BRRD, the SRM-Regulation and Private International Law: How to Make Cross-Border Resolution Effective

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Structure:

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Bank resolution is key to avoiding a repetition of the global financial crisis in which failing financial institutions had to be bailed out with taxpayers' money. It permits recapitalizing banks or alternatively winding them down in an orderly fashion without creating systemic risk. Resolution measures, however, suffer from a structural weakness. They are taken by nation-states with territorially limited powers, yet they concern entities or groups with global activities and assets in many countries. Under traditional rules of private international law, these activities and assets are governed by the law of other states which is beyond the remit of the state undertaking the resolution.

This paper illustrates the conflict between resolution and private international law by using the example of the European Union, where the limitations of cross-border issues are most acute. It explains the techniques and mechanisms provided in the BRRD and the SRM-Regulation to make resolution measures effective in intra-Eurozone cases, in intra-EU conflicts with non-Euro Member States and in relation to third states. However, it also shows divergences in the BRRD's transposition into national law and flaws that have been uncovered through first cases decided in national courts. A brief overview of third-country regimes furthermore highlights the problems in obtaining recognition of EU resolution measures abroad.

This paper posits that regulatory cooperation alone is insufficient to overcome these shortcomings. It stresses that the effectiveness of resolution will ultimately depend on the courts. Therefore, a more stable and uniform text on resolution is required, which could either take the form of a legislative guideline or of a model law. It is submitted that such a text could pave the way for greater effectiveness of cross-border resolution.

Governments around the world were forced to step in and save banks in order to stem the effects of the global financial crisis starting in 2008. They were particularly worried about the maintenance of systemic tasks fulfilled by banks, such as the running of payment systems. In order to preserve these vital functions in the future without needing to spend taxpayers' money, various tools have been devised which are

usually summarized as "resolution measures".[1] The most important of them are the write down, cancellation or equity-swap of debt ("bail-in") and the transfer of assets to another solvent institution or a bridge bank. From the point of view of the state enacting them, these measures serve important policy goals. The bail-in aims at redressing the financial situation of the bank by reducing its debt or converting it into equity, while the asset transfer is designed to ensure the continuity of the bank's systemically important functions.[2] Resolution measures prevent contagion and ensure that bank functions will be fulfilled in times of crisis, thereby guaranteeing the stability of the financial system.

A crucial condition to make these tools work is their effectiveness across borders. In a world in which financial activities are no longer confined to states, bank assets are often located abroad. Since they often form an economic unit, the transfer of systemically important functions would be unworkable if it did not encompass all of these assets. Similarly, debt issued by banks are often governed not by the law of their home country, but by foreign law. A bail-in would be less effective were it not to cover this debt. It could even provide a serious opportunity of arbitrage if foreign law debt of banks were not subject to resolution.

But herein lies a problem: Under traditional principles of conflict of laws or private international law, these assets and debt are governed by foreign private law. They are therefore beyond the authority of the state that adopts the resolution measure (henceforth: the 'resolution state'). Rather, it is the law of the state that governs the asset or debt (henceforth: the 'target state') which will determine their ownership and content. Legislation or measures by the resolution state can have effect only to the extent that the law of the target state allows it.

Private international law on the one hand and banking resolution on the other are thus on a collision course. The problem is serious enough for the Financial Stability Board (FSB) to have recently published principles for the cross-border effectiveness of bank resolution measures.[3] It suggests different strategies to be adopted by national

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[1] A comprehensive overview can be found in FSB, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' 7–10.

[2] For an overview of these tools, see Seraina Neva Grünewald, *The Resolution of Cross-Border Banking Crises in the European Union : A Legal Study from the Perspective of Burden Sharing /*, p 32 et seq.; Jens-Hinrich Binder, 'Resolution: Concepts, Requirements and Tools' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2499613 <http://papers.ssrn.com/abstract=2499613> accessed 3 November 2015.

[3] FSB, 'Principles for Cross-Border Effectiveness of Resolution Actions.'

legislators and supervisors to give resolution measures transnational force independent of the law applicable under traditional conflict of laws. From the supervisory perspective, the problem is particularly acute because debt can only be included in the calculation of an institution's loss-absorbing capacity when it is 'bail-inable'. Under the Banking Recovery and Resolution Directive (BRRD),[4] resolution authorities may require an institution to demonstrate that a bail-in decision would be effective with regard to liabilities governed by the law of a third country.[5] Should the resolution authority not be satisfied that this is the case, the liability will not be counted towards the Minimum Requirement of Own Funds and Eligible Liabilities (MREL), i.e. the European version of the Total Loss-Absorbing Capacity (TLAC).[6] The cross-border effectiveness of resolution must therefore be clarified in advance. The FSB recommends that states should identify those contracts and assets that cannot be transferred with legal certainty and assess the implications for the successful operation of the resolution tool.[7]

But how can the effectiveness of resolution actions by a state be assessed where the law of that state does not govern the asset in question? And assuming that the resolution action is not effective, how can they be made effective? These are the questions which this contribution shall analyse. It will have a special emphasis on the law of the European Union (EU), where the problems of cross-border effectiveness are most severe because of the integration of various nation-states into one market. The structure of this contribution is as follows: The first part will explain the background of the collision between private international law on the one hand and bank resolution on the other, as well as strategies to circumvent it. In the second part, it will be shown how EU law tries to solve the problem. In this context, some Member State laws designed to transpose the latter will be critically analysed. The third part will provide a brief overview of third country regimes and their interaction with the EU meachnism. The piece will conclude with some suggestions on paths that could be taken in the future.

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[4] 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.[2002] OJ L173/190.
[5] Art 45(1), first sentence BRRD.
[6] Art 45(2), second sentence BRRD.
[7] FSB (n 1) 34.

A. Setting the Stage: The Clash of Two Regimes

1. Private International Law vs Bank Resolution

Conflict of laws or private international law determines the law applicable to disputes and legal relations. Its modern form is a product of 19th Century legal thinking.[8] Although private international law is derived from national law and differs from country to country, similar or even identical rules are followed in most parts of the world.[9] This means that the applicable law to a dispute is more or less determined in the same way no matter where a suit is brought. This so-called 'decisional harmony' essentially serves the persons involved in these disputes. Ideally, they can foresee the applicable law regardless of the court in which a dispute is decided. Traditional private international law achieves this by classifying legal issues according to specific categories and using for each of them a specific connecting factor to identify the applicable law.[10] To take an example, the law applicable to torts will be determined by using the place of the tort as a connecting factor, whereas the formal validity of a marriage will be governed by the law of the country in which it was celebrated. For each of these categories, there is a special conflict-of-laws rule with a special connecting factor. The aim is to find the country which has the closest or 'most significant' connection with the dispute or legal relation.[11]

This splitting up of legal issues becomes highly visible when determining the law applicable to an asset or debt. The reason is that private international law distinguishes between different asset classes and determines the connecting factor differently. For corporeal assets, whether movable or immovable, the connecting factor is their geographic location, or 'situs'. They are hence governed by the law of

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[8] On the history of private international law, see Alex Mills, 'The Private History of International Law' (2006) 55 International and Comparative Law Quarterly 1; Max Gutzwiller, *Geschichte des Internationalprivatrechts: von den Anfängen bis zu den grossen Privatrechtskodifikationen* (Helbing & Lichtenhahn 1977)..

[9] A notable exception is the United States, where a different and somewhat incoherent methodology is followed since the so-called 'conflicts revolution' in the 1960s, see Peter Hay and others, *Conflict of Laws* (5th edn, West 2010) 27 et seq; Symeon Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Martinus Nijhoff Publishers 2006).

[10] Trevor Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (2nd edn, Cambridge University Press 2015) 560–561; James Fawcett, Janeen Carruthers and Peter North, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 41–45.

[11] Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht: Ein Studienbuch* (9th edn, CH Beck 2004) 131 et seq; Dominique Bureau and Horatia Muir Watt, *Droit international privé*, vol 1 (2nd edn, Presses Universitaires de France 2007) para 340 and 347 et seq.

the state in which they are located. This is the so-called *lex rei sitae* rule,[12] which is known all over the world.[13] For securities, there is a special version of this rule, which refers to the place where the shares are located (called *lex cartae sitae*).[14] Where shares are registered in electronic accounts, as it is most often the case today, some countries use the place of the relevant intermediary that manages the securities account as the connecting factor (so-called PRIMA approach).[15] It is different for un-securitized bank debt, which is considered to be a contractual obligation. According to the principle of party autonomy, which is the most widely accepted principle of private international law, the parties are free to choose the law governing their contract.[16] Where they fail to do so, a subsidiary rule is used: In many countries, the contract will be governed by the law in force at the habitual residence of the seller or service provider or, more generally, the party to the contract that must effect the characteristic performance.[17] For particular types of contracts, there are special connecting factors to be observed. For consumer contracts, for example, it is generally acknowledged that the law at the habitual residence or domicile of the consumer plays an important role.[18]

In sum, private international law divides the assets and liabilities of the bank into specific compartments and identifies the applicable law for each of them separately. The goal is to find the law that has the closest or most significant connection to the legal relation in question. This serves private interest of having a law applied to a legal relation that is both foreseeable and close to the situation, and, most importantly, that does not depend on the court that is seized of a particular dispute. In

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[12] Hartley (n 10) 763; Kegel and Schurig (n 11) 138 and 765; Dominique Bureau and Horatia Muir Watt, *Droit international privé*, vol 2 (2nd edn, Presses Universitaires de France 2010) para 654 et seq; Lawrence Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws*, vol 2 (Sweet & Maxwell 2012) para 22R–001 (rule 128).

