CHAPTER 5

The Consequences of Chapter 14 for International Recognition of US Bank Resolution Action

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One of the most difficult issues in bank resolution is the question of how resolution measures in one country can be given effect under the laws of another. This debate has turned on two sets of issues. The first of these is whether resolution measures are properly regarded as "insolvency" measures, and should therefore be recognized using existing doctrines of recognition for giving effect to overseas bankruptcy proceedings. This takes us to a series of questions as to whether the way in which the resolution powers are characterized in the home jurisdiction (as bankruptcy or not) is determinative of the way in which courts of other jurisdictions should apply them. The second set of issues concerns whether, where a jurisdiction has an accepted doctrine on universality in bankruptcy, that doctrine should be applied in cases of bank resolution in the same way that it would be in normal bankruptcy. These debates highlight the fact that whereas cross-border recognition of resolution is new and untested territory, cross-border recognition of bankruptcy proceedings is well-trodden ground. The upshot of all of this is that replacing Title II with Chapter 14 could well have a positive impact on the enforceability in other jurisdictions of US resolution measures, since most courts find it easier to recognize foreign bankruptcy proceedings than unclassified administrative procedures which may bear little resemblance to anything in the home jurisdiction.

Most legal systems have mechanisms by which the insolvency regimes of other systems can be given effect. These are not always highly developed, but there can be very few legal systems anywhere in the world which have not had to grapple with the commercial consequences in their jurisdictions of the insolvency of firms established elsewhere. Thus cross-border recognition of insolvency procedures is an established fact of life. Cross-border recognition of bank resolution, by contrast, is even more embryonic than bank resolution itself—there are some ideas as to how it might be accomplished, but very little by way of hard law and nothing by way of precedent. This suggests that one of the issues to be considered in analyzing the Chapter 14 proposal is the extent to which, by using established cross-border insolvency recognition mechanics, it might make cross-border resolution more robust.

Generalizations across multiple legal systems are rarely of any great value, so for this purpose we will consider a specific example. Assume a US bank group company which has obligations owed under English law to English creditors. For this purpose, we will assume that we are dealing with a bank holding company which is capable of qualifying as a financial company under Title II as it currently stands. It has issued bonds which are governed by English law, some of which are held by English resident creditors. How will the English courts treat the intervention of (a) administrative action under Title II, compared with (b) court-ordered action under Chapter 14?

Choice of Law

The starting point for choice of law analysis in the United Kingdom is the Rome I Regulation,[1] which embeds the principle that as a matter of English law parties are free to choose the jurisdiction which governs their contracts, and that choice will be respected by the English courts. Article 3(3) sets out a partial derogation from this principle, in that "where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose

1. See regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations.

law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

Thus, if the situation were that the bond issuance was an entirely domestic US arrangement, and the only reason for the choice of English law was an express desire to avoid the application of US law, it is possible that an English court might be prepared to apply US resolution law on the basis that it would be considered by the US courts to be mandatory. However, in the more likely situation where the bond was offered to international investors in the London or other markets, it is very unlikely that this would apply.

Article 12(1)(d) of the Rome I Regulation also provides that the law chosen by the parties governs not only the rights arising between the parties, generally, but in particular "the various ways of extinguishing obligations, and prescription and limitation of actions."

As a result, it seems clear that the question of whether the obligations of the issuer of the bonds have been reduced or discharged will be a matter for the chosen law of the bond—in this case, English law.

Variation of Liabilities by Foreign Statute under English Law

The basic position under English law as regards the effect of foreign laws on an English law-governed contract is set out in *National Bank of Greece and Athens SA v. Metliss.*[2] In this case a Greek bank had issued English law bonds, whose terms had been purportedly varied by a Greek statute. The House of Lords held that the obligations concerned were contractual obligations, and could therefore not be varied by a law other than the law governing the contract. The Greek government responded to this by passing a new law which purported to be a corporate reorganization measure, but which included provisions that had the same effect as the variation. In general, corporate reorganization measures should be dealt with in accordance with the place of incorporation of the entity concerned, and on this basis the moratorium could have been held to be effective at English law. However, when this

2. [1958] AC 509 (House of Lords).

was litigated in *Adams v. National Bank of Greece,*[3] the House of Lords held that where a law structured as a reorganization measure had the effect of varying contractual rights, to that extent it was a contractual and not a reorganization measure, and could not take effect so as to vary existing contractual rights governed by a different law. These cases have recently been followed in *Global Distressed Alpha Fund 1 v. P. T. Bakrie,*[4] in which it was held that an Indonesian court-approved scheme of arrangement could not have the effect of varying obligations owed by a company under English law-governed notes. The reason that this is important in this case is that where a foreign law reorganization leaves an instrument intact but removes from the obligor under that instrument its ability to repay that debt (as would be the case if a bridge bank transfer had the effect of removing from the original obligor the resources which it would require to discharge those obligations), such a reorganization might well be considered as a variation of rights under this doctrine.

