Recognition is key
or how to deal with a bank crisis in the internationally interconnected financial industry

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Abstract:

The crisis of banks poses unique challenges for supervision, resolution, and insolvency due to their strong international interconnectedness. This paper discusses the procedural variants for resolving a bank crisis in Germany and Europe, the cooperation and recognition possibilities of these variants, and proposes integrating cooperation and recognition options in bank resolution into general international insolvency law.

Keywords: Bank crisis, resolution, insolvency, international cooperation, financial industry

A. Introduction

The crisis of banks[1] poses special challenges for supervision, resolution and insolvency.

On the one hand, due to their business model, banks are strongly interconnected internationally, both within an economic unit and in relation to other market participants. Thus, the failure of financial institutions entails considerable economic risks. These risks result from the danger of contagion due to the close interconnection of market participants on the interbank market. The effects of a bank crisis are rarely limited to a single state. In a bank crisis, cross-border situations are the norm rather than the exception.Moreover, the dangers to the overall economy in the event of a crisis should not be underestimated due to the sheer number of assets held

1 For purposes of this article, the word ‘bank’ is used to include all financial institutions that are subject to special insolvency regimes.

by a bank in relation to the domestic product of the host state. For example, bank assets take up an average of 77 % of GDP in global comparison.[2]

But the enormous importance for the economy as a whole through its financing function also lends its crisis special weight. Due to this importance for the national economy, states have often had their own interests in mind when dealing with a bank's crisis. However, this approach has led to synergy losses, as a better result – i.e. with less negative impact on other market participants – could be achieved with a coordinated approach.

The complexity is further increased in the crisis of an international bank by the different supervisory and resolution variants that exist within the respective jurisdictions and in international comparison.

Despite – or perhaps because of – these enormous challenges in a banking crisis, considerable legislative efforts have been made which, as a result, go well beyond the recognition and cooperation possibilities and obligations in general insolvency proceedings.

Against this background, this paper has a three-part structure:

I. First of all, an overview of the different procedural variants for the resolution of a bank crisis in Germany and Europe will be presented.
II. In the second part, the respective cooperation and recognition possibilities of the different process variants will be considered.
III. In the third part, the above findings will be used to present a reform proposal arguing for the integration of the cooperation and recognition options in the resolution of a bank into general (international) insolvency law.

B. Legislative approaches for bank crisis

In principle, there are two different procedural variants for handling the financial crisis of a bank in Germany: insolvency or liquidation. Since recognition and cooperation are largely determined by the respective legal framework, these frameworks will be presented in a brief overview.

Generally speaking, the legal framework is shaped on the one hand by European law and by national law on the other hand. Various factors must be taken into account when determining the applicable law. The legal

2 See *GlobalEconomy.com*, ‘Bank assets to GDP – Country rankings’, <https://www.theglobaleconomy.com/rankings/bank_assets_GDP/> (last accessed 31.02.2023).

framework depends in particular on the size or systemic relevance of the affected bank, on the respective domicile and on the scope and possible effects of the crisis of the affected bank. However, the areas of application of the legal frameworks cannot be clearly distinguished in the details.

Simplified, these are the available options:

A. Supervisory measures pursuant to §§ 46 et seq. of the Financial Industry Act (hereinafter KGW, acronym for *Gesetz über das Kreditwesen*)[3], in particular, the so-called silent liquidation during ongoing business operations;
B. Resolution measures on the basis of the Act on the Recovery and Resolution of Institutions and Financial Groups (hereinfater SAG, acronym for *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen*);[4] or
C. 'Regular' insolvency proceedings on the basis of the Insolvency Act (hereinafter InsO, short form for *Insolvenzordnung*)[5].

The heading of this section '*crisis*' is therefore not a linguistic inaccuracy insofar as it does not speak of bankruptcy or resolution, since banks in Germany can go through both insolvency proceedings and official resolution measures.

I. Preventive supervisory measures

First of all, the German national banking supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht,* or *BaFin*) has various (preventive) measures at its disposal in the event of a financial threat to the bank.

If milder measures are unsuccessful, BaFin may, in particular if the fulfilment of the credit institution's obligations towards its creditors is at risk, revoke the banking license under the conditions of § 35 (2) no. 4 KWG and order liquidation pursuant to § 38(1), sentence 1 KWG and appoint a liquidator.