[13] Khalil A Sfeir, *Droit international privé comparé*, vol 1 (Sader 2005) 674 (para 544).

[14] See Matthias Lehmann, *Finanzinstrumente* (Mohr Siebeck 2009) 490.

[15] Art 9(2) Settlement Finality 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 [1998] OJ L166/45, and Art 9(1) Financial Collateral Arrangements Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims [2002] OJ L168/43. The PRIMA approach is also followed by the Hague Convention on Intermediated Securities (Royston Miles Goode, Hideki Kanda and Karl Kreuzer, *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary: Hague Securities Convention* (Brill 2005) para Int–41.), which has however not entered into force.

[16] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art 3.

[17] See Art 4(1)(a), (b), (2) Rome I.

[18] See Art 6 Rome I.

this sense, private international law is a global rule of law that divides the applicable law evenly among nations.

Resolution measures interfere with this regime. They require that one and the same law is applied to all assets of the distressed bank, independently of which type of asset is concerned. This law is the law of the resolution state, as interpreted and applied by its authorities. To illustrate, an asset transfer purports to affect all property rights of the bank no matter where the assets are located. From the viewpoint of the target state, the measure claims to have extraterritorial effects beyond the border of the enacting state. Similarly, a bail-in seeks to write-down, cancel or convert debt independently of the law that applies to the debt in question. It purports to affect even debt that is governed by the law of a foreign country.

It follows that there exists a very deep conflict between private international law on the one hand and resolution on the other. At the heart of this collision is a conflict between private and public interests. From the viewpoint of the private individuals involved, it would be preferable if the assets and liabilities remain subject to the law that is normally applicable to them. Yet public interest requires a deviation from the latter. The immediate purpose of bank resolution measures is to maintain global financial stability, which is a common good. To this, it is necessary to centralise the applicable law to one jurisdiction, that of the resolution state. Ultimately, this stability also benefits private individuals because stability is the backdrop against which private transactions can flourish.

Presented in this way, it seems clear that resolution measures deserve priority over private interests and must override traditional principles of conflict of laws. Yet such a view would be too one-dimensional, because in addition to the clash between public and private interests there is also a collision between manifest state interests.[19] While the resolution state feels an obvious need to recapitalize its credit institution, the target state may have other interests. It may fear in particular that in the process of restructuring important business activities may be moved abroad. More palatable still is its desire to keep as many assets as it can in its territory for its own creditors in the

[19] On the conflicting sovereign interests, see e.g. Eva Hüpkes, '"Form Follows Function" – A New Architecture for Regulating and Resolving Global Financial Institutions' (2009) 10 European Business Organization Law Review (EBOR) 369, 377; Eva Hüpkes, 'Rivalry in Resolution. How to Reconcile Local Responsibilities and Global Interests? : European Company and Financial Law Review' (2010) 7 European Company and Financial Law Review 216, 235.

event of a looming bankruptcy.[20] The situation is cynically, but correctly described by Ernest Patrikis:

> *When faced with the prospect of bankruptcy at a multinational bank, it is the solemn duty of each bank supervisor to do all that can possibly be done to ensure that the adverse financial effects fall on no customer or counterparty of the bank. But failing that, they should fall in another jurisdiction.*[21]

Beyond such egoistic interests, there may be good reasons for a state to resist the effectiveness of cross-border measures. The government of the state in which the bank is established may engage in "abusive resolution". It may, for instance, discriminate foreign creditors in comparison to its own, or it may use the resolution procedure as a pretext to clean its banks from debt.[22] In situations such as these, the governing law deserves respect. It becomes clearly relevant here that private international law also safeguards important public interests, such as the rule of law, legal certainty and the protection of investments.

The tension between the applicable law under traditional rules of private international law and resolution measures is therefore much more complex than the somewhat simplistic juxtaposition of private and public interests suggests. Behind the surface lurks an important conflict between sovereigns. On the one hand, the resistance of recognition of resolution measures in the interest of mere asset grabbing should not be favoured. On the other hand, such measures should not be enforced at any cost, but only where they truly serve public interests and do not go beyond what is necessary for their protection.

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[20] See Bank for International Settlement (BIS), 'Report and Recommendations of the Cross-Border Bank Resolution Group' 15 (highlighting that 'National resolution authorities will seek, in most cases, to minimise the losses accruing to stakeholders (shareholders, depositors and other creditors, taxpayers, deposit insurer) in their specific jurisdiction to whom they are accountable.'); see also Charles Hendren, *Judicial and Administrative Approaches to Bank Resolution : Prospects for International Harmonization* (Philadelphia, Pa : Financial Institutions Center, Wharton School, Univ of Pennsylvania 2011) 11 (stressing that ring-fencing by individual countries can limit and undermine the actions taken by other jurisdictions).

[21] Ernest Patrikis, in G30 Working Group on Financial Stability, 'Financial Reform: A Framework for Financial Stability' 84 <http://www.group30.org/rpt_03.shtml> accessed 5 October 2015.

[22] A particularly striking example of abusive resolution is provided by the case *BayernLB v Hypo Alpe Adria (the HETA case)* discussed below B 6 b.

2. Contractual Bail-in Clauses as a Solution?

There are different strategies for avoiding the clash between private international law and bank resolution that has been described above. The most important of them is to include an explicit clause in bank debt that gives effect to resolution measures by the competent national authority. The FSB strongly recommends the inclusion of such contractual bail-in clauses in all debt instruments governed by the law of a third country.[23] The EU has turned this into a general obligation. According to the BRRD, Member States shall require institutions to stipulate in debt instruments that the creditor recognises the write-down and conversion powers of the resolution authority and agrees to be bound by of its decisions.[24] By such a contractual provision, the creditor autonomously accepts the resolution measures. Their basis is therefore no longer a command by the resolution authority, but the free will of the creditor. In other words, resolution is transformed from a statutory into a contractual mechanism.

Bail-in clauses will function as long as they are valid under the applicable foreign law governing the contract. In accordance with the principle of freedom of contract, which is recognised by most legal systems of the world, there should be no obstacle to their operation. However, one must caution against a too optimistic view of such clauses. First of all, it will not always be easy to convince the bank's counterparty to accept them. Usually, it will only do so in consideration for an interest rate premium. It is true that such a premium will also be charged where the issuer is subject to a statutory regime, but a contractual bail-in regime is different because it will prove especially costly at the beginning: The first investors in the new instruments will require a hefty surcharge because they will be subordinated to *almost all* other creditors. Another drawback of contractual bail-in clauses is that it is difficult for the supervisor to assess their effectiveness because their terms and their interpretation may vary from one instrument to another. A further disadvantage is that it takes time for the institution to build up a cushion of contractually bail-inable debt. Finally, contractual resolution clauses are of limited value for asset transfers. While they may support the assignment of claims to a bridge bank or other institutions, they do not work for transfers of assets like corporeal or intellectual property. The transfer of these

[23] FSB (n 3) 7–8.
[24] Art 55(1) BRRD.

assets usually requires more than just an agreement by the parties, e.g. a record in a public register. This point will be explained in more detail below.[25]

For all of these reasons, contractual bail-in *alone* is not key, but merely a complementary piece in the puzzle. The FSB is right in recommending that states continue to pursue the development and adoption of *statutory* frameworks, which may supplement and even supersede contractual approaches.[26] There is hence no contractual panacea for the clash of private international and banking law.

3. The Role of Bank Group Structure and Structural Bail-in

The tension between the governing law and bank resolution may be somewhat reduced in the case of bank groups. It must be remembered that most credit institutions are not single institutions, but part of a larger group of companies with establishments in a number of states. The measures for their restructuring will be decided in the EU by a so-called resolution college.[27] This college is composed of the resolution authorities of the different countries in which parents, subsidiaries and branches of the bank group are located. Once the colleges decide over a so-called group resolution scheme, all of the authorities that have not explicitly disagreed must implement its decision.[28] The group resolution scheme therefore has an automatic cross-border effect. Provided that all of the assets and liabilities of the bank group are located in states bound by the resolution college's decision, there can be no conflict of laws. Unfortunately, however, the group resolution scheme is not always effective because every Member State reserves the right to disagree and depart from it.[29] Moreover, it does not work where some assets of the group are governed by the law of third states that are not represented in the resolution college.

Such deficiencies do not plague structural bail-in measures, which is a more elegant way of dealing with bank groups. They are mostly practised in the United States, where such groups usually have a holding structure. A structural bail-in is done by a write down, cancellation or debt-equity-swap at the level of the holding company only. The measure is taken by the resolution authority in the home country of the bank

[25] See below B 3 a.
[26] FSB (n 3) 9.
[27] Art 88 BRRD.
[28] See Art 92(6) BRRD for the resolution of subsidiaries and Art 92(10) BRRD for group resolution.
[29] Art 91(8) and 92(4) BRRD.

holding. Provided that the holding company has issued debt exclusively under the law of its home jurisdiction, no conflict with other countries can arise. This is the so-called single point of entry or SPOE strategy.[30]

The SPOE recovery strategy presents various advantages against resolution measures regarding individual group members.[31] First, it functions even where the law of a third state governs the bank's assets since it does not purport to transfer those assets but simply redresses the financial situation of the bank. Second, the SPOE strategy is less costly than a group resolution because only the holding company must be endowed with additional bail-inable capital, which can be used to recapitalise any of the group's subsidiaries. Third, a structural bail-in is easier to execute and enforce than a bail-in at multiple levels of the group. Finally, this strategy may avoid the risk of asset grabbing by the regulators of the various jurisdictions in which group members are established.

