

The SRM Regulation: How to Make Cross-Border Resolution Effective

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- A. The Conflict-of-Laws Problem
- B. The Answer by the EU
- C. The Need for a World-Wide Solution
- D. Ways for Improvement

A. The Conflict-of-Laws Problem

- conflict of laws (private international law) determines the law applicable to assets
- looks for **most significant connection**
- can be **different from law of the place of the bank**

A. The Conflict-of-Laws Problem

- for movables and immovables: *lex rei sitae* rule



country A



country B

A. The Conflict-of-Laws Problem

- for debt: principle of party autonomy



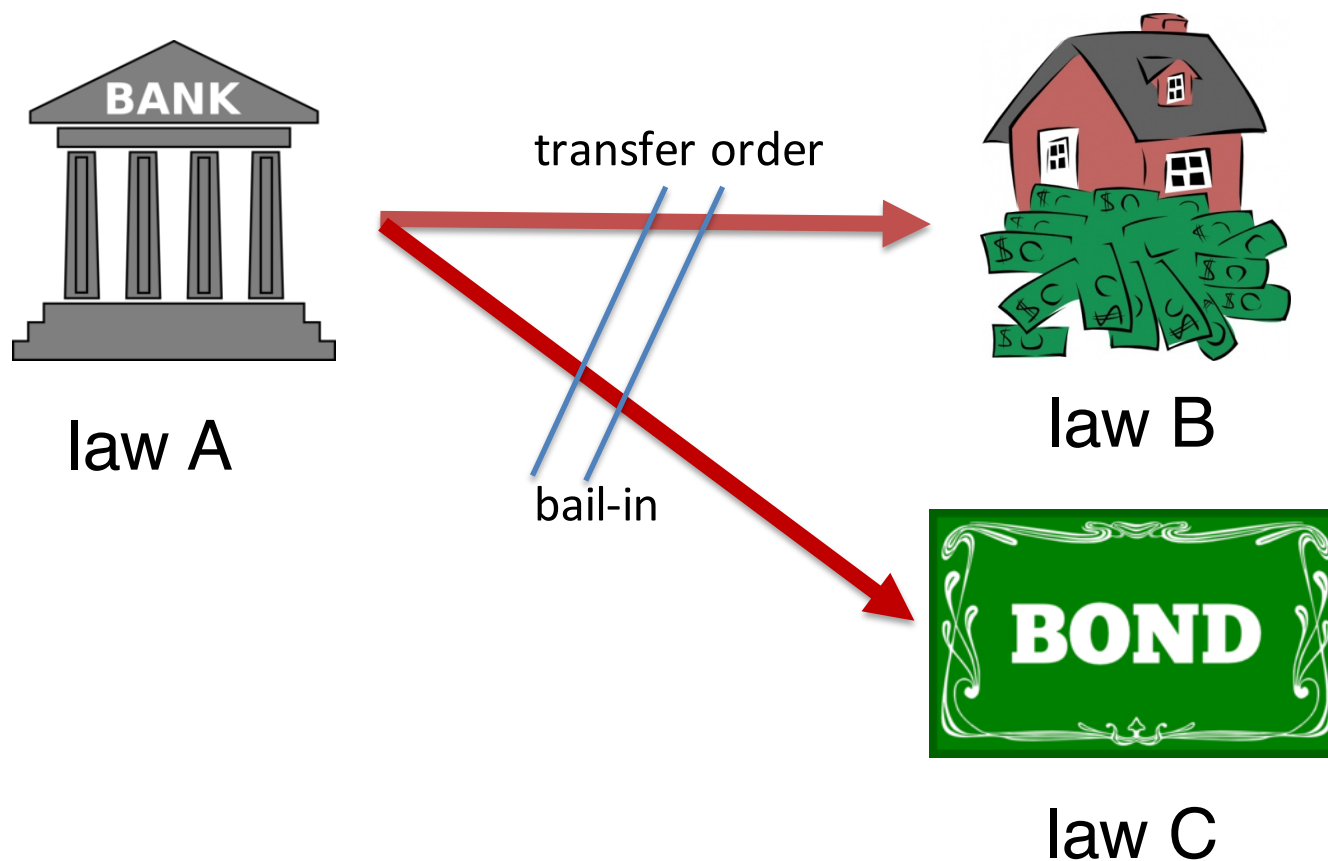
country A



country C

A. The Conflict-of-Laws Problem

- foreign law as obstacle for resolution

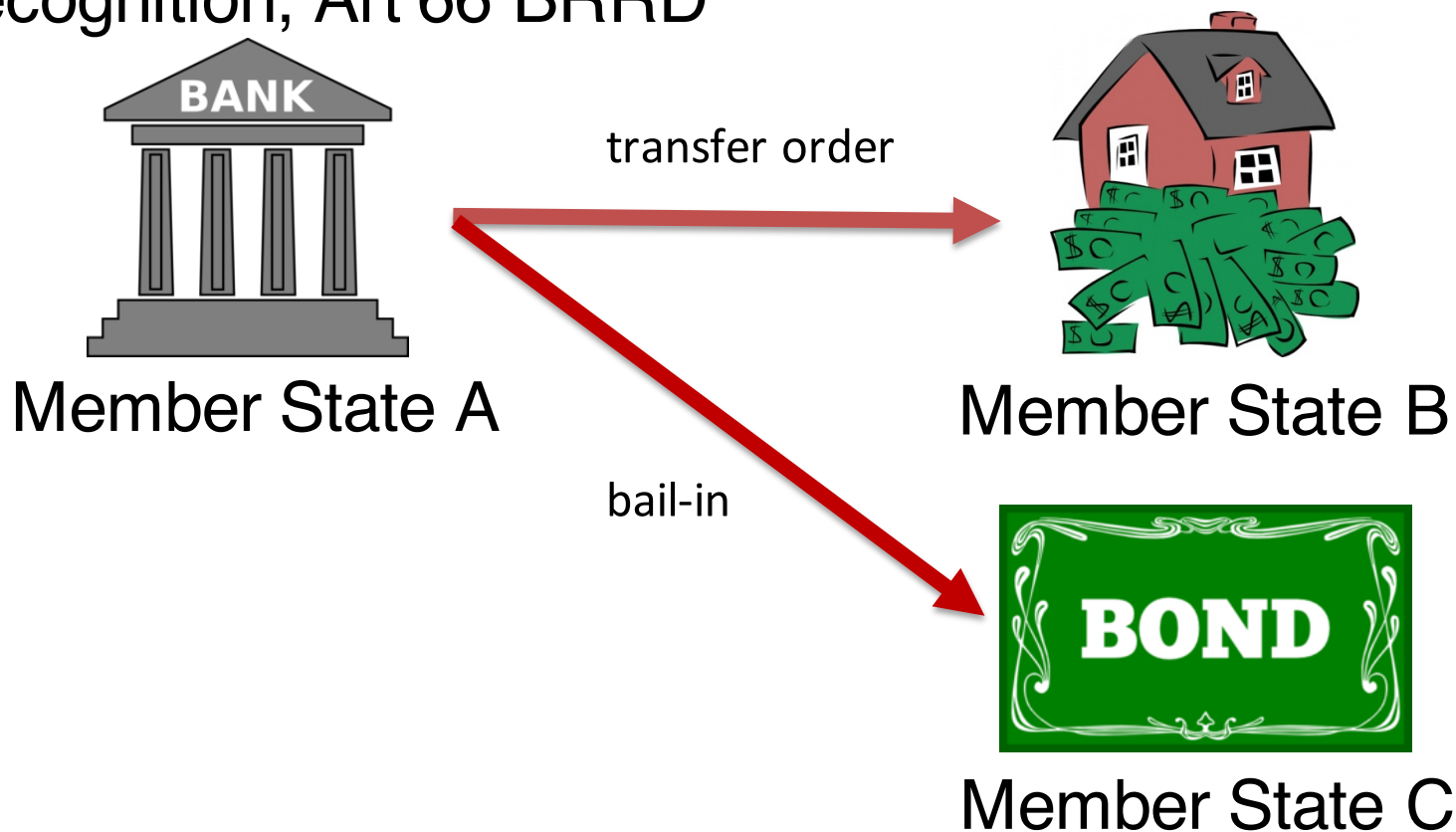


B. The Answer by the EU

- BRRD and SRM Regulation
- three areas to be distinguished:
 1. Intra-Eurozone – centralized decision-making by SRB (“federal model”)
 2. Non-Euro Member States of EU – decentralized decision-making (“country-of-origin model”)
 3. Third States – no prescriptive powers of EU (“coordination model”)