Insolvency proceedings and supervisory measures under the KWG do not have an exclusive relationship. For example, BaFin will regularly order

3 As amended on 09.09.1998, BGBl. I.p. 2776.
4 Enacted 10.12.2015, BGBl. I p. 2091.
5 Enacted 05.10.1994, BGBl. I p. 2866.

a moratorium pursuant to § 46 of the German Banking Act (KWG) prior to filing an application to open insolvency proceedings in order to protect the insolvency estate from adverse changes.[6] However, liquidation on the basis of § 38 of the German Banking Act (KWG) does not permit any interference with the rights of creditors and other stakeholders. In fact, this is a liquidation ordered by the BaFin, which follows general commercial law.

II. Resolution

A different rule applies to resolution on the basis of the SAG. Firstly, the historical background of this law is important for understanding the SAG:

In the context of the financial crisis of 2007–08, insolvency law for banks had reached its limits. The dangers of an uncontrolled market exit by individual banks for other financial institutions and the entire financial system have become apparent. The subsequent bail-outs with taxpayer money were often defended with the slogan 'too complex, too connected, too big to fail'. In fact, this led to a State guarantee for the high-risk corporate management and the ensuing economic collapse.

This unsatisfactory result caused a constant flow of reforms aimed at avoiding bank insolvencies and, if necessary, achieving an alternative resolution involving the economic stakeholders.[7] The preventive aspect of these reforms in response to the financial crisis concerned mainly the capital requirements of credit institutions, which were successively tightened up until the latest iteration (Basel III).[8]

A core element of the European banking regulations is also the strengthening of depositor protection. Most recently, Directive 2014/59/EU, known as Recovery and Resolution Directive (hereinafter, 'BRRD') and Regulation (EU) No 806/2014, known as Single Resolution Mechanism Regulation (hereinafter, 'SRM Regulation') were amended in 2019 for this purpose, which was implemented in German law within the framework of the Risk Reduction Act (RiG) at the end of 2020.[9] Overall, the European legislature

6 Lindemann, in Fischer/Schulte-Mattler, KWG § 46 mn 34.
7 See in particular the so called 'bail-in' on the basis of § 91 SAG, BGBl. I 2021 p. 2091.
8 Basel III: A global regulatory framework for more resilient banks and banking systems – revised version June 2011.
9 See Waschbusch/Reinstädtler, StB 2022, p. 201–212.

is attempting through the reforms to mitigate the disincentives that result from the 'too big to fail'-policy. Through capital requirements and resolution planning, European banking crisis legislation has tried to replace this previous predicament, which led to a massive use of public money to rescue ailing credit institutions, with the mantra of '*too safe to fail*'.[10] However, banking crises cannot be completely avoided.

This is why a trend towards resolution rather than insolvency has been gaining ground worldwide since the financial crisis of 2007–08.

On behalf of the G20 Heads of State and Government, the Financial Stability Board (FSB) developed the so-called Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes). Based on these key attributes, the BRRD was created at European level on 2 July 2014, which was implemented in Germany in the form of the SAG.[11] The main new regulations brought about by the SAG include the participation of shareholders and creditors in the losses of an institution and in the costs of resolution. In addition, the SAG has expanded the obligation to prepare a restructuring plan. Also new are rules on early intervention by supervisory authorities, intra-group financial support and cross-border cooperation between national supervisory and resolution authorities. Compared to other economic sectors, the banking industry is thus characterized by extensive possibilities of administrative coercive measures.[12]

The resolution of a systemically important financial institution (Significant Institute) within the European Union is carried out by the single resolution board (SRM), whose legal basis is the SRM Regulation.[13] The already existing BaFin handles all other proceedings as the national resolution authority within the meaning of the SAG, § 3(1) SAG.

III. Insolvency

In addition to liquidation, there is also the possibility in Germany of conducting insolvency proceedings for a bank, provided there is no threat of

10 See Huertas, passim.

11 Sanierungs- und Abwicklungsgesetz, enacted 10/12/2014, BGBl. I 2091.

12 See §§ 45 et seq. KWG and §§ 89 et seq. SAG.

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

disadvantages compared to resolution. In the event of the insolvency of a bank, the InsO generally applies. However, the InsO is partially modified by §§ 46b et seq. KWG. On the other hand, the InsO also contains special provisions, for example on the treatment of certain financial products (cf. § 104 InsO).

In particular, the application for the opening of insolvency proceedings against the assets of a bank is regulated differently from general insolvency proceedings by § 46b of the KWG. In other common insolvencies, according to § 13 (1) sentence 2 InsO, creditors and debtors are entitled to file an application for the opening of insolvency proceedings.