Yet the SPOE strategy also suffers from distinct disadvantages. First of all, it only works where the group has a holding structure. For reasons of path dependence, this is not the case for many European groups. It would therefore be necessary to introduce a statutory requirement for reorganisation in order to provide the conditions for SPOE. Second, once the creditors of the holding company have been bailed-in, it will be necessary to transfer the capital from the holding to the subsidiaries in need. This can be done by writing down, cancelling or swapping debt that has previously been issued by the subsidiary to the parent. But where this debt is not governed by the law of the resolution state, the conflicts problem re-emerges. Third, there is a worry that the resolution authority in the home state of the holding company will not act as vigorously to recapitalize a troubled subsidiary in another country as it would with regard to a domestic institution.[32] Fourth, the resolution authority of the host state in which the subsidiary is located may be tempted to adopt its own resolution measures and cancel or write down the debt issued to the parent in order to protect its national interest. It could pledge to refrain from any such measure, but such a 'self-denying

[30] On the single point of entry strategy, see Jeffrey N Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) 115 Columbia Law Review 1297, 1323–1330.
[31] For a full explanation of the advantages, see ibid.
[32] David A Skeel, 'Single Point of Entry and the Bankruptcy Alternative' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2408544 11 <http://papers.ssrn.com/abstract=2408544> accessed 27 November 2015.

ordinance' would not be legally enforceable.[33] The opportunity for asset grabbing is therefore not completely eschewed.

Inspite of some undeniable advantages, the SPOE strategy does not eliminate the conflict of sovereigns. It is certainly for this reason that the BRRD presents SPOE as one among different options.[34] Equally possible is a multiple point of entry-strategy (MPOE). At least in Europe, resolution will most often be done by mandatory statutory rules at the level of the individual institution. This comprises bail-in, but also asset transfers. In these cases, conflicts with other states are inevitable.

4. Insolvency Law and the Principle of Universality

A way to solve the clash between private international law and banking resolution is to characterize resolution measures as belonging to insolvency law. This is due to a basic principle of insolvency law: the principle of universality. According to this principle, bankruptcy proceedings opened in one state can have a world-wide effect.[35] Following of this principle, which is accepted by conflicts lawyers, could reconcile the differences between private international law and banking resolution. It would endow resolution measures with the necessary world-wide effect without putting the normally applicable law into question.

It is true that the principle of universality is not accepted by all states under all conditions, but is often derogated in favour of its competitor, the principle of territoriality. Yet universality reigns at least in certain areas and situations. A case in point are bank insolvencies in the EU, which is particularly important in the context of bank resolution. The so-called Winding-up Directive empowers the authorities of the Member State in which a credit institution is established to decide on the bank's reorganisation.[36] In making these decision, the competent authority may rely on the law of its state (the "*lex fori*").[37] According to the Directive, the measures taken on the

[33] It seems that this point is ignored by Thomas Huertas, 'Safe to Fail' (2013) 1 Journal of Financial Perspectives 93, when he considers the SPOE mechanism as being secure.
[34] Recital 80 BRRD.
[35] Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) para 11 and 14.
[36] Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ L 125/15) Art 3(1), 9(1) subpara 1.
[37] Art 3(2) sub para 1, Art 10 Winding-up Directive.

basis of the *lex fori* will be fully effective in other Member States.[38] The principle of universality thus governs bank insolvencies in the EU.

Crucially, the European legislator has decided to extend the Winding-up Directive's rules to resolution measures. It has introduced a new provision into the Directive according to which it also covers financial institutions or firms and their parents that are subject to measures under the BRRD.[39] More importantly, the term 'reorganisation measure' has been defined so as to include resolution tools and the exercise of resolution powers.[40] The BRRD and the Winding-up Directive are thus not separate regimes, but complement each other. The latter endows decisions taken under the former with universal effect throughout the EU.

Yet this technicality does not suffice to confer upon resolution measures transnational force in other Member States. The reason for this lies is the many exceptions that the Winding-up Directive contains. For instance, rights *in rem* in respect to tangible and intangible assets situated in other Member States are not affected by reorganisation measures in the sense of the Directive.[41] This clause is designed to protect the justified expectations of those creditors who have secured their rights by charges on the debtor's foreign assets and which rely on the exclusive applicability of the *lex situs*.[42] Reservations of title and set-off remain unaffected for similar reasons.[43] The same is true for proprietary rights registered abroad, which are subject only to the *lex rei sitae*.[44] The Winding-up Directive also spares transactions on regulated markets, such as the sale or acquisition of shares and bonds, apparently in an attempt not to interfere with the functioning of those markets.[45]

The situation with netting agreements and repos is more complex. In principle, they are solely governed by the contract law chosen by the parties.[46] However, the Winding-up Directive provides two exceptions: First, regardless of the applicable law, a resolution measure should not be deemed an enforcement event or an insolvency

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[38] Art 3(2) sub-para 2, Art 9(1) sub-para 2 Winding-up Directive.
[39] See Art 1(4) Winding-up Directive, added by Art 117(1) BRRD.
[40] See Art 2 Winding-up Directive, as amended by Art 117(2) BRRD.
[41] Art 21 Winding-up Directive.
[42] On the similar provision of Art 5 European Insolvency Regulation (Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1): Virgós and Garcimartín (n 35) 142; Stefan Smid in Peter Leonhardt, Stefan Smid and Mark Zeuner (eds), *Internationales Insolvenzrecht: Kommentar* (2nd edn, Kohlhammer 2012) Art 5 EuInsVO para 2.
[43] Art 22 Winding-up Directive.
[44] Art 24 Winding-up Directive.
[45] Art 27 Winding-up Directive.
[46] See Art 25 and 26 Winding-up Directive.

proceeding.[47] The effect of this exception is that contracts with a netting clause or repos are not automatically terminated by a resolution. Moreover, the resolution state is awarded the right to impose a temporary stay on the termination rights of the parties under the contract.[48] This helps to safeguard the financial stability of the credit institution until the end of the following business day. The fate of termination clauses and their combination with netting will be further analysed below.[49] It suffices to say here that the applicable law for termination and netting under principles of private international law is not completely discarded in favour of that of the resolution authority.[50]

In sum, although the Winding-up Directive gives universal effect to reorganisation measures and operates a centralization of the applicable law, it does not overcome the clash between private international law and bank resolution. Its exceptions are numerous. It does not give resolution measures a comprehensive transnational effect.

The Winding-up Directive therefore does not provide the solution to the cross-border enforcement of resolution measures. This is unsurprising. The Directive basically pursues an insolvency approach, which is evidenced by the parallel structure to the European Insolvency Regulation.[51] Banking resolution is different. Its purpose is macroeconomic, not microeconomic. Contrary to insolvency, it does not seek to maintain the debtor's business or share its assets among the creditors. Rather, it aims at preserving the stability of the financial system, by avoiding bank runs and contagion to other institution as well as by maintaining critical functions such as payment systems. To put it bluntly, without resolution mechanisms in place citizens might not be able to draw money on ATMs anymore in the event of a bank crisis. This specific goal is important for the public welfare. It exceeds that of insolvency law, and is alien to it. That is why typical resolution measures such as a bail-in or an asset transfer to a bridge entity are unheard of in insolvency law.

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[47] See the introductory clause of Art 25 Winding-up Directive, as amended by Art 117(3) BRRD.
[48] See the introductory clause of Art 26 Winding-up Directive, as amended by Art 117(4) BRRD.
[49] See below B 5.
[50] For a detailed treatment of the effects of resolution measures on derivatives, see Francisco Garcimartín Alférez, Treatment of Derivative Claims in Cross-border Insolvency Proceedings, in: Niels Vermunt et al. (eds.), Bank Failure: Lessons from Lehman Brothers, Oxford University Press, forthcoming.
[51] Cf. Art 1(1), 2(a) and (c) European Insolvency Regulation, and also the Appendixes A and B to the Regulation.

B. EU Law and Cross-border Effectiveness of Resolution

1. A System of Differentiated Effectiveness

The key to the clash between the applicable law and bank resolution is to be found in the EU texts on resolution measures. These texts are, first and foremost, the BRRD and the SRM Regulation. They organize a system of transnational cooperation that may overcome differences in the applicable law. Yet they do so to a varying degree. With regard to the cross-border effects of resolution measures EU law distinguishes between three different areas: the Eurozone, the Union at large and third countries.[52]

The strongest effects of resolution measures are within the Eurozone. Inside the 19 Member States that have adopted the Euro, the resolution decisions will be adopted at the EU level by a European agency, the Single Resolution Board (SRB) headquartered in Brussels. It selects the measures to be taken, which the Member States then must transpose.[53] In this way, the SRB decisions have transnational effect throughout all states that have adopted the Euro as a currency. One could call this the centralized or federal model.[54]

In the relation between Eurozone and non-Eurozone countries and amongst the latter, a decentralized model is followed. The home country of the credit institution adopts the necessary measures, which the other Member States must recognize and support to become effective.[55] This is the country-of-origin principle which is present in many areas of EU law.

Finally, in relation to third countries the EU is lacking any prescriptive and enforcement powers. The competent resolution authority – the SRB or those of a non-Euro Member State – therefore must rely on persuasion to make sure that its decisions are respected; where this is not the case, they are without effect. This is the coordinative model.

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[52] The BRRD also has relevance for the European Economic Association (EEA), which comprises in addition to the 28 EU Member States Iceland, Liechtenstein and Norway. However, the BRRD only applies within the EU until the EEA Joint Committee amends the EEA Agreement to allow its application in the EEA States.

