooted in domestic legal traditions. For that reason, many scholars consider the creation of EU legislative instruments to change these areas of law complicated.[27]

The goal of this book is to assist in the further development of the EU bank resolution regime by asking the question of how the harmonized bank resolution frameworks currently relate to national private law. It starts from the premise that academic and policy discussions on the further develop-

23 E.g., International Monetary Fund, 'Euro Area Policies. Financial sector assessment program. Technical note – bank resolution and crisis management', IMF Country Report No. 18/232, p. 22-23 and 25-27; Merler 2018; Lehmann 2018; Philippon & Salord 2017, p. 44-46; Valiante 2016, p. 31-32. For a discussion of these proposals, *see* paragraph 3.2 of chapter 7.

24 Véron 2018, p. 9; Bénassy-Quéré at al. 2018, p. 6.

25 E.g., Merler 2018; Philippon & Salord 2017, p. 44-46; European Banking Authority, Final Report on MREL. Report on the implementation and design of the MREL framework (EBA-Op-2016-21, 14 December 2016), p. 119; Council of the European Union, 'Council Conclusions on a roadmap to complete the Banking Union', 17 June 2016, para.7; Wojcik 2016, p. 124-126. *See also* Recital 7 Directive (EU) 2017/2399 of the European Parliament and of the Council of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in insolvency hierarchy (OJ L 345, 27.12.2017, p. 96–101).

26 Hüpkes 2011, para. 5.58.

27 On the harmonization of insolvency law in the EU in general, *see* e.g., Eidenmüller 2017, p. 275; Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (SWD (2016) 357 final, 22.11.2016), p. 23-25; Mucciarelli 2013, p. 196-199; Laukemann 2013, p. 385-386. *See also* Fletcher & Wessels 2012, p. 107-135. For a discussion of the harmonization of property law in the EU, *see* e.g., Akkermans 2016; Van Erp & Akkermans 2012, chapter 10; Drobnig, Snijders & Zippro 2006.

ment of the bank resolution frameworks call for the closer harmonization of national private law for bank resolution. The chapters, therefore, analyze how the resolution rules, principles, and objectives of the BRRD and SRM Regulation currently interact with and how they have been embedded into existing areas of private law at the national levels. On that basis, they examine which possible differences in interpretation and application of the bank resolution rules are created by the differences in areas of national private law that interact with the bank resolution rules.

The results of the research indicate that Member States are currently indeed left discretion in the field of substantive insolvency law. At the same time, the present study ascertains that differences in bank resolution procedures may not only stem from the diverging insolvency legislation to which the literature and policymakers have paid much attention. Divergent national approaches and procedures to apply the harmonized bank resolution rules may also lead to a different application and interpretation of the bank resolution rules. Therefore, in the debate on the further development of the EU bank insolvency framework, we may also need to consider the current implementations of the bank resolution framework and their effect on supranational coherence in the bank resolution procedures.

Furthermore, the examination mentioned above of how the resolution rules, principles, and objectives currently interact with and how they have been embedded into existing areas of national private law signals that inconsistencies in legislation may not only arise at the supranational level. The developments in EU bank insolvency law entail that the national bank insolvency regimes have been and will be increasingly governed by EU legislation. The EU legislation deals with specific topics and objectives and contains rules and terminology that are entirely different from that in the existing national law. The legislatures of the Member States are faced at the moment and will also be charged in the future with the difficult task of aligning their national legal orders with the EU legislation. This book analyzes coherence of the resolution rules, principles, and objectives with private law of the national legal orders. It maintains that the national legislatures should carefully examine coherence in the domestic legal orders in the further development of the national bank insolvency laws.

2 Theoretical framework

The present study investigates several examples of relations between the current bank resolution frameworks and national private law. The investigated relations are selected because of their relevance to legal practice or the literature has paid much attention to them. This analysis also requires an examination of the resolution rules as established at the EU level. Nonetheless, the focus of the assessment is on the bank resolution rules,

principles, and objectives provided by the SRM Regulation, which is by its nature directly applicable at the national level, and the national legislation transposing the BRRD.