B. The Answer by the EU

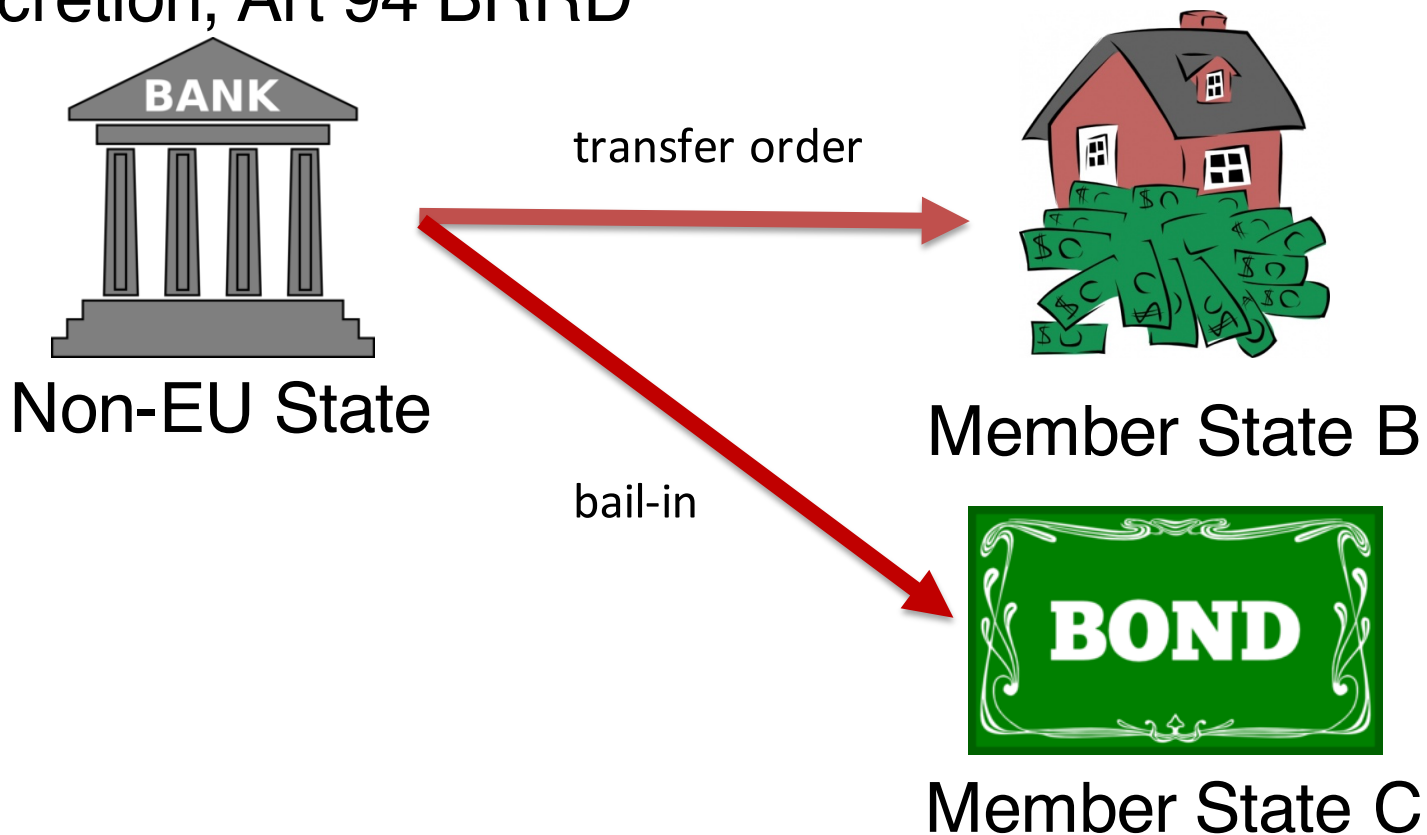
1. Resolution measures by other Member States:
recognition, Art 66 BRRD



- **legal remedies** centralized in **country of origin**, Art 85 BRRD

B. The Answer by the EU

2. Resolution Measures by third States:
discretion, Art 94 BRRD



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2. Resolution Measures by third States:
discretion, Art 94 BRRD

examples of reasons for refusing recognition:

- adverse effects on financial stability of a Member State
- discrimination of EU creditors
- material fiscal implications for the Member State

C. The Need for a World-Wide Solution

- banks have assets all over world
- can be resolved only through concerted action world-wide
- global banks should no longer die nationally

the reality on the ground

- conflicting interests:
 1. resolution state: use assets to recapitalize bank
 2. target state: ring-fence assets for local creditors
 - little incentive for recognition because
 1. lack of mutuality
 2. relative rareness of need for resolution
 3. hyperbolic discounting
- situation is **not conducive to international cooperation**



answer: regulatory networks

1. Crisis Management Groups
2. Institution-Specific Cross-Border Cooperation Agreements
3. Recovery and Resolution Plans
4. Resolvability Assessments