[53] Art 29(1) Regulation No 806/2014 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 ('SRM Regulation') (OJ L 225/1).

[54] See e.g. Grünewald (n 2) 115 (addressing 'centralized resolution in Banking Union').

[55] Art 66(1), (2) BRRD.

2. Solution of Intra-Eurozone Conflicts

The simple three-level model that has been outlined above must be somewhat qualified. Though it is an essential element of the Banking Union, the SRB is not responsible for all banks in the Eurozone, but only for those that are supervised by the ECB. Broadly speaking, these are the systemically important institutions, or 'SIFIs'. The SRB has powers also with regard to other banks where national authorities fail to respect its instructions.[56] Finally, it is competent whenever a recovery or resolution measure requires financing by the Single Resolution Fund (SRF).[57] In all other circumstances, Eurozone Member States remain in charge of resolution.

Even where the SRB is competent to decide on a resolution, it normally does not have the power to take directly effective measures itself. Instead, it adopts a resolution scheme, which the national resolution authorities must implement.[58] For this purpose, the latter will use the powers conferred to them under the national law transposing the BRRD.[59] The SRB can directly exercise powers only in the exceptional circumstance in which a national authority fails to comply with a resolution scheme. In this case, it can itself order an asset transfer or a conversion of debt into equity.[60] As its measures are based on a regulation, they will have a direct effect in the Member States. They are supranational law, binding in all of the Eurozone.

One may wonder why the EU legislator has not endowed the decisions of the SRB with supranational powers in all other cases as well and given them transnational effect in the Euro countries. Part of the explanation may be the lack of a suitable competence in EU treaty law. Under the so-called Meroni doctrine, the powers of the Commission cannot be delegated to new EU bodies that are not foreseen in primary law.[61] The European legislator has therefore chosen to follow the model set by ESA Regulations which establish 'supervisors of supervisors' on the EU level,[62] a solution

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[56] Art 7(4) SRM Regulation.
[57] Art 7(3) SRM Regulation.
[58] Art 18(6) SRM Regulation. For the sake of clarity, one must not confound the 'resolution scheme' in the sense of the SRM Regulation with the 'group resolution scheme' under the BRRD. While the latter is binding only on those Member States that have not explicitly disagreed with it, the resolution scheme adopted under the SRM Regulation is mandatory for all Member States in the Eurozone without any possibility to deviate.
[59] See Art 29(1) SRM Regulation.
[60] Art 29(2) SRM Regulation.
[61] See *Cases 9/56 and 10/56, Meroni* 1958 ECR 1 (ECJ).
[62] See e.g. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority).

that has received the blessing of the CJEU.[63] Instead of a new agency with direct powers over market participants, it has created a EU resolution authority above national resolution authorities. Moreover, the effectiveness of its decisions is restricted by the condition that neither the Commission nor the Council objects to them within 24 hours after their transmission by the SRB.[64]

The restriction of the SRB's powers may also be explained by the 'no creditor worse off' principle followed by the BRRD. This principle guarantees that the shareholders and creditors affected by a resolution tool receive at least as much as they would have received had the institution under resolution been wound up in normal insolvency proceedings at the time the resolution decision was taken.[65] Applying this principle to individual measures requires an assessment of the situation under Member State insolvency law. Crucially, this part of the law is not harmonized in the EU. The European legislator may therefore have thought that the assessment of whether the creditor is worse-off than in a national insolvency proceeding would have overburdened the – comparatively lightly staffed – SRB, and therefore preferred to leave it to the national authorities.

In sum, the Eurozone provides the most advanced integration with regard to resolution measures. Decisions are taken by a central EU agency. Nevertheless, the need for implementation by Member States' authorities and the possibility of objections by the Commission and the Council may lead to a delay. This can become a crucial obstacle given the severe time constraints under which restructurings must be carried out. Not even in the Eurozone, is the transnational effectiveness of resolution measures therefore fully guaranteed.

3. Solution of Intra-EU Conflicts

The most detailed rule on how to overcome the clash between private international law and bank resolution can be found in the BRRD. Its Article 66 addresses the problem with regard to all conflicts inside the EU. This includes relations within the Eurozone because Member States must use the powers conferred to them under the BRRD transposing legislation to implement resolution measures adopted by the SRB,

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[63] *Case C-270/12, United Kingdom v Parliament and Council* ECLI:EU:C:2014:18 (CJEU).
[64] On the latter restriction, see Art 18(6) SRM Regulation.
[65] Art 73 BRRD.

save for the few cases in which the SRB is allowed to implement its resolution decisions itself.[66]

The relation between Art 66 BRRD and the Winding-up Directive is not easy to fathom. It was already shown that the Winding-up Directive gives automatic effect to resolution measures in other Member States, but contains a certain number of exceptions, e.g. for rights *in rem*.[67] These exceptions are however not repeated in Art 66 BRRD. The best way to interpret the relationship between the two texts is therefore that the Winding-up Directive requires Member States to recognize foreign resolution measures, while the details of what this recognition entails are set out in Art 66 BRRD.

a) Transfer Measures

For the purpose of determining the cross-border effects of resolution measures, Article 66 BRRD distinguishes between two different groups of such measures. A first group concerns 'transfers of shares, other instruments of ownership and assets, rights and liabilities'.[68] What is meant here are the three resolution measures that imply a transfer: the sale of business tool, the bridge institution tool and the asset separation tool. Art 66(1) BRRD confirms this limitation and provides for an alternative mechanism. It obliges Member States to ensure that the resolution measures have effect 'in or under the law' of the other Member State in which assets are located, i.e. the target state.[69] The formula implies that the law of the situs is not simply discarded, but continues to apply. The Member State which takes the resolution measure must comply with the conditions set by this law in order to effect the transfer.

This approach is quite respectful of the rules of private international law and the foreign law that applies accordingly to the asset. The major advantage of this respectfulness is that it ensures legal certainty and protects the legitimate expectations of third parties. For instance, where the assets affected are entered into a public register, like shares or real estate for example, the transfer must be made public in order to take effect. This guarantees the publicity of the measures and the dissemination of information to the public. One may also be forgiven for thinking that

[66] See above B 2.
[67] See above A 4.
[68] Art 66(1) BRRD.
[69] Art 66(1) BRRD.

the EU had qualms about interfering directly with the Member States' property law regime.

The drawback of this approach, however, is that it may undermine the resolution measure's efficiency. The authority of the bank's home country must respect the law of the target state, but it will not necessarily be familiar with the law of the other 27 Member States in which assets may be situated. Where it fails to comply with the prerequisites for a transfer under any of these laws, its measure will be without effect in such Member State.

The European legislator tries to counter this information problem by providing an original cooperation mechanism. According to Article 66(2) BRRD, Member States shall provide the resolution authority with 'all reasonable assistance' to ensure that the transfer complies with any applicable requirements of national law. The resolution state and the target state whose law is applicable will thus have to work together. The Directive does not say what this implies exactly. As a minimum, the target state will have to provide the resolution state with information about its law in general. But that is not sufficient. One may assume that the target state is also required to inform about the concrete steps necessary to transfer the particular assets in question. This is a far-reaching obligation. It is even more so because it applies not only to actual, but also to prospective transfers. This becomes clear when reading the text of the BRRD, which describes the addressee of the information as the resolution authority that 'has made or intends to make the transfer'.[70] It follows that the information obligation already applies when a resolution is only at the planning stage. Member States must therefore cooperate early on to ensure that the measure will be effective under the applicable law.

b) Bail-in

With regard to write down, cancellation or conversion of debt governed by foreign law or owed to foreign creditors, the BRRD follows another precept. Article 66(4) BRRD obliges the target state (called 'Member State B') to ensure that the transfer ordered by the resolution state (called 'Member State A') is effective. In other words, the burden is placed here on the target state or the Member State whose law is applicable. It must adopt measures in order for the debt of the ailing bank to be written down, cancelled

[70] See Art 66(2) BRRD *in fine.*

or converted into equity, and not only help the resolution state in respecting the requirements of its law, as it is the case for asset transfers. One means to fulfil this obligation is to introduce a provision recognizing bail-in orders by other Member States. This has been done, for instance, by Germany.[71] The result is a transnational effectiveness of the bail-in order without the need for any further steps on the part of the resolution authority.

At first sight, Article 66(4) BRRD seems hard to square with the rules of private international law. The recovery measure directly affects debt governed by the law of another Member State. It is the latter law which determines the content of the debt instrument and the person that is its creditor. On the other hand, the provision does not change the applicable law. It merely requires the Member State whose substantive law governs to change this law in view of the goal of the transfer. Applying the principle of equivalence,[72] the measure adopted by the recovery state must have the same force to measures taken by its own authorities. This is a truly transnational effect.

The Member States will be able to comply with their obligation where the debt in question is governed by their own law. Much more problematic is the second situation, addressed in Art 66(4)(b) BRRD, namely liabilities owed to creditors located in a Member State. The provision obliges the Member State where the creditor of a debt is located to ensure the effectiveness of their bail-in. Some Member States, including Germany, have transposed this rule word for word into their law.[73] Yet it is impossible for them to write down, cancel or swap a claim that is governed by foreign law. Such debt is rather widespread as a loan or other claim and does not necessarily submit to the law in force in the state of domicile of the creditor. For instance, where the parties have chosen the law of another state to apply, this law governs the claim to the exclusion of any other law.[74] Even in the absence of such an agreement, the law of the bank's country will govern where it has provided a loan.[75] Therefore, a bail-in by any other state has no effect.