The application of these cases in the context of cross-border recognition of resolution actions taken directly under statute is clear. It also seems relatively clear that, confronted with a US issuer who had issued English law-governed bonds, the starting point for the English courts would be that any purported variation of the terms of the bonds by US statute—including variation of amounts due or substituting an obligor—would be ineffective to vary the obligations of the bank. It would therefore be possible for an English bondholder to obtain judgment in England for the amount due and to attach property in England in satisfaction of that debt.

Contractual Issues

It has been suggested by some commentators that the English courts could give effect to a US resolution law through an implied term theory. The best formulation of this is the observation of Ian Fletcher

3. [1961] AC 255 (House of Lords).
4. [2011] EWHC 256 (Commercial court).

in *Insolvency in Private International Law*[5] (cited with approval in *Bakrie*):

> In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.

The court suggested that this rule could be developed either as a rule of private international law (following Re *HIH Casualty and General Insurance Ltd.*[6]) or that such a provision might be implied as a term into the contract between the parties, following the argument that those who contract with regulated entities should be presumed to intend the regulated entity concerned to act in accordance with the regulations which apply to it. It is possible that English law may develop in this direction at some point in the future, but there is no authority for suggesting that an English court would follow this line of reasoning today.

Consequences of Variation of Debts

If a US bank entity subject to resolution had English law–governed debt in issue which did not include an express "recognition of resolution" clause, then the effect of a US statutory variation of obligations would be to leave the bank concerned liable to pay money under English law but prohibited from paying that money under US law. If the bank had no assets outside the United States, the English position probably would not matter, since even if a judgment against the US

5. Ian F. Fletcher, *Insolvency in Private International Law*, *Main Work (2nd Edition) and Supplement* (Oxford: Oxford University Press, 2005).

6. [008] UKHL 21 (House of Lords).

bank for the debt were obtained in the English courts, it is unlikely that the US courts would enforce it.

However, if the entity concerned had branches (and therefore, presumably, assets) in the United Kingdom, the real risk is that the English courts would attach assets held in the United Kingdom and apply them in satisfaction of the English law debt. There is no general English doctrine of comity which would suggest that the English courts should give effect to a mere administrative act of another sovereign. Thus, in the absence of any other proceedings, the English court would recognize the validity of the English debt and, in the event of non-payment, permit the assets in the United Kingdom to be attached and collected, to be applied in satisfaction of that debt. It is also likely that the English court would be prepared to grant injunctions restraining the removal of assets from the jurisdiction pending payment of the debts concerned.

There are broadly two routes by which the US government, or other US creditors, could seek to challenge this. One would be where ancillary English insolvency proceedings are opened in respect of the UK assets—in this case it would be possible to intervene in these proceedings to request that the US resolution process be recognized. The other would be to seek to take advantage of the existing mechanism whereby decisions in overseas insolvency proceedings may be given effect by the English courts.

Where UK Ancillary Proceedings Are Opened

It is very likely (although not inevitable) that the commencement of resolution proceedings under Title II in the United States would result in the commencement in the United Kingdom of insolvency proceedings resulting in the gathering in of the assets of the branch under the supervision of the insolvency courts. The question then becomes one of how the English insolvency courts would regard the US provisions.