Based on the analysis of the selected relations, the final chapter of this dissertation, which is chapter 7, uses two notions of coherence, namely national coherence and supranational coherence, as tools to determine how the bank resolution frameworks created by the BRRD and SRM Regulation relate to existing areas of national private law. Both supranational coherence and national coherence are in the book regarded to contribute to important goals such as transparency in rights of parties and predictability of the application and interpretation of the law.

Although the literature assigns a variety of meanings to the concept of coherence in the law, here coherence in the national legal orders is considered to focus on the elements that form a system of law. At the surface level of the national legal system, coherence requires that the legal components such as statutes and case law allow non-contradictory interpretations and definitions, and that they are logically connected with each other. Hence, a study of the coherence at this level is intended to identify, for instance, a contradictory meaning of a rule, leading to potential uncertainty. Furthermore, at a deeper level of the national legal system, coherence requires a set with some shared policy goals, principles, and objectives. The analysis at this deeper level is intended to identify, for example, joint objectives of areas of law, without disputing the fact that the relevant areas of law have potentially distinct fields of applicability. If full coherence cannot be reached because, for instance, a different meaning of one term in two different areas of law is preferable to a uniform definition, for the sake of legal certainty it may be preferable to at least explicitly provide how the conflicting legal components relate to each other.

Coherence in the national legal orders is to be distinguished from a coherent interpretation and application of the bank resolution rules across jurisdictions. An analysis of the latter, supranational type of coherence requires an investigation of whether the results of the interpretation and application of the harmonized bank resolution rules are likely to be different in different jurisdictions because of the transpositions into the national legal orders. For example, inconsistent implementations of the harmonized rules in the EU or heterogenous private laws with which the harmonized rules interact may cause divergent outcomes.

3 Research questions and structure of the dissertation

This book asks the question of how the bank resolution frameworks created by the BRRD and SRM Regulation currently relate to national private law.

Chapters 2-4 introduce bank insolvency law and define the notions of coherence that the present study uses. In particular, chapter 2 examines why many scholars and policymakers consider bank-specific insolvency rules crucial and which developments have taken place in the field of bank insolvency law at the EU level over the last decades. Chapter 3 focuses on developments in the field of banking supervision and bank insolvency law from a historical perspective. It investigates which bank-specific supervisory and insolvency tasks were granted to authorities in the Netherlands, Germany, and the UK before the introduction of the BRRD. It also makes some introductory remarks about the implementation of the BRRD in the three jurisdictions. Chapter 4 introduces the normative legal framework by discussing the notions of national and supranational coherence and why the coherence analysis is relevant in the context of the harmonization efforts in the field of bank resolution law.

Chapters 5 and 6 then analyze key relations between the objectives, principles, and rules of the bank resolution framework and several areas of private law in the selected jurisdictions – in particular, national substantive insolvency law. The first question in both chapters focuses on the deeper levels of the domestic legal orders, namely the principles or objectives. The next three questions in each chapter focus on the relation of the bank resolution rules with rules of national private law. Chapter 5 is devoted to bail-in, i.e., the write-down and conversion into equity of capital instruments and liabilities of a bank. Chapter 6 discusses the other three bank resolution tools, i.e., the tools to transfer a part of or the whole business of a failing bank to a third-party bank, a temporary bridge institution or an asset management vehicle. One can also say that chapter 5 focuses on restructuring measures that mainly take place on the liabilities side of the balance sheet of a bank and chapter 6 on the measures on the assets side of the bank balance sheet.

Chapter 5 discusses the following questions:

1. Do the national legal frameworks on bail-in and the national company and insolvency laws share some important principles, especially from the perspective of the trend in the EU to introduce corporate restructuring procedures as an alternative to traditional court-centered procedures?
2. What is the effect of a reduction of liabilities of a bank by a resolution authority on the liabilities themselves and related guarantees under national law?
3. Does conversion of debt into equity under the bank resolution rules follow the formalities and practice for such conversion normally followed in a financial restructuring under national law?
4. How does the hierarchy of claims in bail-in relate to the insolvency ranking of claims under national law?