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[71] Sec. 153(2) German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz - SAG).
[72] The principle of equivalence requires that Member States apply the same rules to the enforcement of European Union law as to the enforcement of national law, see e.g. ECJ Case C-118/08, *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*, para 33-48.
[73] See sec. 153(2) German SAG.
[74] See Art 3(1) Rome I Regulation.
[75] See Art 4(1)(b) Rome I Regulation.

The European legislator seems to assume that a Member State could interfere nevertheless with a claim under foreign law on the basis that the claim's creditor is domiciled on its soil. However, this is not the case. National law can introduce overriding mandatory or public policy rules, yet such provisions will only have limited effect before the courts of other states.[76] The legislator could also decide to expropriate the claim, but it appears that under general principles of public international law, an expropriation will only be valid where the *debtor* has its domicile or at least assets in the expropriating country.[77] Under the current doctrine, the location of the *creditor* is not a sufficient connection justifying the taking away of a claim. Unless there is a change in the rules of public international law, which does not seem to be imminent, an expropriation by the country in which the creditor is domiciled is without effect. Therefore, the Member State in which the creditor is located cannot fulfil its task under Art 66(4)(b) BRRD. Its measures will in all likelihood not be enforced by the courts of other states. This will be particularly damaging if among them is the country where the debtor is domiciled, because this country is best placed for enforcing the claim.

c) Remedies

One possibly fatal obstacle for recovery and resolution measures could be legal actions seeking to enjoin them. If creditors, owners of shares or third parties could retard such measures by questioning their validity before the courts in different countries, then they would likely be inefficient. At the same time, they must have some access to justice. After all, measures such as a bail-in come close to or are indeed expropriations. The rule of law requires that their legality is controlled by courts.

The EU legislator has struck a balance. On the one hand, it has asked Member States to ensure that resolution measures cannot be challenged.[78] On the other hand, it obliges the Member State which adopts such measures to grant the persons affected by them a right of appeal.[79] In this way, access to justice is preserved. It is simply monopolized in the resolution country. The BRRD adds that the appeal must be

[76] See Art 9(3) Rome I Regulation.
[77] Gerhard Kegel and Ignaz Seidl-Hohenfelder, 'On the Territoriality Principle in Public International Law' (1981) 5 Hastings International and Comparative Law Review 245, 255.
[78] See Art 66(3), (5) BRRD.
[79] Art 85(2), (3) BRRD.

governed by the law of the Member State which adopts the measure.[80] But this is self-understood. Since resolution measures are part of public law, they can only be controlled under the law of the state that enacts them and not under the law of another state.[81] The BRRD only states the obvious.

4. Solution of Conflicts with Third States

With regard to non-Member States, the EU lacks any prescriptive powers. It therefore cannot require them to change their law or to recognize orders issued by the SRB or an authority of a Member State. This results in dramatic consequences for the efficiency of recovery and resolution. One must look no further than the many debt instruments issued under New York law. If the creditors of such instruments are European banks, the EU cannot exchange the person of the creditor by transferring the instrument to a bridge bank or another institution. The reason is that from the perspective of the United States, these instruments are beyond the remit of the EU. The identity of the creditor is a question which is in the exclusive ambit of the governing law, which is New York law. Other states will take a similar position based on the traditional principles of private international law. In the converse situation, in which European banks are debtors of instruments issued under New York law, the EU lacks influence as well. It does not have the power to directly write-down these instruments or convert them into equity. The applicability of New York law shields the instruments against interference by foreign legislators. In a sense, that is exactly the purpose of a choice-of-law clause.

Yet one must bear in mind that bail-ins and resolution measures are necessary to safeguard global financial stability, an interest shared by all sovereigns and private individuals alike. Such measures would be incomplete if they spared assets and instruments governed by foreign law. From a macroeconomic perspective, it is therefore preferable that the resolution encompasses them as well. The way for the EU to achieve this effect must necessarily be indirect.

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[80] Art 66(6) BRRD.

[81] This is an insight of international administrative law, see Christoph Möllers in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 409.

a) Cooperation Agreements

The most natural and smoothest way to make resolution measures transnationally effective is to conclude an agreement with third states. The BRRD seeks to promote such agreements by authorising them on different levels. It empowers first the Council, on a proposal by the Commission, to conclude cooperation agreements.[82] Where the Council has not done so, each Member State may conclude a bilateral agreement.[83]

The BRRD does not clearly state the subject of cooperation. Its article 93(1) mentions that they concern information sharing, but adds the important words 'inter alia'. That recognition of EU resolution measures is the ultimate goal of cooperation results from Art 94 BRRD. The provision allows Member States to unilaterally recognise and enforce third-country resolution measures. It applies 'unless and until an international agreement as referred to in Article 93(1) enters into force with the relevant third country'. This clause implies that where the EU enters into a cooperation agreement, it must ensure that it provides for the execution of resolution orders by third-country measures. In exchange, the third state will demand for a similar commitment with regard to the EU measures.

Alternatively, EBA may also enter into a framework agreement.[84] Such an agreement may complement or substitute an agreement by the Council. It may also coexist with Member State agreements. As one of its subjects, the BRRD mentions 'the application of resolution tools and the exercise of resolution powers'.[85] This may cover recognition of foreign measures. Yet crucially, a framework agreement is by its very nature non-binding. EBA may thus not bind other states to recognise EU resolution measures, and vice versa.

b) Unilateral Recognition by Third State

Another strategy to make EU resolution measures effective across borders is to conjecture that the third country will recognize the EU measure. This is by no means impossible. Many states around the world feel a similar need to restructure banks in financial distress.

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[82] Art 93(1) BRRD.
[83] Art 93(2) BRRD.
[84] Art 97 BRRD.
[85] Art 97(3)(e) BRRD.

The EU Member States' power to unilaterally recognize resolution measures by third states is not contingent on reciprocity.[86] This is in line with the FSB recommendation that such a condition should 'in principle' be avoided.[87] It gives cooperation a head start and aids to lift bureaucratic obstacles. In recognizing foreign resolution actions, the EU certainly hopes that other states would return the favour. Art 94 BRRD therefore is a sort of advance for future cooperation. It is the 'boon' that shall entice foreign countries to recognize the European measures.

c) Extraterritorial Leverage

Where no international agreements exists, as it is the case for now, and where third states do not recognize EU or Member State measures voluntarily, one must resort to other methods. A well-known strategy of states to give their commands effect beyond their territory is to exert pressure on the persons subject to the powers of the sovereign. Examples can be witnessed in embargo legislation or anti-suit injunctions.[88] The commands are addressed to national companies or persons present in the jurisdiction, which must adopt a certain behaviour.

Such extraterritorial leverage is also to be found in the BRRD. It obliges the persons exercising control of the ailing bank as well as the transferee, i.e. an acquirer of the ailing institution or a bridge bank, to take all measures necessary to ensure that the transfer is effective.[89] These persons, the control person and the transferee, are subject to the EU Member States' jurisdiction and can therefore be expected to fulfil their duties under EU law. They are clearly obliged, for instance, by the UK transposition to take the necessary steps to ensure that the transfer is effective as a matter of foreign law.[90]

It is not entirely clear which steps the persons must take. In case of a transfer order, one can surmise that it must try to contractually effectuate the transfer from the bank to the buyer or bridge entity. In case of a write-down or conversion, it will be obligated to try to convince the counterparty of either renouncing of its debt or agreeing with its conversion to equity. Yet there will be factual obstacles to what the controlling

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[86] See Art 94 BRRD.
[87] FSB (n 3) 12.
[88] Boleslaw A Boczek, *International Law: A Dictionary* (Scarecrow Press 2005) para 91 with further references.
[89] Art 67(1)(a) BRRD.
[90] See sec 39(3) UK Banking Act.

person can achieve. The counterparty will normally not agree to bail-in measures without receiving substantial compensation. The obligation therefore only carries so far. What is factually impossible cannot be legally demanded, in line with the old adage *'impossibilium nulla obligatio est'*.

d) Substitutes

Until the second strategy succeeds, the BRRD foresees a default rule. The person controlling the ailing bank will have to hold the assets 'on behalf' of the recipient until the resolution measure becomes effective.[91] In other words, the EU is obliging those persons under its remit – the person controlling the ailing bank – to provide an interim solution. The formula gives room for interpretation and has been transposed quite differently into national law.[92]

e) Abstention and Invalidity of Measure

Despite the many provisions of EU law, there will be instances where a transfer or bail-in fails because of the applicability of foreign law and the absence of a contractual bail-in clause. The BRRD provides that where it is 'highly unlikely' that a recovery or resolution measure will become effective, the resolution authority shall not proceed with it.[93] The formula is conspicuously imprecise. It is also asking much to demand the resolution authority, which must typically act under a lot of time pressure, to analyse the chances of a transfer or bail-in of the many thousands of assets and obligations of a bank. Ideally, this question should therefore already be assessed at the resolution planning stage.