The leading case in this regard is *Felixstowe Docks and Railways v. US Lines.*[7] This case concerned the behavior of the UK courts in exactly this situation where the insolvent entity was a US company

7. [1989] QB 360 (QBD).

which had entered into a Chapter 11 reorganization. The company argued that the assets collected should be passed to the company to be applied in accordance with the court-approved Chapter 11 plan for reorganization, whereas the UK creditors argued that the assets should be retained in the United Kingdom. The court found in favor of the UK creditors. However, it should be noted that the facts of *Felixstowe Docks* were somewhat unusual, in that the approved plan of reorganization for the entity involved its withdrawal from all non-US markets, and therefore a discriminatory treatment of UK creditors as compared with US creditors. It should also be noted that the policy of the English courts at the time was to regard any insolvency arrangement which did not ensure equal treatment of creditors as unfair (the United Kingdom only introduced an administration regime equivalent to the US Chapter 11 regime in 1985). In other decisions on similar facts, it was held in *Banque Indosuez v. Ferroment Resources*[8] that where there was no established discrimination against UK creditors, the UK creditors could represent themselves in the relevant US Chapter 11 proceedings, and the assets could therefore be dealt with in those proceedings. In *Re HIH Casualty and General Insurance,*[9] the court considered the position where the (Australian) overseas proceedings were based on an explicit discrimination between some creditors and others. It held that the assets should be dealt with under the Australian regime, and that the fact that that regime might be discriminatory between creditors (and therefore violate the principle of equal treatment) was not an obstacle to cooperating with the jurisdiction concerned.

It is therefore clear from this that in the circumstances described above, the English courts would be prepared to remit UK assets to the US authorities to be dealt with if they regarded the US resolution proceedings as insolvency proceedings and there was no explicit discrimination against non-US creditors in those US proceedings.[10]

8. [1993] BCLC 112 (CD).

9. [2008] UKHL 21 (House of Lords).

10. It should be emphasized at this point that we are considering the resolution of a US bank holding company. If the resolution were a direct resolution of a US bank deposit-taking entity, the rules granting insolvency preference to US

Is Title II an "Insolvency Regime"?

The key question, therefore, is whether Title II could be regarded for this purpose as an insolvency proceeding. It is clear from the Financial Stability Board (FSB) Key Attributes paper that there is no automatic answer to the question of whether resolution regimes are insolvency regimes or not. The paper explicitly provides for resolution to be a court-supervised process,[11] but this does not of itself constitute it as an insolvency process.

The starting point for the United Kingdom courts in considering whether a resolution power constituted an insolvency proceeding would almost certainly be to identify the equivalent UK powers, and ask whether those powers would be regarded as insolvency proceedings or not. In UK legislation the position is clear that they would not—the equivalent powers of the UK resolution authority[12] are conferred under part 1 of the Banking Act 2009, and that act makes a clear distinction between part 1 (bank resolution) and part 2 (bank insolvency).[13]

The court would then go on to consider the characterization of the relevant powers as a matter of their proper law—in this case, US law. If US law provided that Title II was an insolvency proceeding, the English courts would begin with a presumption that that was the case. However, that presumption is capable of being rebutted. In particular, the less similar the proceeding is to UK insolvency, the less likely it is that the proceeding will be accepted as an insolvency proceeding. To this end, important relevant characteristics will include similarity

depositors over non-US depositors would constitute clear discrimination against overseas creditors, and the situation would be much more complex. However, in general US resolution practice seeks to intervene at the holding company level, and this issue is therefore currently of only theoretical importance.

11. See, e.g., paragraph 1.13 of the Essential Elements of Recovery and Resolution Plans section of the Financial Stability Board's Key Attributes paper.

12. These powers would be exercised through a partial property transfer under Part 1 of the Banking Act 2009.

13. Sections 129 and 165 of the act make explicit that bank insolvency and bank administration are to be regarded as insolvency proceedings for the purpose of section 426.

to UK insolvency processes, court supervision, the existence of some administrative or similar procedure designed to weigh the competing claims of different creditors, and some commitment to procedural fairness. A procedure which does not have at least some element of each of these is unlikely to be recognized by the English courts as an insolvency procedure.[14]

It is hard to envisage a situation in which Chapter 14, if enacted, would not be regarded as an insolvency proceeding under any local law. As noted above, the characterization of proceedings under local law is not always completely determinative for this purpose. However, it seems very unlikely that any court-supervised proceeding under the US bankruptcy code would not be recognised as an insolvency proceeding by the UK courts.

Where UK Ancillary Proceedings Are Not Opened

Both at common law and as a matter of treaty, English courts may in certain circumstances give effect to the actions of foreign liquidators without the opening of formal ancillary proceedings.