Chapter 6 addresses these questions:

1. Do the resolution rules on the transfer tools and national insolvency law share objectives?
2. How did the national legislatures ensure that the transfers ordered by a resolution authority have an immediate effect? How do the effect and scope of the application of the transfer tools relate to other types of acquisition of assets, rights, and liabilities or shares under national private law?
3. In case of a partial transfer of assets, rights, and liabilities, how do the resolution rules protect security rights under a security arrangement and set-off or netting rights under a set-off or netting arrangement, respectively? Would creditors also benefit from these rights if an insolvency procedure is opened under national insolvency law? Do other areas of national private law also offer protection against a loss of these rights in case of a partial transfer in a resolution procedure?
4. What is considered a 'normal insolvency proceeding' for a bank under national insolvency law? Which role does the national resolution authority play in the opening of such a procedure?

As noted above, chapter 7 is the final chapter that applies the coherence theory that was developed in chapter 4 to the results of the analysis in chapters 5 and 6 to identify how the bank resolution frameworks relate to national private law.

4 Scope of the study

The analysis focuses on the bank resolution frameworks in three jurisdictions: the Netherlands, Germany, and England. The three jurisdictions have large national financial sectors. Financial institutions such as ING Bank, Deutsche Bank, and Barclays are considered 'global systemically important banks'. In addition, the Netherlands has 4, Germany 15, and the UK 12 so-called 'other systemically important institutions'.[28]

The three jurisdictions also introduced domestic bank resolution frameworks already before the introduction of the BRRD at the EU level. These national regimes then formed the legal basis for interventions in several failing banks. The interventions in the failing Dutch financial conglomerate SNS Reaal, German bank Hypo Real Estate (HRE), and UK bank Northern Rock are often selected as case studies to illustrate how EU Member

28 Financial Stability Board, '2017 list of global systemically important banks (G-SIBs)', 21 November 2017; Basel Committee on Banking Supervision, 'Regulatory Consistency Assessment Programme (RCAP): Assessment of Basel III G-SIB framework and review of D-SIB frameworks – European Union', June 2016, p. 11.

States dealt with failures of financial institutions before the entry into force of the BRRD and SRM Regulation. Moreover, the Dutch, German, and English bank resolution frameworks that existed before implementation of the BRRD have all influenced the current design of the bank resolution framework at the EU level, although the national regimes differed amongst themselves. In its Impact Assessment accompanying the proposal for the BRRD of 2012, the European Commission refers several times to Germany and the UK as examples of Member States that had recently introduced a national bank resolution framework and to the Netherlands as an example of a country that was in the process of introducing such a framework at that time.[29] Thus, the three jurisdictions are important players in the EU bank resolution framework.

Besides, the Dutch Bankruptcy Act (*Faillissementswet*, Fw), German Insolvency Act (*Insolvenzordnung*, InsO), and English Insolvency Act 1986 (IA 1986) represent diverse legal traditions. The three national insolvency acts are used as examples in the discussions about the harmonization of general insolvency law at the EU level. A study of the Dutch legal system was also chosen because the author is familiar with this system and has good access to Dutch legal resources. An examination of English law is relevant because the common law tradition differs highly from the civil law tradition and in practice, a large number of financial contracts is concluded under English law. Furthermore, the selection of Dutch and German law, on the one hand, and English law, on the other hand, is relevant because it illustrates the distinction that can be made in the EU between the SRM participating Member States and the Member States which only transposed the BRRD.

Although the UK soon leaves the EU and the effects of the Brexit on banking legislation are uncertain at the moment of finalizing this dissertation (August 2018), a study of the English bank resolution framework is of significant relevance. Firstly, as indicated above, the UK approach to bank resolution served as a model for the BRRD.[30] Secondly, according to the present author, the UK resolution framework is likely to influence the EU approach to resolution in the future, and vice versa. Bank resolution cases that extend to both the UK and the EU force authorities on both sides of the Channel to find some means to cooperate and coordinate the procedures.

29 Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010 (COM(2012) 280 final, 6.6.2012), p. 61, 72, 79 and 101-102.