What happens if the resolution authority proceeds with the resolution despite it having few chances of being successful? The BRRD provides that in such cases the order should be 'void'.[94] This sanction is quite rigid. It is also detrimental to legal certainty given that the conditions that trigger the voidness are so imprecise. According to the text of the Directive, the resolution measure is void when it is 'highly unlikely' that it will be effective. Of course, this term can be assessed very differently. It is even not clear whether this assessment has to be made on an ex-ante or an ex-

[91] Art 67(1)(b) BRRD.
[92] See below 6.
[93] Art 67(2) BRRD.
[94] Art 67(2) BRRD.

post basis. In light of the many questions surrounding the notion, one should have rather abstained from providing for harsh consequences. It seems that the Member States felt uneasy as well, which is reflected in transpositions diverging from the EU legislator's demands.[95]

5. The Special Case of Termination and Netting Clauses

A very peculiar problem arises from termination clauses in complex debt instruments such as derivatives, which are typically combined with provisions for close-out netting.[96] If clauses like these would be triggered by resolution measures, they could thwart any bail-in attempt because they lead to the termination of the contract and the set-off of all claims against each other. Where this happens, there are less claims and hence less opportunity for writing down, cancelling or converting debt. The BRRD prevents this result by providing that resolution measures shall not be deemed to be an enforcement event for the purposes of the termination clauses and the European Directives that support their validity.[97] It also requires Member States to endow their resolution authorities with the power to suspend early termination rights that may arise for other reasons.[98] It thereby follows recommendations by the FSB which advise that early termination rights under the relevant contracts should be temporarily stayed in order to prevent their interference with resolution measures.[99]

For the temporary stay to work, it must also apply if the contract including the netting clause is governed by another law than that of the resolution state. It was already mentioned that the Winding-up Directive now contains a special twist that allows the resolution authority to execute its powers under Art 68 and 71 BRRD.[100] In addition, the legislator has explicitly emphasised that Art 68 is an 'overriding mandatory rule' in the sense of Art 9 of the Rome I Regulation.[101] This is well meant, but it is insufficient. It works only inside the EU where the Rome I Regulation applies

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[95] See below B 6.
[96] See, e.g., sec 6 ISDA Master Agreement 2002. Under close-out netting clauses, all obligations between the participants of a terminated contract are set-off against each other. The purpose of such clauses is to reduce the risk of a fallout of one contractual party in the event of an insolvency of its counterparty.
[97] Art 68(1) BRRD.
[98] Art 71(1) BRRD.
[99] FSB (n 1) 10; FSB (n 3) 7.
[100] See the introductory clause of Art 25 Winding-up Directive, as amended by Art 117(3) BRRD. On this, see above A 4.
[101] Art 68(6) BRRD.

and where Union law thus has the power to define the notion 'overriding mandatory rules'. Yet it does not work before tribunals of third states. They will therefore not be obliged to heed the temporary stay contained in the BRRD.

Again, the EU has reached the limit of its prescriptive powers. Yet again, it hopes for the cooperation of other states. The Directive is kind enough to extend the benefit of the temporary stay to resolution measures adopted by the authorities of third states.[102] They will not be considered as events triggering early termination rights. The only condition is that the foreign measure has been recognized by a Member State under Art 94 BRRD, but even this requirement can be avoided where an EU resolution authority so decides.[103] This is cross-border cooperation at its best. Crucially, reciprocity is not a requirement. But it is obvious that the EU hopes the other states will return the favour of a temporary stay for their measures.

The most important initiative in the area of temporary stay, however, does not come from a national legislator, but from private actors. ISDA, the International Swap and Derivatives Association, has published a 'Resolution Stay Protocol' in 2014, which was updated one year later by the Universal Resolution Stay Protocol, as well as a Jurisdictional Modular Protocol.[104] ISDA suggests that the users of its Master Agreement adhere to these protocols by signing up with them. Where both parties to a derivative have done so, an annex is automatically added to their contract, by which a special resolution regime regarding one of them will be enforceable upon the other. The various special resolution regimes are defined for different countries. The main effect of this annex is a temporary stay of the default rights, in particular the right to termination. Through contractualization, the national resolution regimes are therefore made binding upon parties outside the borders of the enacting state.

6. Inconsistencies in Member States' Transposition

a) Legislative Divergence

By now it has become clear that the EU rules on the solution of conflict of laws are complex and sometimes also vague. It is therefore little wonder that the way in which the Directive has been transposed into Member State law differs considerably. Within

[102] Art 68(2) BRRD.
[103] Art 68(2) BRRD.
[104] For background, see https://www2.isda.org/functional-areas/protocol-management/protocol/22 (last accessed 2 December 2015).

the limited frame of this contribution there is not enough space to trace those differences exhaustively. Some examples might however give an idea of their kind and degree.

As has been seen, the BRRD creates some confusion with regard to its relation to the Winding-up Directive.[105] This has led to divergent approaches in the Member States. The UK, for instance, has followed Art 117 BRRD's approach and treats resolution measures adopted by other Member States as reorganisation measures under its Credit Institutions (Reorganisation and Winding up) Regulations 2004.[106] This means that such measures are recognized, but also that the exceptions provided in this text apply. Immovable property, registrable rights, or reservation of title agreements, among others, will therefore be exempted from recognition.[107] The same approach has been followed by France.[108] In contrast, the German transposition simply provides that resolution measures by other Member States 'have the same effect' as those taken by the German resolution authority itself.[109] In other words, the German legislator simply puts foreign measures on an equal footing with its own. One might question whether this far-reaching approach is still in line with the Winding-up Directive, which seems to aim at full harmonisation and therefore makes also its exceptions binding. But it certainly helps the efficiency of foreign resolution measures.

Another example of inconsistent transposition relates to the situation in which Member State measures are not recognized in a third state. The BRRD prescribes that in this event, the person controlling the ailing bank will have to hold the assets 'on behalf' of the recipient until the resolution measure becomes effective.[110] This requirement has been transposed quite differently. French law obliges the controlling person to conserve the assets.[111] The UK Act states that the bank, and not the person

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[105] See above B 3.

[106] See Regulation 2, UK Credit Institutions (Reorganisation and Winding up) Regulations 2004, as amended by The Bank Recovery and Resolution (No2) Order 2014 SI 2014/3348, Schedule 3. Accordingly the definition of "directive reorganisation measure" in the 2004 Regulations include, besides "reorganisation measures" in the original sense of the Winding-up Directive, "any other measure to be given effect in or under the law of the United Kingdom pursuant to Article 66 of the BRRD".

[107] See Art 23 to 35 UK Credit Institutions (Reorganisation and Winding up) Regulations 2004.

[108] See Art L613-31-2 and L613-31-5 and L613-31-6 French Monetary and Financial Code (Code monétaire et financier).

[109] Art 153(1), (2) German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz - SAG), Federal Gazette (Bundesgesetzblatt) 2014, p. 2091.

[110] See above B 4 d.

[111] Art L650-9(3) French Monetary and Financial Code (Code monétaire et financier).

controlling it, must hold the property for the benefit of the transferee.[112] The German legislator chooses a middle way by obliging the controlling person to ensure that the bank will hold the property until the transfer becomes effective.[113] It is debatable whether the UK and German transpositions comply with the obligations by the Directive since the bank is not freed from the assets. Only payments must be made in all systems on behalf of the bank to the transferee.[114]

A final example of inconsistency concerns the voidness of the resolution measure. The BRRD foresees that a resolution measure by a Member State is void in case it is 'highly unlikely' that it will become effective in a third country. This sanction has been criticized above as overly rigid and impracticable.[115] It is interesting to note that the Member States have found ways to avoid it. The German legislator does not declare the transfer void, but instead obliges the resolution authority to revoke the resolution order.[116] The UK Banking Act provides for voidness, but conditions it upon a determination by the Bank of England that it is not possible to effectuate the transfer.[117] This determination necessarily comes ex post and is not based on the unlikeliness, but on the actual impossibility of the transfer taking effect. The French legislator has chosen to simply not address the issue and just to oblige the authority to abstain from the action.[118]

In sum, national laws still considerably diverge regarding the recognition of resolution actions by other Member States and the relation to third States. Inspite of harmonisation by the BRRD and the Winding-up Directive, the effectiveness of such actions is therefore not secured. This is partly due to conscious choices by Member States' legislatures, but also to misunderstandings caused by the complexity of the texts. With hindsight, it would have been preferable if the EU had proceeded by way of a regulation to avoid such differences. At least it should have given the Member States a precise text on which to model their transpositions if it was interested in a similar transposition.

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[112] Sec 39(4)(a) Banking Act (2009).
[113] Sec 81(1) no 2 German Recovery and Resolution Act.
[114] Sec 39(4)(b) UK Banking Act, Art L650-9(3) French Monetary and Financial Code; sec 81(1) no 2 German Recovery and Resolution Act.
[115] See above B 4 e.
[116] Sec 81(2), last sentence German Recovery and Resolution Act.
[117] Sec 39(4a) Banking Act, introduced by sec 38 of The Bank Recovery and Resolution Order 2014, SI 2014 No 3329.
[118] Art L650-9(3) French Monetary and Financial Code. See also Art L613-50(9).

b) Judicial Uncertainty

The legislative discrepancies are compounded by vagaries in the case law. The BRRD is still young, but it took off on the wrong foot. Two cases illustrate the uncertainty surrounding it.

In May 2015, the Regional Court 'Munich I' had to decide about an aspect of the Hypo Alpe Adria saga that had strained relationship between Bavaria and Austria for long.[119] Hypo Alpe Adria was an Austrian bank that had lost its authorization as a credit institution and went into resolution. Its assets were transferred to a wind-down entity called HETA. Hypo Alpe Adria and HETA had both issued debt, with the Republic of Austria and the State of Carinthia acting as guarantors. Part of this debt had been acquired by the German public bank BayernLB. A few days after the BRRD came into force in July 2014, the Austrian legislator adopted an act that cancelled or suspended some of these debt instruments and associated guarantees which were specifically mentioned.[120] Undeterred, BayernLB brought an action against Hypo Alpe Adria in the Munich court for the payment of the debt and guarantees.