The United Nations Commission on International Trade Law (UNCITRAL) model law on cross-border insolvency is incorporated into English law by the Cross-Border Insolvency Regulations 2006. It provides for English courts to cooperate with foreign courts in matters of foreign insolvency where the foreign court concerned has jurisdiction. The UK regulations do not apply to bank insolvencies, but do apply to insolvencies of bank holding companies. However, the definition of "proceedings" for this purpose is "a collective judicial or administrative proceeding in a foreign state . . . pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign

14. There is a decision of the European Court of Justice (LBI hf v Kepler Capital Markets SA [2013], EUECJ C-85/12 [October 24, 2013]) which may cast some doubt on this conclusion. However, since the judgment is particularly confusing and difficult to follow (even by ECJ standards), and appears to be based on a strongly purposive construction of the EU directive relating to mutual recognition of bank winding-up proceedings within the EU, it is merely noted here.

court, for the purpose of reorganisation or liquidation." It is hard to see how a Title II OLA (Orderly Liquidation Authority) proceeding could be said to be "judicially supervised" for this purpose,[15] and it therefore seems that the UNCITRAL model would not be available for the purpose of giving effect to a Title II resolution in the United Kingdom.

The Consequences of Explicit Contractual Terms Recognizing Resolution

It is worth pausing at this point to enquire whether this is in fact an imaginary problem. Article 55 of the European Union (EU) Bank Recovery and Resolution Directive purports to address this issue by requiring EU banks to insert into the terms of any contract which they enter into under any non-EU law a provision to the effect that the contract may be varied in accordance with the relevant resolution law. Could the United States solve this issue simply with an equivalent requirement?

A preliminary issue which arises here is whether the effect of an explicit incorporation of US resolution powers into an English law-governed instrument would be (a) to subject the relevant provisions of the document to US governing law (thus creating a bifurcated governing law provision) or (b) to incorporate the relevant provisions as contractual terms. At English law this is not a relevant distinction, since both approaches would be legally robust, although it may raise issues in other jurisdictions. However, it is hard to see how the first view (implicit split governing law) can be supported—there is no part of the document which is explicitly subjected to a separate governing law, and the ordinary construction of such a provision would be that the parties are simply agreeing by contract that their obligations to each other shall be calculated as if the relevant US legislative provisions

15. See Stanford International Bank Ltd. [2010] 3 W.L.R. 941. For example, a scheme of arrangement under section 899 of the UK Companies Act 2006, which is proposed by the management of a company to its creditors and approved by them, is not an "insolvency proceeding" for this purpose, since it is not conducted under "insolvency law."

had applied to the document. This is no more than a variation of an English law obligation by agreement.

Once this is established, the validity of the contract term is prima facie established. The remaining question is whether there is any other doctrine of law which might invalidate it.

One possibility here would be the doctrine set out in *Government of India v. Taylor.*[16] This doctrine says that where a foreign government seeks to appropriate property by statute, that act should not be recognized in any other jurisdiction. Although primarily concerned with tax legislation, the case is sometimes taken as authority that statutory unilateral appropriation of property by a government should not be given extraterritorial effect. Even in the absence of an explicit provision, we do not believe that such a challenge could be successful, since a resolution does not constitute a simple appropriation of property. The inclusion of an express provision recognising the possibility of a variation of terms by administrative action removes this issue completely.

Allied to this, and potentially of slightly more concern, is the risk of challenge under the Human Rights Act. Strictly speaking, the UK Human Rights Act is irrelevant to an act of the United States, since it affects only UK authorities. However, it does embody a presumption that English law should be interpreted as far as possible in a way which is compatible with the European Convention on Human Rights. This could be relevant if it could be shown that the relevant resolution provisions were contrary to that convention.

The relevant part of the convention is the first protocol, which imposes an obligation on the state not to interfere with peaceful enjoyment of property, deprive a person of his possessions, or subject a person's possessions to control. For this purpose, the question has been raised in the United Kingdom as to whether the exercise of a resolution power could constitute an unlawful deprivation of a person's property.

The key issue here is that Protocol No. 1 is subject to a proviso that an act of state will not constitute a violation of this right if such interference, deprivation, or control is carried out lawfully and in the public interest. The question of what is in the public interest is

16. [1955] AC 491.

in general left to the state itself to determine, and the majority of the challenges to state action based on this protocol before the European Court of Human Rights have resulted in a finding that the act concerned was in the public interest. In general, only an act which constituted either a completely discretionary taking of property or a refusal to grant a property right previously contracted for would constitute a clear breach of this protocol. In the context of a bank resolution it is almost impossible to imagine a court taking the view that the exercise of the resolution power was so egregious that it could not constitute a legitimate manifestation of the public interest. This will particularly be the case where one of the considerations which is required to be taken into account in initiating the resolution is the preservation of systemic stability within the state concerned.