This is not applicable to credit institutions. § 46b (1) sentence 4 KWG creates a statutory application monopoly for credit institutions by the BaFin. This sole right of application ensures the priority of the special state supervision to which this sector of the economy is subject. Only in the case of imminent insolvency does an effective insolvency application additionally require the consent of the institution concerned, § 46b (1) sentence 5 KWG, whereas this consent is not required if insolvency or overindebtedness has occurred. Applications to open insolvency proceedings by the debtor or by creditors are therefore inadmissible within the scope of application of § 46b (1) KWG. In addition, § 46c of the KWG, in deviation from the standard insolvency proceedings, sets out special deadlines for contesting insolvency and blocking enforcement pursuant to § 88 and §§ 129 et seq. InsO.

Furthermore, § 104 InsO provides for extensive special rules for banking transactions in the form of fixed transactions, financial services or contractual liquidation netting in deviation from § 103 InsO. In principle, § 103 InsO grants the insolvency administrator a right of choice regarding the fulfilment or termination of contract.[14] If fulfilment of the contract appears to be advantageous for the insolvency estate, fulfilment of the contract will therefore regularly be demanded. In contrast, § 104 InsO orders the termination of contracts by law for goods that have a market or exchange price as well as for financial futures and other financial instruments.[15] The aim of the provision is to avoid uncertainties for the contracting parties

14 BGH, 20.12.1988 – IX ZR 50/88, ZIP 1986, 171; Wegener, in: Uhlenbruck, InsO § 103 mn 2.

15 Andres, in Andres/Leithaus, InsO, § 104 mn. 1; Ringstmeier, in Schmidt, InsO § 104 mn 24.

and incalculable speculation by the insolvency administrator in the event of market fluctuations.[16]

The state of uncertainty caused by the insolvency administrator's right of choice under § 103 of the InsO would increase counterparty risk, which would indirectly lead to a threat to financial market stability due to the enormous volume of the potentially affected transactions.[17]

Apart from these special rules, however, regular insolvency proceedings are carried out as a basic procedure.

IV. Non-applicable legal frameworks

There are other restructuring and resolution procedures in Germany, but they do not (or no longer) apply to banks.

Until 28.12.2020, credit institutions also had the option of restructuring under the KredReorgG.[18] This law had been created by the German legislator on its own as a reaction to the financial crisis. However, during its period of application, not a single case of usage has become known.

The German Act on the Stabilization and Restructuring of Enterprises (*Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG*) does not apply to companies in the financial sector within the meaning of § 1 (19) of the KWG. The financial sector within the meaning of this provision consists of two sectors. On the one hand, the insurance industry and, on the other, the banking and securities services industry, which is why the credit institutions discussed in this paper are not covered by the personal scope of application of the StaRUG.

The recently published proposal for a directive to harmonize certain aspects of insolvency law[19] also does not apply to credit institutions as defined in Article 4(4)(1) of Regulation (EU) No 575/2013 according to Article 1(2)(b) of the proposal for a directive.

16 Balthasar, in Nerlich/Römermann, InsO § 104 mn. 6, Andres, in Andres/Leithaus, InsO § 104 mn. 1.

17 Knof, in Uhlenbruck, InsO § 104 mn. 5, 7.

18 Gesetz zur Reorganisation von Kreditinstituten – Kreditinstitute-Reorganisationsgesetz, enacted 09.12.2010, BGBl. I 1900, repealed with effect on 29.12.2020.

19 Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, Procedure 2022/0408/COD.

C. Recognition and Cooperation

In accordance with the types of proceedings mentioned above, a distinction must be made between resolution proceedings and insolvency proceedings with regard to recognition and enforcement in international cases. The details are as follows:

I. Resolution proceedings

Within the EU, the recognition of resolution measures is governed by Art. 87–92 BRRD. Art. 87 BRRD lays down general principles for decision-making regarding the resolution measures of individual resolution authorities. Central to this is the consideration of the interests of the other Member States by the respective resolution authority, Art. 87(e)-(h) BRRD. This is particularly important as the measures of the resolution authority under Article 66(1) BRRD also have an effect on assets, shares or liabilities in other Member States, which the German legislator has implemented in § 153(1) SAG.