One of the contentious points was whether the German court was obliged to heed the Austrian Act because of the BRRD. The claimant BayernLB alleged that the Austrian Act was not a transposition of the BRRD, but merely a 'fig leaf' because the moratorium did not to restructure an active bank. Moreover, it argued that the BRRD would not apply to the case at hand since Hypo Alpe Adria only had subsidiaries and not branches in other Member States. The Regional Court clarified that the Directive covers credit institutions with subsidiaries in other Member States. Nevertheless it came to the conclusion that the cancellation and moratorium were not covered by the BRRD, for two reasons. First, it agreed with the claimant that the Austrian Act was not intended to recapitalize an existing bank, but rather resolved an ailing institution. Second, the court highlighted that the measure was not taken by an authority but by the legislature itself. It was therefore not a resolution measure within the sense of the Directive, and a German court had no obligation to recognize it. While one can easily accept the first ground, the second one is more difficult to follow. It is hard to understand why the obligation to recognize a resolution measure by another Member

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[119] *BayernLB v Hypo Alpe Adria (HETA case)* Regional Court, Munich I, judgment of 8 May 2015, BeckRS 2015, 15096.

[120] The Federal Act on the restructuring of the Hypo Alpe Adria AG (HaanSanG), Austrian Federal Gazette (Österreichisches Bundesgesetzblatt), 31 July 2014.

State's administrative authority should not apply *a fortiori* to measures adopted by its legislature. Before these questions could be decided on appeal, the Austrian Constitutional Court put an end to the affair by invalidating the Act of 2014 on the ground that it discriminated between bondholders and unjustly invalidated the guarantees taken out by the Austrian Republic and Carinthia.[121]

Another case in which uncertainties over the BRRD emerged was decided by the High Court for England & Wales (Commercial Court) in 2015.[122] The claimant Goldman Sachs had acquired debt of the Portuguese Banco Espírito Santo. In August 2015, the Portuguese resolution authority decided to transfer all debt of this bank to a bridge entity called Novo Banco, with the exception of debt owed to certain shareholders who should be bailed-in. On the basis of this act, Goldman Sachs brought an action against Novo Banco in the English courts. The particularity of this action, when compared to that of BayernLB in the Hypo Alpe Adria case, was that Goldman Sachs wanted the resolution measure to be effective. In December of the same year, however, the Portuguese resolution authority had adopted another decision according to which the transfer to Novo Banco excluded the debt held by Goldman Sachs International on the ground that it had been a former shareholder of Banco Espírito Santo and therefore should be bailed-in.

The question before Justice Hamblen of the Commercial Court was whether he had jurisdiction over Novo Banco based on the forum selection clause in the debt instrument. Novo Banco opposed this on the ground of the December decision, which excluded its subrogation to the debt held by Goldman Sachs International. Novo Banco took the view that the Commercial Court was required by the BRRD to recognise this decision taken by the Portuguese resolution authority. Goldman Sachs International could not have the 'plums' without the 'duff', i.e. the August decision without the December decision. Justice Hamblen however saw things differently. He ruled that the UK only needed to recognize the August decision which operated the transfer of all assets and debt, but not the December decision which excluded the debt held by the plaintiffs from the transfer. He noted that at the time of the August decision there was no 'duff'. Although he accepted that the BRRD allows for the transfer as well as the retransfer of debt, he refused to qualify the December decision in this way. In

[121] Austrian Constitutional Court, decision of 3 July 2015, ECLI:AT:VFGH:2015:G239.2014.
[122] *Goldman Sachs International v Novo Banco SA* (2015), High Court for England & Wales, Commercial Court, judgment of 7 August 2015, [2015] EWHC 2371 (Comm), per Justice Hamblen.

his mind, it did not fit any of the categories of resolution measures provided by the BRRD and was therefore outside of its scope. This way of arguing seems highly legalistic and somewhat atypical for an English judge. If the BRRD gives a resolution authority the power to transfer and retransfer debt of its own volition, it also allows it to delineate the breadth of its own measures. In this context, it can hardly matter in which the precise moment such decision is taken.

Both of these early bird rulings show a certain disquiet on the part of Member State courts to accept foreign resolution measures. This uneasiness is most probably due to the political nature of such measures and their interference with legal certainty and private property rights. The state interests behind them are all too obvious and their legitimacy is not always beyond doubt. Understandably, some courts therefore consider it to be their prime role to protect their citizens or companies from foreign resolution measures. In doing so, however, they may undermine the goals of the BRRD.[123] One of these goals was to centralise remedies against resolution measures in the courts of the country of origin. Contrary to this intention, the validity and scope of such measures is subject to scrutiny by any Member State court in the EU, for instance in the context of civil proceedings for the performance of bailed-in debt. One may easily imagine that this may seriously compromise the efficiency of resolution measures.

C. An Overview of Third Country Regimes

The EU is not alone in providing for a special resolution regime. Switzerland has introduced a recovery and resolution regime as early as 2003.[124] This was probably due to the fact that the country had gigantic banks that outsized its economy. This peculiar situation forcefully demonstrated the need for a special resolution regime. In its current form, Swiss law provides for the adoption of a restructuring scheme, which may comprise the continuation of certain service functions including the transfer of assets and debt to another company or a bridge entity.[125] Remarkably, the Swiss

[123] Accord Jens-Hinrich Binder, 'The Position of Creditors Under the BRRD', *Commemorative Volume in memory of Professor Dr. Leonidas Georgakopoulos* (Social Science Research Network 2016) 26 <http://papers.ssrn.com/abstract=2698086> accessed 16 February 2016.
[124] See Art 25 et seq. Federal Act on Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen – BankG).
[125] See Art 29 and 30 Swiss BankG.

financial markets authority (FINMA) is given the power to recognize foreign insolvency decrees and other measures issued by the authorities at the real seat of a bank.[126] Although it does not directly follow from the text, the *travaux préparatoires* make it clear that this power also includes the recognition of third country recovery procedures.[127] According to an estimate by the FSB, the Swiss recognition procedure takes two months.[128] Alternatively, FINMA may allow the foreign resolution authority to have access to assets located on the territory of Switzerland, the only condition being that Swiss creditors receive equal treatment in comparison to other creditors.[129] The Swiss rules do not contain any requirement of reciprocity. The Swiss authorities can therefore recognize foreign resolution actions even where the state from which they emanate would not or did not do the same with regard to Swiss resolution measures.

The United States is another country that disposes of a comprehensive resolution regime.[130] The so-called 'Orderly Liquidation Authority' (OLA) has been introduced shortly after the height of the financial crisis by the Dodd-Frank Act.[131] It comprises many tools that can also be found in the BRRD: asset and debt transfer, bail-in of unsecured creditors, suspension of termination clauses. However, it dedicates relatively few provisions to international cooperation.[132] The Federal Deposit Insurance Cooperation (FDIC) has drafted a joint paper with the Bank of England on a common SPOE approach, yet they have not entered any binding commitment.[133] In the absence of any specific text on recognition of foreign resolution actions, US courts will follow the same general principles as in bankruptcies. Under the principle of comity, they are allowed to give effect to foreign resolution measures, but will do so only on a case-by-case basis. In the past, pre-insolvency measures have

[126] Sec 37g(1), (3) Swiss BankG.
[127] See Botschaft zur Änderung des Bankengesetzes (Sicherung der Einlagen), 12 Mai 2010, Federal Gazette (BBl) 2010, p. 3993, 4021.
[128] FSB (n 3) 18.
[129] Sec 37g(2) Swiss Banking Act (Bankengesetz – BankG).
[130] For an analysis, see Mark A McDermott and David M Turetsky, 'Restructuring Large, Systematically-Important, Financial Companies' (2011) 19 American Bankruptcy Institute Law Review 401; Skeel (n 32).
[131] Title II Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.
[132] (noting that the Act provides only 'a handful of exhortations of US regulators to coordinate with their foreign counterparts') Skeel (n 32) 9.
[133] FDIC and BoE, Resolving Globally Active, Systemically Important, Financial Institutions, Joint Paper, 10 December 2012.

been accepted,[134] but also rejected by US courts.[135] Whether they will give effect to a foreign resolution can therefore not be determined in advance.[136]

Other major financial centres also have resolution mechanisms in place, such as Japan[137] and Singapore[138], but it is also uncertain how they will deal with foreign measures. In other regions, the situation is even bleaker. To illustrate, special resolution regimes are still anathema in Latin America.[139] All these factors makes international cooperation difficult and impede the cross-border effectiveness of resolution actions.

D. Ideas on How to Improve the Cross-border Effectiveness of Resolution

The foregoing part has shown that international cooperation is crucial to make resolution measures transnationally effective. But whether other states recognize or support EU resolution is uncertain. Particularly frustrating is that this uncertainty will last until the very moment of crisis, when recognition and support is most needed. Moreover, the relative rarity of such events does not help cooperation. Game theory teaches that the likelihood of cooperation increases with the frequency of encounters between the two sides. States that are called upon to recognize foreign resolution measures of another country might assume – rightly or wrongly – that they will not come into the same position at any point in the near future and therefore withhold cooperation. One must therefore fear that cooperation will not emerge automatically over time.