The most significant difficulty with an explicit contract term, however, is whether it could potentially be struck down as an attempt to contract out of the insolvency jurisdiction of the host country. It is a strong principle of English law that it is not possible to "contract out of insolvency,"[17] and any contractual provision which purports to vary the claims of a creditor of an insolvent entity so as to vitiate the principle of equality of treatment of creditors may be struck down as contrary to public policy.[18] Where branch insolvency proceedings have been commenced in the UK, the position of a contractual provision purporting to vary the creditors' claims in that insolvency would be at least questionable.

New Developments—Statutory Powers

The issues outlined above are, of course, extremely clear to the UK resolution authorities. Since those authorities have a strong interest in ensuring that a resolution of the UK operations of US banks is as

17. British Eagle International Air Lines Ltd v. Cie Nationale Air France [1975] 1 WLR 758 (Court of Appeal).

18. There are, of course, certain types of contractual provision which *are* effective to "contract out" of insolvency—subordination being the most commonly encountered. In practice, in deciding whether to give effect to a contractual provision of this kind, a court would almost certainly end up asking whether the provision was a species of subordination clause.

effective as possible, much thought has been given—on both sides of the Atlantic—as to how this can be achieved with minimum risk of subsequent litigation challenge.

The answer to this—in the United Kingdom at least—is that as regards physical operations in the United Kingdom, what is assumed is that ancillary insolvency proceedings will be commenced in the United Kingdom, and that the provisional liquidator appointed by the UK court will cooperate with the US resolution authority in effecting the bridge bank transfer, on the basis that this strategy is likely to provide the best outcome for creditors. This is almost certainly correct, both as a matter of law and as an analysis of the likely behavior of an insolvency office-holder. It does, however, somewhat emphasize the point that even though resolution may be a non-insolvency procedure in the country in which it is implemented, it is likely to be implemented through insolvency mechanisms in other jurisdictions.

The intervention of a court-appointed liquidator also has—for the UK authorities—the unwelcome consequence of introducing another actor into an already crowded field, and in particular one whose primary objective is not necessarily the preservation of systemic stability.[19] A power is therefore being introduced into UK law which will enable overseas resolution action to be "adopted" into UK law by a further UK administrative action.

As from January 1, 2015, the United Kingdom has a separate statutory regime intended to enable overseas resolution actions to be enforced at English law. This is contained in new Chapter 6 of Part 1 to the Banking Act 1989, sections 89H to 89J.[20] These provide for the Bank of England (as resolution authority), with the consent of the Treasury, to make an order recognizing the resolution action of any third-country resolution authority. The effect of such recognition

19. The United Kingdom does have a separate regime (the bank insolvency regime, created by part 2 of the Banking Act 1989), which permits an office-holder to be appointed in respect of bank insolvency proceedings whose statutory objectives do include a wider systemic objective, but such an appointment can only be made in respect of a UK bank.

20. Inserted by article 103 of the Bank Recovery and Resolution Order 2014.

is (per section 891(2)) that the third-country resolution action has "the same legal effects in . . . the United Kingdom as it would have produced had it been made . . . under the law of . . . the United Kingdom." The format of the provision is that the bank "must" make the order recognizing the foreign action, but has a wide discretion not to in a range of circumstances. Some of these are specific (thus, such an order may not be made if the third-country resolution action would disadvantage foreign creditors against domestic creditors[21]) but others are generally expressed (thus, no order should be made which "would have an adverse effect on financial stability in the United Kingdom or another EEA [European Economic Area] state"). It should also be noted that the making of such a recognition order is trumped by the commencement of UK insolvency proceedings (section 89H(5)). The meaning of this provision is far from clear, since it is copied directly out of the BRRD (European Bank Recovery and Resolution Directive) (Article 94(6)). However, at the very least it raises considerable uncertainty as to whether UK resolution authorities, even given the section 89H power, may not in the end be driven back on the approach of appointing provisional liquidators under the UK insolvency regime in preference to using this power, simply in order to avoid the power being challenged by a series of dissident creditors seeking to trump the power by seeking the appointment of such a liquidator.