Further special aspects must be taken into account in the resolution of a banking group. In this case, the respective regulatory authorities establish a joint resolution authority that ensures cooperation and coordination with resolution authorities in third countries, Art. 88(1) BBRD. If, due to equivalent branches or subsidiaries in several Member States, no resolution authority should be solely responsible for group resolution, so-called European resolution colleges can also be created on the basis of Art. 89 BRRD. In Germany, these requirements were laid down in §§ 46e para. 2, 6 KWG. The recognition of resolution measures thus has the effect that particular proceedings in Germany, be they insolvency or resolution proceedings, are inadmissible if a Member State had already opened proceedings against the bank.

The recognition results in support obligations for the measures of the authorities of the home member state, § 46d (5) sentence 1 KWG. This is because the responsibility of the home Member State for enacting the reorganisation measure does not change the fact that the legal power for enforcement in the individual States remains with the respective authorities. The support includes, for example, the provision of information but also compulsory enforcement by way of administrative enforcement.

For resolutions where the SRB replaces the national authority, cooperation is governed by the SRM Regulation. Art. 33 SRM Regulation applies to the recognition of settlement measures from third countries, unless an international agreement with the third country pursuant to Art. 93 BRRD regulates the aspect concerned. The criteria for recognition are set out in Art. 33 (2), (3) SRM Regulation as follows:

(2) The Board shall assess and issue a recommendation addressed to the national resolution authorities on the recognition and enforcement of resolution proceedings conducted by third-country resolution authorities in relation to a third- country institution or a third-country parent undertaking that has:
   (a) one or more Union subsidiaries established in one or more participating Member States; or
   (b) assets, rights or liabilities located in one or more participating Member States or governed by the law of participating Member States.
   The Board shall conduct its assessment, after consulting the national resolution authorities and, where a European resolution college is established pursuant to Article 89 of Directive 2014/59/EU, with the resolution authorities of non-participating Member States.
   The assessment shall give due consideration to the interests of each individual participating Member State where a third- country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States.

(3) The Board shall recommend to refuse the recognition or enforcement of the resolution proceedings referred to in paragraph 1, if it considers that:
   1. (a) the third-country resolution proceedings would have an adverse effect on financial stability in a participating Member State;
   2. (b) creditors, including in particular depositors located or payable in a participating Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;
   3. (c) recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the participating Member State; or

4. (d) the effects of such recognition or enforcement would be contrary to the national law of the participating Member State.

Based on Art. 93 BRRD, cooperation agreements were concluded with 17 third-country authorities as of 26 March 2023.[20]

In addition, the SRB can also ensure a uniform approach of the Member States outside of the original supervisory responsibility, provided that the resolution action of a third state has a link to several member states.[21] In this case, the SRB also represents the SRM participating member states in principle in dealings with non-participating member states, Art. 32(1) SRM Regulation.

The write-down or conversion of liabilities (bail-in) is of particular importance in the recognition process. If these liabilities are subject to the law of a third country, the liabilities can only be included in the eligible liabilities of the bank if the recognition of a resolution procedure in the third country is secured, see Art. 12(17) SRM Regulation.

Central counterparties (CCP) that are systemically important in more than one jurisdiction (so called SI>1 CCPs) are subject to special rules. Authorities have established crisis management groups (CMGs) for all 13 CCPs that are systemically important in more than one jurisdiction.[22] The Plan of the G20 States to implement institution-specific arrangements for information sharing and cross-border cooperation has been fulfilled for the majority of SI>1 CCPs.[23]

Other third-country resolution measures can be recognized and enforced by participants in the European Banking Union on the basis of Art. 94 BRRD, which was implemented in Germany in the form of § 169 SAG. However, Art. 95 BRRD clarifies that member states are entitled to refuse to recognize third-country resolution, in particular if there is a threat of negative effects on the financial stability of the member state or if the cred-

20 States of origin are in chronological order: Canada, USA, Brazil, Serbia, Mexico, Albania, Japan, United Kingdom, Switzerland, Bosnia and Herzegovina, South Korea, Montenegro, Australia, Argentina, New Zealand, see Single Resolution Board, 'Cooperation', <https://www.srb.europa.eu/en/content/cooperation>(last accessed 31.03.2023).

21 Recital 92, Regulation (EU) No. 806/2014, L 225/17.

22 Financial Stability Board, 2022 Resolution Report, Completing the agenda and sustaining progress, 08.12.2022, p. 1.

23 Financial Stability Board, 2022 Resolution Report, Completing the agenda and sustaining progress, 08.12.2022, p. 1.

itors of the member state are placed in a worse position in the third-country resolution than creditors with a comparable position.