“Principles for Cross-border Effectiveness of Resolution Actions”, 3 November 2015

1. contractual approach:

- temporary stay of early termination rights (see ISDA Protocol)
- bail-in clauses

2. statutory approach:

- domestic rules to give effect to foreign resolution measures
- should clearly establish: (i) the conditions for recognition, enforcement or support actions; (ii) the grounds for refusal of such actions, which should be limited; and (iii) the process for taking such actions

- but: mind the courts!
- courts take centre-stage in resolution – regulation will often end up in litigation
- courts may refuse recognition
 1. for legitimate purposes – e.g. abuse of resolution (HETA case, Landgericht Munich I, 8 May 2015)
 2. for narrow legalistic reasons and/or to protect domestic creditors (Goldman Sachs International v Novo Bank, [2015] EWHC 2371 (Comm))

D. Ways for Improvement

starting point:

- regulatory cooperation is not enough
- courts need a secure legal basis
- more uniformity is necessary

D. Ways for Improvement

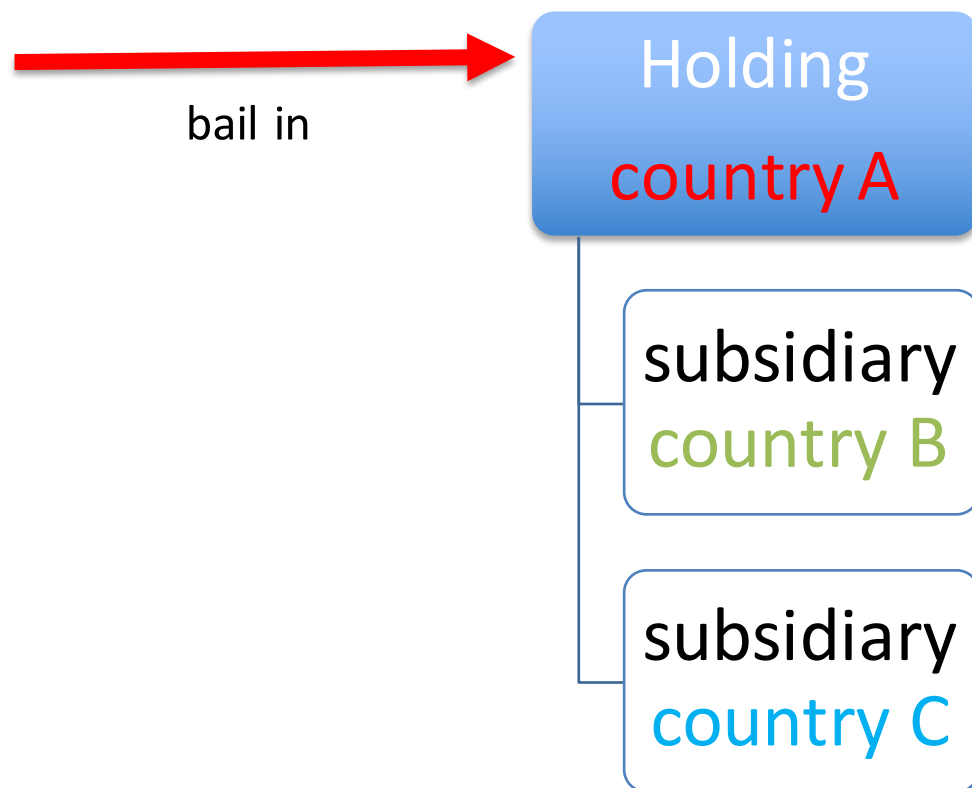
1. An International Treaty on Resolution?

not workable because

- lack of political agreement
- high stakes; sovereignty issues
- no credible commitment possible

D. Ways for Improvement

2. An International Single Point of Entry Solution?



D. Ways for Improvement

2. An International Single Point of Entry Solution?

disadvantages:

- not all banks are grouped in holding structure
- no trust in authorities of country in which holding is established
- does not exclude ring-fencing by countries in which subsidiaries are established

D. Ways for Improvement

own suggestions:

1. An International Model Law on Resolution

advantages

- gives precise rules
- transposition would make it binding on courts
- deviations possible (sovereignty maintained)
- makes deviations transparent
- international case law can develop

D. Ways for Improvement

2. Create Resolution Colleges with Target States

- where assets are in other State, include that State in resolution process
- only when major assets
- may help securing recognition

Thank you for your attention!

Questions and comments:
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