30 *See* Brierley 2017, p. 460-461.

The study is both descriptive and normative. For the examination in the selected jurisdictions, several questions have been phrased which all have a functional perspective. Following the in-depth analysis of the current national bank resolution rules and their relations with national private law in the selected jurisdictions, the bank resolution frameworks can be measured against the coherence standards.

Inevitably, the scope of the study had to be limited in some respects. The bank resolution framework interacts with many areas of national law. The areas of law that are studied include bank resolution law, insolvency law, company law, property law, and contract law. The primary focus of the present study is bank resolution law and substantive insolvency law. This angle was chosen because in the current policy and academic discussions on the further development of bank resolution law pay much attention to the interaction of the bank resolution rules with substantive insolvency law. A comprehensive analysis of conflict of laws rules falls outside the scope of the dissertation.

The book focuses on banks (credit institutions), even though the scope of the resolution framework under the BRRD and SRM Regulation is broader.[31] Notwithstanding the fact that not all banks that are established in the Netherlands, Germany, and England are organized as public limited companies, the present study focuses on public limited companies while addressing other legal forms when considered relevant. Furthermore, the following chapters do not contain an extensive discussion of legal practice and recent case law in the field of bank resolution. They rather focus on the positive law in three jurisdictions and on the systemization of the national legal orders in these jurisdictions. Hence, the dissertation does not thoroughly discuss questions such as whether the existing resolution measures are in practice appropriate for both an idiosyncratic bank failure and the failure of a systemically important bank, and which conclusions about the application of the bank resolution rules can be drawn from recent bank resolution cases in the EU. Also, it does not include an in-depth analysis of whether different structures of large financial conglomerates influence the resolution strategies chosen by authorities.

5 Terminology

The dissertation uses, in principle, the terminology used in the BRRD and SRM Regulation, such as the terms 'resolution tools' and 'resolution powers'. In some cases, different terminology is preferred. The bail-in tool and the write-down or conversion of capital instruments and eligible liabilities

31 *Cf.* Article 1 BRRD; Article 2 SRM Regulation.

tool are together called the 'bail-in mechanism'. The sale of business tool, bridge institution tool, and asset separation tool are together called the 'transfer tools'. The meaning of these terms is discussed in chapters 5 and 6, respectively. For the sake of simplification, this book uses the term 'bank' to refer to a credit institution, which is the term used in the BRRD and SRM Regulation and many other EU legislative instruments.[32] Moreover, for the sake of clarity, the term 'competent supervisory authority' or 'supervisory authority' is used rather than the term 'competent authority', as employed in EU legislative instruments.[33] The study uses the term 'bank insolvency law' as an umbrella term for both bank resolution law and the more traditional bank insolvency law. Chapter 2 discusses this term. The term 'general insolvency law' or 'insolvency law', in turn, is used for the field of law related to the insolvency of a corporate debtor.[34] Finally, the present study uses the term 'private law' for the area of law that, as opposed to public law, is traditionally concerned with 'the rights which, against another, people are able to realize in courts'.[35] It includes, for instance, property law, contract law, insolvency law, and company law.[36]

The book takes into account developments until August 2018.

32 Article 4(1)(1) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1) (Capital Requirements Regulation, CRR) defines the term 'credit institution' as 'an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.'

33 *Cf.* Article 2(1)(21) BRRD; Article 4(1)(40) CRR.

34 *Cf.* Goode 2011, para. 1.01. English lawyers distinghuish between 'bankruptcy', which applies to individuals, and 'insolvency', which applies to companies. The German legal literature generally only uses the term 'insolvency law' (*Insolvenzrecht*). Dutch lawyers seem to use the terms 'bankruptcy law' (*faillissementsrecht*) and 'insolvency law' (*insolventierecht*) often interchangeably. *See* Wessels 2016, para. 1001-1002.

35 Burrows 2013, p. ix. *See also* Hesselink 2002a, p. 8.

36 It is not always possible, however, to make a sharp distinction between private law and public law. EU legislative instruments, for instance, often contain both public and private law aspects. *See* Hesselink 2002a, p. 8-10.