In addition, Art. 94(6) BRRD, which has been implemented in Germany in the form of § 169(7) SAG, clarifies that general insolvency law remains unaffected despite recognition of the foreign resolution proceedings.

II. Insolvency Proceedings

Bank insolvencies within the EU are not covered by the scope of application of the general rules of the EU Insolvency Regulation (EIR[24]). Banks are expressly excluded from the scope, Art. 1 (2) b) EIR. The recognition of insolvency proceedings over the assets of a bank from a third country is therefore generally governed in Germany by §§ 335 et seq. InsO. Since credit institutions are excluded from the scope of application of the EIR pursuant to Art. 1 (2) EIR, the autonomous insolvency law of §§ 335 et seq. InsO are also applicable even within the geographical area of the European Union.

Therefore, for the cooperation of administrators and courts, in particular Art. 56 et seq. EIR do not apply, even if at least one proceeding concerning the assets of a debtor of the group of companies is conducted in another Member State.[25] However, in autonomous German international insolvency law, § 357 of the German Insolvency Code (InsO) regulates cooperation between insolvency administrators in situations outside the scope of application of the European Insolvency Regulation. Thus, insofar as the scope of application of the EU Insolvency Regulation is not opened, § 357 InsO applies as part of the autonomous insolvency law.[26]

However, § 46e KWG contains a special provision for insolvency proceedings of a credit institution within the European Economic Area (EEA). In contrast to §§ 354 et seq. InsO or §§ 34–52 EIR, the opening of secondary insolvency proceedings is barred, § 46e (2) InsO. According to § 46e (2) KWG, the authorities and courts of the home member state are solely responsible for opening insolvency proceedings regarding the assets

24 Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings, L 141/19.

25 Spliedt, in Schmidt, InsO §§ 269a et seq. mn. 6.

26 BGH, 03/02/2011 – V ZB 54/10, NZI 2011, 420, 421 pt. 11; Reinhart, in Stürner/Eidenmüller/Schoppmeyer InsO § 335 mn. 5.

of a credit institution. In particular, the foreign proceedings are recognized without regard to the requirements of § 343 (1) InsO, see § 46e (1) sentence 2 KWG. In particular, the jurisdictional competence of the foreign court is not reviewed and the effects of the proceedings are not assessed for its recognisability on the basis of German ordre public under § 343 InsO. Accordingly, § 46e (1) sentence 2 KWG states that not only the opening of proceedings, but the organization of the entire proceedings – including the distribution of the insolvency estate – falls under the jurisdiction of the home state.[27]

In addition, § 340 InsO contains a special provision for banks insofar as they are – as is regularly the case – participants in an organized market. According to this section the settlement of the pending contractual relationships is not governed by the *lex fori concursus*, in deviation from § 335, but by the law to which the respective market is subject, § 340(1) InsO. This makes the applicable insolvency law predictable for market participants. This exception is extended by § 340(2) InsO to the insolvency of a contracting party in repurchase agreements and debt conversion agreements and by § 340(3) InsO to payment and securities settlement systems. For such systems of the interbank market, the general § 335 InsO is superseded by a link to the *lex causae* in order to protect legal certainty for the participants of the system in the insolvency of a system participant. § 340 InsO is intended to minimize the insolvency-related disruption of complex financial systems that could result from the collision of different legal systems.[28] § 340 InsO is thus an all-round conflict rule for domestic as well as for foreign insolvency proceedings.[29] The choice of the governing contract law by the participants in the system can also determine the law applicable in insolvency by referring to the property law of the other state under § 340 InsO.[30]

The content of the German provision § 340(3) InsO corresponds to Art. 12 EIR despite the deviations in the wording.[31] However, Art. 12 EIR does not apply to credit institutions in view of the exclusion in Art. 1(2) EIR. Art. 12 EIR thus has a limited scope of application in practice for

27 Lindemann, in Fischer/Schulte-Mattler, KWG § 46e mn. 14.
28 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2.
29 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2; Lüer/Knof, in Uhlenbruck, InsO § 340 mn pt 1.
30 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2.
31 Lüer/Knof, in Uhlenbruck, InsO § 340 mn 1.

those companies that are not credit institutions or investment firms but are nevertheless members of clearing houses, for example in the context of direct access/sponsored membership models, on the basis of which direct access to clearing houses can be granted to non-regulated companies.[32]