UK Recognition of Overseas Insolvency Regimes

We turn now to the question of how different the position would be if, instead of the US authorities exercising their Title II powers, they were to proceed under the US Bankruptcy Code.

In general, the approach of the UK courts to insolvency proceedings is "modified universalism." Many legal commentators take the view that the UK courts flirted briefly with broad universalism,[22] but

21. It would therefore not be possible to make such an order to facilitate an FDIC conservatorship of an insured institution.

22. Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26, [2007] 1 AC 508 (House of Lords).

have now retreated to the position where they will restrict the exercise of their powers to the narrow scope of English domestic law.[23] However, it should be emphasized that although the UK courts have rejected broad universalism to the extent of declining to assert an in personam jurisdiction which they would otherwise not possess arising purely out of a power to enforce third-country judgments, they have not budged in their fundamental adherence to what has been called the golden thread of English cross-border insolvency law: "The English courts should, so far as is consistent with justice and UK public policy, co-ordinate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."[24]

Thus, where the English courts are satisfied that a foreign court is in control of an insolvency procedure, it will take all necessary steps, without the necessity for governmental, administrative, or statutory activity, to ensure that assets are got in and distributed in accordance with that single scheme. The key point here is that cross-border cooperation between insolvency courts, in this regard at least, is automatic and self-executing.

It is, of course, by no means the case that an English court will mechanically implement any decision of an overseas court. In particular, where the UK court gets in assets and there are significant UK creditors,[25] the UK court is very likely to order that the UK rules of insolvency set-off are adhered to in dealing with those creditors,[26] although it has been said that in other cases the English court may remit assets to be distributed under the scheme of the home jurisdiction.[27]

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23. Rubin v. Eurofinance [2012] UKSC 46 (Supreme Court).

24. Per Lord Hoffmann, HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 WLR 852, para. 30.

25. "Significant UK creditors" in this instance means creditors whose debts arose out of transactions conducted in England or who are otherwise closely connected with England, not merely creditors who have proved in the English proceedings.

26. Re BCCI (No 10) [1997] Ch 213.

27. Per Lord Hoffmann in *HIH*.

Finally, there is the fact that even a discharge by a New York insolvency court would not finally determine claims under an English law document. It is a principle of English law that where a person owes an obligation, the obligation is only discharged by an act which is legally effective under the law of the obligation. Thus, where a New York person owes an obligation under New York law, if that person is made bankrupt under New York law the discharge is recognised under English law, since the question is a question under New York law, and New York law has firmly answered it. The position is more complex, however, where the obligation is an obligation under English law, since no provision of New York law can in principle affect the position inter parties under an English law agreement. This point has arisen from time to time in UK litigation, where UK creditors of foreign bankrupts have sought to attach property of those bankrupts in England on the basis that their debt is not extinguished by the foreign bankruptcy court's decision. The English courts have in general responded to this by adopting a doctrine based on estoppel. There are two limbs to this doctrine: first, that a creditor should not be able to prefer himself over other creditors in any insolvency (including a foreign insolvency) by attaching property after the commencement of the insolvency proceedings;[28] and, second, that if a creditor participates in the overseas proceedings, and accepts a distribution in them, he is treated by the courts as being estopped from pursuing the English law claim which he still has.[29]

It should be noted that all of these difficulties would be equally present in the event of a UK ancillary liquidation proceeding conducted in support of a Title II resolution. In particular, the discharge question would become even more acute if the US resolution were not conducted under insolvency law, since it appears from the English authorities that the two principles relied on above would not apply in respect of an administrative non-judicial process, and it is therefore possible that in such a case the English law claims might be inextinguishable.

28. Galbraith v. Grimshaw [1910] AC 508 (House of Lords).

29. Phillips v. Allan (1828) 8 B&C 477, Seligman v. Huth (1877) 37 LT 488.

Conclusion

Cross-border recognition of bank resolution proceedings is a complex and difficult area, and it would be wrong to present Chapter 14 as a "magic bullet"—even in relatively straightforward cases, cross-border recognition of insolvency proceedings is not trouble-free. However, it is true that national courts around the world have established mechanisms for dealing with cross-border recognition of insolvency proceedings, and those mechanisms are generally familiar to insolvency judges. By positioning resolution within that intellectual construct, Chapter 14 makes the task of overseas courts charged with addressing the legal issues resulting from US resolution substantially easier, and significantly improves the predictability of the behavior of those courts in a resolution.