The conditions for mutual recognition and support are therefore far from ideal. International cooperation is not to be assumed, but needs to be spurred. What can be

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[134] For the acceptance of a foreign pre-insolvency measure regarding a bank, see: Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999).
[135] In Re Treco, 240 F3d 148 (2d Cir. 2001)
[136] David Geen and others, 'A Step Closer to Ending Too-Big-To-Fail' (2015) 35 Futures and Derivatives Law Report 1 footnote 35.
[137] See Kimie Harada and others, 'Japan's Financial Regulatory Responses to the Global Financial Crisis' (2015) 7 Journal of Financial Economic Policy 51, 61.
[138] FSB (n 3) 18–19.
[139] Javier García, Victoria Santillana and Santiago Fernández de Lis, 'Resolution Regimes in Latin America' <https://www.bbvaresearch.com/publicaciones/regimenes-de-resolucion-en-america-latina/?idioma=en> accessed 14 February 2016.

done? The FSB has taken an important step with the publication of 'Key Attributes of Effective Resolution Regimes for Financial Institutions' and the 'Principles for the Cross-border Effectiveness of Resolution Actions'. Yet it seems unlikely that they will suffice. In addition to being not binding, they are notoriously imprecise. For example, the texts are conspicuously vague about the situations that may allow resolution actions.[140] This may lead to abuse, which may in turn hurt recognition by other states. The conditions for such recognition are equally vaguely formulated. The FSB in some instances simply relies on the 'good faith' of the resolution authorities.[141] This standard is too vague to allow any precise adjudication. States need more precise criteria. Another drawback of the 'Key Attributes' and the 'Principles' is the fact that they are couched in regulatory terms. They are mainly focused on cooperation between resolution authorities. Yet ultimately, the effectiveness of resolution actions will dep end on courts in which they will be tested. It is therefore necessary to convince judges of the need to recognise foreign resolution measures as effective, even where they are at variance with the applicable law under classic conflict of laws. Many judges will be unfamiliar which international soft law texts such as the FSB recommendations and might find it difficult to transpose them into a legal context. In order to spur world-wide convergence on resolution, one must make use of other methods of transnational law-making.

1. An International Treaty?

One idea would be to negotiate, sign and ratify a treaty under public international law. States could engage in such an instrument to respect and support the actions adopted by other signatories. It could stipulate conditions for such an obligation, for instance that the measure was adopted by the authorities at the seat of the bank. It could also contain limits to resolution powers or restrict it to certain cases.

For all its possible benefits, it is unlikely that a treaty would work. First of all, states will be reluctant to assume any binding obligation under public international law in an area that is as crucial to their economic and social well-being as the protection of banks and bank creditors' assets. And even if they are willing to sign such a treaty,

[140] See FSB (n 1) no 3.1: 'Resolution should be initiated when a firm is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so.'
[141] FSB (n 3) 13.

one may reasonably doubt whether it would be of any use in a crisis.[142] It is probable that confronted with realities, national authorities will prefer to protect short-term domestic interests, even at the cost of violating their treaty obligations. Public international law is inherently weak where the economic and political stakes are high. Other governments know that and will anticipate defection. States therefore find themselves in the situation that they are unable to make a credible commitment before a crisis.

2. Uniform Resolution Law

A more promising suggestion that shall be made here is to elaborate a uniform text on resolution, such as a legislative guide or a model law. The idea is to formulate a set of rules which contains precise conditions for bail-ins and transfer orders, and for recognition and support of resolution measures by other states. The backbone of such a uniform text would be formed by the FSB 'Key Attributes of Effective Resolution Regimes for Financial Institutions' and the 'Principles for Efficient Cross-border Resolution Actions'. Yet they need to be made more precise.

The precise rules could be inspired by national legislation. The resolution regimes e.g. of Switzerland or of EU Member States could serve as a starting point. They would have to be stripped of their particularities and transformed into a baseplate that is universally acceptable. This work could be done by one of the different organisations that have uniform law as their mission, such as UNIDROIT, UNCITRAL, or the Hague Conference on Private International Law.

A legislative guide or model law could bring many benefits. First, it would ensure that resolution actions are recognized by the courts and not only by administrative agencies. Second, it would also guarantee a level playing field for resolution. A state recognizing the measures of another would have a reasonable chance that its measures receive the same treatment in similar circumstances. It would therefore not withhold its cooperation for fear of being duped. In addition, a legislative guide or model law could serve as a recommendation to those states who do not know which text to adopt. Many states lack the expertise and the experience in matters of financial law that is necessary to draft their own resolution law. Being far from the financial

[142] See also Grünewald (n 2) 75 (noting that even legally binding obligations would not guarantee effective burden-sharing).

centres of the world, they also have no particular interest or stake in these matters. This may be a major hindrance for any adoption of an appropriate law. An internationally backed model could spur a world-wide wave of legislation which would arrive at even the most distant shores.

An obvious counter-argument against harmonisation is sovereignty. It is an ambiguous word, which breaks down into several aspects.

First, sovereignty may designate the need to adapt a state's resolution regime to the particularities of its legal system. Yet resolution is a highly technical area. It does stand on its own and is not tightly woven to the rest of a country's legislation. It is also a very novel area, which makes that in most countries there is no old law that stands in the way of the adoption of a new act. There will thus be not much need for an adaption to local circumstances.

Second, sovereignty may express the need for policy space and regulatory diversity.[143] Yet a model law on resolution is not at variance with this aspect either. Resolution is not an area where creativity is needed, but rather strong and robust rules must be applied in the same way around the globe. While policy space and regulatory competition are certainly important, they would not be beneficial in an area where the temptations to protect domestic interests is so strong as in resolution. Any benefits of new and innovative rules would be clearly outweighed by the benefits of harmonisation.

Crucially, the suggestion of a legislative guide or model law would not exclude the room for national traditions nor experimentation. Being a soft law text only, its rules can still be departed from. This obviously limits its harmonizing effect. Yet even if no global uniformity is achieved as a result, such a uniform text may nevertheless bring some benefits: First, it will counsel those legislators who do not know which rule to adopt. Second, it will bring transparency. Against its backdrop, any domestic deviation will stand out. It will therefore become clearer where states diverge and how. As a result, the national legislator might feel pressure to at least justify its departure from the global regime. Moreover, experience with other model laws suggests that

[143] See Roberta Romano, 'For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture' (2014) 31 Yale Journal on Regulation 1; Roberta Romano, 'The Need for Competition in International Securities Regulation' (2001) 2 Theoretical Inq. L. 387; Christian Tietje and Matthias Lehmann, 'The Role and Prospects of International Law in Financial Regulation and Supervision', *International Law in Financial Regulation and Monetary Affairs* (Oxford University Press 2012).

deviations will be limited. The need to explain them will discipline and suppress unnecessary idiosyncrasies. Finally, a uniform text may lead to the emergence of a global case law on resolution that can be catalogued and compared, such as the one that exists for the CISG and other texts[144].

A legislative guide or model law, if well drafted, will therefore ultimately result in increased transparency and uniformity, while maintaining some policy space. It would greatly enhance the potential for cross-border effectiveness of resolution actions. It would also entice global cooperation and strengthen the foreseeability of such actions.

3. More Inclusive Resolution Colleges

A further and final proposal is to improve the cooperation through resolution colleges. So far, such colleges are set up where a bank has branches or subsidiaries in more than one country.[145] But other states will be affected by such a measure as well. This is true, in particular, for the target state in which the bank's assets are located. This state has an interest of protecting local creditors. It may therefore be tempted to resist any foreign resolution measure or to adopt its own one.

Including target states into the resolution decision could improve the effectiveness of the measure. The countervailing interests could be openly discussed and a mutually satisfying solution be find. It could also help to make clear from the beginning which actions will be successful – because they will be recognized by the target state – and which not.

One should therefore seriously consider the possibility of including target states into resolution colleges. This of course need not apply to each and every state whose laws governs a tiny amount of a bank's assets. The proposal made here is restricted to those states in which considerable part of the patrimony is located or whose law applies to an important number of debt instruments that are subject to resolution and recovery measures.

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[144] See e.g. the CISG Database, available at http://www.cisg.law.pace.edu. For court decisions and arbitral awards relating to the UNCITRAL's Conventions and Model Laws see the CLOUT database, available under http://www.uncitral.org/uncitral/en/case_law.html.

[145] See, for instance, from the EU perspective, Art 88–89 BRRD.

D. Conclusion: Resolution and Law's Elasticity

Katharina Pistor has observed that financial law tends to be relatively elastic at the apex of the financial system and more binding on the periphery.[146] The foregoing analysis of the effectiveness of resolution measures provides a striking confirmation of this insight. Resolution measures are prime examples of law's elasticity. They may transfer rights in assets to third parties, and they may reduce or even cancel straight-forward contractual claims ('IOUs'). The more effective resolution measures are, the less binding are property rights and obligations. As has been shown, the effectiveness of resolution measures diminishes on a sliding scale from the Eurozone to third States. The strongest effectiveness is in the Eurozone, which is hardly surprising because it is the most integrated part of the EU. That means that property rights and assets are most flexible there. A middle area is occupied by the non-Eurozone countries, where Member States are obliged to make resolution measures of one state effective in the others. The least effectiveness can be observed in relation with third countries, where we continue to see 'hard law'.

This diminishing effectiveness of resolution, and the consequent hardness of law, does not come as a surprise. Its basic reason is the limitation of sovereign powers. The EU strives to make its resolution measures effective across borders. Nevertheless, it encounters natural limits where the law of a Non-Member State is applicable according to the traditional rules of private international law. The EU cannot simply impose its measures on third states whose law governs debt or where assets are located. Insofar, it must rely on transnational coordination. It is this coordination which makes resolution measures effective and thereby increases the law's flexibility. Two suggestions on how such coordination can be enhanced have been made here: the introduction of a legislative guideline or model law and the inclusion of target states – i.e. states whose law applies to the bank's assets – into resolution colleges.

[146] Katharina Pistor, 'A Legal Theory of Finance' (2013) 41 Journal of Comparative Economics 315, 317.