III. Recognition of Bank Insolvencies in the U.S.

Due to the close economic relations with the United States of America, the question arises as to what possibilities exist for the recognition of German insolvency proceedings over the assets of a bank in the USA. The United States have taken a different path to resolve bank insolvency by prohibiting these entities to enter bankruptcy proceedings.[33] This does not include the holding companies, which can still file for bankruptcy.[34] Banks in America are resolved in a receivership-proceeding under control of the FDIC with almost no judicial review.[35] For the recognition of foreign insolvency proceedings, the U.S. has opted for a procedure based on the UNCITRAL Model Law on Cross Border Insolvency with Chapter 15.[36]

At first glance, this seems contradictory, because the UNCITRAL Model Law on Cross Border Insolvency excludes banks from the scope of application, cf. Art. 1(2) UNCITRAL Model Law. However, this only applies to the extent that banks are subject to special insolvency regimes. Bank insolvencies can also be recognized via Chapter 15. This solution is surprising at first glance, as banks are generally denied access to the Bankruptcy Code, 11 U.S.C. § 109(b). However, this exclusion only applies to banks 'doing business in the United States'.

This provision dates back to the case of *Israel British Bank (London) Ltd. v. Federal Deposit Ins. Corporation*.[37] In this case, it had been stated regarding the recognition, '*that the exclusion of banking corporations from US Bankruptcy Act did not apply to foreign banks not doing business in the United States.*' This case law was codified in the now repealed 11 U.S.C.

32 Fried, in Stürner/Eidenmüller/Schoppmeyer EUInsVO, Art. 12 mn 5.
33 Hynes Wash. & Lee L. Rev. 2010, 985 (993).
34 Hynes Wash. & Lee L. Rev. 2010, 985 (993); a well-known example is *Washington Mutual, Inc.*
35 Hynes Wash. & Lee L. Rev. 2010, 985 (993).
36 Chapter 15 replaced § 304 U.S.-Bankruptcy Code. An overview of this is provided by Grauke/Fail/Hwangpo, in: Stürner/Eidenmüller/Schoppmeyer InsO vol. 4, Länderbericht USA mn 71 et seq.
37 586 F.2d 509, 512–15 (2d Cir. 1976) denied 429 U.S. 978 (1976).

§ 303(k). Now this follows from the reference in 11 U.S.C. § 1501(c)(1) to 11 U.S.C. § 109(b)(3)(B), which denies foreign banks access to the Bankruptcy Code if they have a branch or agency (as defined in § 1(b) of the International Banking Act of 1978) in the United States.

An example in this respect is the recognition of the resolution of the Irish Bank Resolution Corporation Ltd -successor entity to the Anglo-Irish bank Resolution Corporation (IBRC)- based on the Irish Bank Resolution Corporation Act 2013 as a foreign procedure under Chapter 15 of the U.S. Bankruptcy Act. On December 18, 2013, the Delaware District Court overruled the Creditors' appeal against the recognition and granted recognition of the foreign main proceedings.[38]

IV. UNCITRAL Model Laws

The UNCITRAL Model Law on Cross-Border Insolvency (1997) proposes to exclude banks from the scope of application of the relevant implementing legislation insofar as they are subject to special procedures, see Art. 1 (2) of the Model Law.[39] However, a backward exception is formed regarding recognition.

Remark No. 58 states the following: 'It is not advisable to exclude all cases of insolvency of the entities mentioned in paragraph 2. In particular, the enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme. The enacting State might also wish not to exclude the possibility of recognition of a foreign proceeding involving one of those entities if the law of the State of origin does not make that proceeding subject to special regulation.'

In addition, Remark No. 59 emphasizes that the features of the Model Law concerning cooperation and coordination should be applied, even if access to the procedure should be denied for certain types of debtors.

38 Bankr. Case No. 13–12159-CSS; affirmed: In re: Irish Bank Resolution Corp., District Court for the District of Delaware, Bankr. Case No. 13–12159-CSS (D. Del. Sep. 27, 2019).

39 Art. 1 (2): 'This Law does not apply to a proceeding concerning [...] banks [...], that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law'.

In other words, the recommendation to exclude banks from the scope of application is directed at the domestic institutions of the respective State and does not make any statement about the recognition of proceedings concerning foreign banks.

The 2018 Model Law on Cross Border Recognition, on the other hand, takes a somewhat different approach with Article 1, paragraph 2, which provides for the possibility of excluding banks from the scope of recognition. The reasons for this provision are cited as 'public policy considerations or where other specifically designated legal regimes are applicable.'[40]

V. Summary on recognition

The assessment shows that there are significant differences in terms of recognition and cooperation.

§§ 153 et seq. SAG or § 46e KWG show that in the European context there is a recognition and extension of effect of resolution and insolvency proceedings that even goes beyond the recognition of general restructuring and liquidation proceedings under the EIR. There is no possibility for credit institutions to conduct particular or secondary proceedings, as the home member state has sole jurisdiction, cf. § 46e (2) KWG. There is EEA-wide insolvency jurisdiction of the home Member State, since the unity that the credit institution and its branches form is to be maintained even in the case of reorganization or liquidation.[41]

There are also far-reaching recognition possibilities for third-country matters specifically for credit institutions in the law of the European Union and Germany:

On the one hand, there is the possibility to negotiate agreements with third countries on the recognition of settlements. The legal basis for this practice is Art. 93 BRRD, which was implemented in § 167 et seq. of the SAG. However, even without a corresponding agreement, resolution measures from third countries can be recognized and, if necessary, enforced under the conditions of § 169 SAG.

Insolvency proceedings of third countries, on the other hand, can be recognized in Germany by means of the autonomous international insolvency law of §§ 335–358 InsO.

40 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018, Guide to Enactment, p. 28.
41 Becker in Reischauer/Kleinhans, KWG § 46e mn 1.

D. Reform proposals regarding recognition

Recent cases again highlight the need for stronger international coordination in bank resolution. The orderly resolution of Credit Suisse demonstrated how rapidly measures such as the write-down of AT1 instruments and the facilitated takeover by another global bank can affect multiple legal sytems.[42] It also revealed reliance on exceptional domestic powers and ad hoc international acceptance to ensure financial and legal stability.

A similar pattern can be observed in the collapse of the Silicon Valley Bank, where the failure of the US parent company triggered coordinated yet different responses in other countries. In particular, the resolution of its UK subsidiary required swift intervention by national authorities, without a unified framework for crossborder recognition.[43]

Both cases illustrate that the effectiveness of resolution measures depends heavily on prompt cooperation and mutual recognition between authorities, while the current framework remains fragmented and provides limited legal certainty.[44]

Functionally, bank resolution and insolvency pursue closely related objectives, namely the orderly management of failing institutions and the mitigation of systemic risk. Resolution tools, especially bail-in mechanisms, further underline this proximity. At the same time, parallel resolution and insolvency processes within banking groups can create coordination challenges and legal uncertainty.

Against this background, embedding the recognition of resolution outcomes within the existing insolvency recognition framework appears appropriate. Recognition should remain conditional, guided by financial stability, equal treatment of stakeholders, and relevant public interest, with existing European frameworks offering a useful reference point.

Taking into account the above findings, we therefore propose the implementation of resolution procedures in the UNCITRAL Model Law on Recognition and Enforcement. The aim of this proposal is to enable uniform recognition of insolvency and resolution proceedings, provided that

42 See Swiss Financial Market Supervisory Authority (FINMA), ´Resolution of Credit Swiss Group AG´, <https://www.finma.ch/en/news/2023/03/20230319-mm-cs/> (last accessed 20.05.2026)

43 See Financial Stability Board, ´Key Attributes of Effective Resolution Regimes for Finacial Institutions´, <https://www.fsb.org/work-of-the-fsb/financial-institutions/resolution/> (last accessed 20.05.2026)

44 UNCITRAL Model Law on Cross-Border Insolvency (1997), FSB

the security of the financial stability of the recognizing state is granted as a condition for recognition.

This proposal is based on the following considerations:

The global trend towards the resolution of distressed credit institutions is unstoppable. Bank resolution – and its international recognition and enforcement – is predominantly left to special regimes. The trend towards resolution of banks outside of insolvency proceedings causes challenges, as the traditional rules for the recognition of insolvency proceedings generally do not apply.

General international civil law does not provide any support in this respect either. Decisions on insolvency proceedings are usually excluded from the Hague Convention, as these matters are deemed too specialized.[45] Furthermore, Article 2, subparagraph 1 (e), of the 2018 Hague draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters provides for the additional exclusion of 'resolution of financial institutions'.

The 2018 Model Law on Cross Border Recognition of Insolvency-Related Judgments also provides for the option of excluding banks from the scope of recognition in the form of Article 1, paragraph 2. The motives behind this option are 'public policy considerations or where other specifically designated legal regimes are applicable'.[46]

The approach of excluding the recognition of the ´resolution of financial institutions´from the scope of application may be convincing in the context of the Hague Convention. However, a comparable exemption is not convincing within the framework of the UNCITRAL Model Law. This is because the decision to exclude banks from the scope of application is difficult to understand in view of the strong global networking within this sector as long as there is no adequate alternative recognition option. The Financial Stability Board (FSB) has a clear focus on (globally) systemically important banks. However, even for the 13 globally systemically important banks, it has not yet been possible to reach corresponding agreements.

Moreover, despite the enormous economic importance of these big players, it should not be forgotten that the vast majority of banking crises affect

45 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), Guide to Enactment, p. 12.

46 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), Guide to Enactment, p. 28.

small and medium-sized banks. These too are usually strongly networked internationally.[47]

Fundamentally, bank resolution is ideally characterized by an economic approach. The institution is to be stabilized or broken up in order to avoid contagion risks for the entire financial market. With the help of the resolution instruments, especially bail-in, an attempt is made to involve the relevant stakeholders in the costs of resolution, as in a hypothetical insolvency, cf. § 97 SAG. In this way, a resolution is not dissimilar to an insolvency. Thus, this article argues for the recognition and, if necessary, enforcement of bank resolution to be included in the regulatory recommendations within the framework of the Model Law on the Recognition and Enforcement of Insolvency-Related Judgements due to the comparable interests involved, to enable recognition in states whose legal systems do not recognize bank resolution.

And in addition, the assessments of the respective supervisory authorities on systemic relevance, capital requirements and possible options for action by the supervisory authorities can differ greatly from the assessments of the national regulators in foreign jurisdictions. It can therefore happen that a resolution procedure is carried out in one country, but an insolvency procedure over a subsidiary or branch is carried out in another country. In order not to face follow-up problems in these cases regarding the recognition and coordination of resolution and restructuring proceedings, the recognition of resolution proceedings should therefore take place within the same legal framework as the recognition of insolvency proceedings.

However, recognition should not be inevitable. It is important that the measures do not jeopardize the financial stability of the recognizing state and that the extraterritorial procedure does not put creditors from the recognizing state at a disadvantage compared to other creditors. The criteria for recognition should in particular consider financial stability, equal treatment of stakeholders and other fiscal interests of the recognizing state. In this respect, Art. 94 BRRD and § 169 SAG could serve as a model. This would shorten the lengthy process of creating a new legal framework for

47 A more recent example is the collapse of Silicon Valley Bank, which radiated to Germany through its branch, although its business was geared towards the American tech scene.

the recognition of resolutions, but rather adapt the existing rules on the recognition of insolvencies.[48]

E. Conclusion

The financial crisis and the subsequent collapses of individual banks up to the present day have highlighted two aspects in particular with regard to the internationally strongly interconnected financial industry. Firstly, the importance of cooperation in the event of cross-border insolvency and, secondly, the importance of ensuring that agreed resolution measures are also implemented.

A particular difficulty arises in the area of banking crises from the fact that they occur infrequently. This means that there is no opportunity to comprehensively test laws and regulations geared to this crisis. In this respect, the insolvencies of individual, smaller institutions, credit institutions are only suitable as a testing ground to a limited extent, since each crisis differs in its causes and effects. A blanket statement about crises, especially those of a bank, is out of the question. The famous introductory sentence from Anna Karenina still applies: 'Happy families are all alike; every unhappy family is unhappy in its own way'.

Without a sufficiently large number, an empirical statement about the decisive factors of the crisis of a credit institution is not possible apart from anecdotal evidence. But recognition that enables resolutions even across national borders is essential. So, there must be an effective system in place to recognize bank resolution as well.

In the international context, the recognition of bank resolution and insolvency proceedings is subject to a conflict between the preservation of synergies and the individual interests of states. On the one hand, the strong international networking of credit institutions requires a coordinated approach to avoid contagion risks. On the other hand, the recognizing states resist far-reaching coordination, since even the crisis of a medium-sized bank regularly leads to considerable economic distortions and the states regularly oppose extensive recognition because of their own monetary and market policy interests. It is therefore important not to limit the recognition of resolution measures to individual agreements between resolution author-

48 The 2022 FSB Resolution Report, p. 17, No 3.4, shows that despite intensive efforts, the finalization of agreements is currently still ongoing.

ities, but to include it in general international insolvency law in line with the above proposal.

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