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**UNIDROIT Working Group on Bank
Insolvency**

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SECRETARIAT'S REPORT

1. This document provides: (i) an update on the work carried out by the Working Group on Bank Insolvency, the three informal Subgroups that were created after the first session of the Working Group, and the Drafting Committee that was established following the third Working Group session; and (ii) a discussion of issues that the Working Group may wish to consider at its fifth session.
2. This document retains an updated version of the Secretariat's Report for the fourth Working Group session relating to preliminary matters associated with the project (Part I). Part I was updated to reflect developments during and after the fourth session of the Working Group held on 29-31 March 2023. It contains questions the Working Group may wish to consider relating to general matters (e.g., regarding the format of the future Legislative Guide and the organisation of future work).
3. This document is accompanied by a confidential consolidated draft of the future Legislative Guide (Study LXXXIV – W.G. 5 – Doc. 3, hereinafter "Master Copy"), which will be the main object of the deliberations at the fifth Working Group session.
4. The Master Copy consists of ten chapters, as follows:
 - (i) Chapter 1. Introduction
 - (ii) Chapter 2. Institutional Arrangements
 - (iii) Chapter 3. Procedural and Operational Aspects
 - (iv) Chapter 4. Preparation and Cooperation
 - (v) Chapter 5. Grounds for opening bank liquidation proceedings
 - (vi) Chapter 6. Liquidation Tools
 - (vii) Chapter 7. Funding
 - (viii) Chapter 8. Creditor Hierarchy
 - (ix) Chapter 9. Group Dimension
 - (x) Chapter 10. Cross-Border Aspects
5. Part II of this document relates to the content of the future Guide, with questions relating to each draft Chapter to guide the discussion of the Working Group during its fifth session.

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I. PRELIMINARY MATTERS

A. Background of the Project

1. Since the Global Financial Crisis of 2008, the international community has developed a framework to manage failures of systemic financial institutions in a way that preserves financial stability while minimising the risk of loss to public funds. These efforts resulted in the adoption of the Financial Stability Board's (FSB) '*Key Attributes of Effective Resolution Regimes for Financial Institutions*' (Key Attributes) as a set of international standards which informed the adoption of bank "resolution regimes" in jurisdictions around the world. Despite this significant progress, however, critical gaps remain. In particular, there is no international standard or guidance on bank liquidation frameworks, and accordingly the effectiveness of bank liquidation laws varies substantially across countries. This creates problems in particular when dealing with failures of banks to which the resolution framework of the *FSB Key Attributes* would not apply. In addition, national insolvency laws still play a key role in the resolution of banks that are systemic in failure, both as the framework under which parts of a bank in resolution may be wound up and liquidated, and as the counterfactual for the application of the 'no creditor worse off' safeguard.

2. Against this background, in the run-up to the drafting of the Work Programme for 2020-2022, the UNIDROIT Secretariat received two separate but congruent proposals concerning the convergence of rules in the field of bank insolvency, one from the Bank of Italy and one from the European Banking Institute (EBI) (see [UNIDROIT 2019 – C.D. \(98\) 14 rev. 2, Annex 4 and 6 respectively](#)).

3. The Governing Council at its 98th session (Rome, 8-10 May 2019) acknowledged the importance of the topic, admitted the high potential impact of the work to be conducted, and agreed to recommend that the General Assembly include the project on bank insolvency in the 2020-2022 Work Programme with medium priority. The assigned level of priority was merely formal. The Governing Council asked the Secretariat to conduct further research and provide a more defined scope for the project, as well as further justification of its adequacy as work to be conducted by a global transnational institution (see [UNIDROIT 2019 – C.D. \(98\) 17, para. 261](#)).

4. The Governing Council at its 99th session (Rome, 23-25 September 2020) was informed by the Secretariat that steps had been taken to reinforce the capacity and expertise of the organisation to carry out the project. In particular: (i) the Financial Stability Institute (FSI) of the Bank for International Settlements (BIS) had shown availability to collaborate with UNIDROIT on this project and willingness to provide research expertise and, where needed, contribute to the development of the project with financial resources; and (ii) the process for the creation of an UNIDROIT-Bank of Italy Chair was in an advanced stage (see [UNIDROIT 2020 – C.D. \(99\) B.6, paras. 4-6](#)). The Governing Council took note of the information provided by the Secretariat during the 99th session and agreed with the proposed action plan, leading to the drafting of a feasibility study to be presented to the Governing Council at its 100th session (see [UNIDROIT 2020 – C.D. \(99\) B.21, para. 117](#)).

5. The Governing Council at its 100th session (A) in April/May 2021 was informed that: (i) the UNIDROIT-Bank of Italy Chair had been officially established and a Chair Holder had been recruited; and (ii) a first workshop on bank liquidation would be organised jointly by UNIDROIT and the FSI (see [UNIDROIT 2021 – C.D. \(100\) A.2, paras. 25-27](#)), with a view to analysing and discussing the feasibility of the project.

6. On 7 and 8 June 2021, UNIDROIT and the FSI jointly organised an Exploratory Workshop, which gathered 40 international experts and stakeholders with a view to (i) assessing the need for an international instrument in the area of bank insolvency; (ii) determining the most suitable form of such instrument; and (iii) defining the scope of the project.

7. The Secretariat presented the results of the deliberations of the Exploratory Workshop and of additional analysis at the autumn session of the 100th UNIDROIT Governing Council ([C.D. \(100\) B.4](#)). On that occasion, the Council agreed to recommend proceeding with this project as a high priority, allowing the Secretariat to establish a Working Group ([C.D. \(100\) B Misc 2, paras. 5- 6](#)).

B. Organisation of the work

Working Group

8. Consistent with UNIDROIT's established working methods, the Working Group on Bank Insolvency is composed of members selected for their expertise in the fields of insolvency law, bank crisis management, resolution and deposit insurance. Experts participate in a personal capacity and represent different legal systems and geographical regions.

9. The Working Group is composed of the following members:

- Ms Stefania Bariatti, (Chair), Professor, University of Milan (Italy), UNIDROIT Governing Council member
- Ms Anna Gelpern, Professor, Georgetown Law (United States)
- Mr Christos Hadjiemmanuil, Professor, University of Piraeus (Greece)
- Mr Matthias Haentjens, Professor, University of Leiden (the Netherlands)
- Mr Marco Lamandini, Professor, University of Bologna (Italy)
- Ms Rosa Lastra, Professor, Queen Mary University of London (United Kingdom)
- Mr Matthias Lehmann, Professor, University of Vienna (Austria)
- Ms Irit Mevorach, Professor, University of Warwick (United Kingdom)
- Ms Janis Sarra, Professor, University of British Columbia (Canada)
- Mr Reto Schiltknecht, Attorney-at-law (Switzerland)

10. Ms Concetta Brescia Morra (Professor, Roma Tre University) participates in the Working Group as an individual expert observer. Furthermore, Mr David Ramos Muñoz (Associate Professor, University Carlos III of Madrid) and Mr Marco Bodellini (Associate Lecturer, Queen Mary University of London) act as advisors to the UNIDROIT Secretariat for this project.

11. The project is undertaken in cooperation with, and with the support of, the FSI. UNIDROIT and the FSI have invited a number of international and regional organisations, and public sector stakeholders with expertise in the field of bank liquidation, bank restructuring and deposit insurance to participate as observers in the Working Group. Observers are entitled to participate fully in the Working Group's discussions and are considered an integral part of the working team. Participation of these organisations and stakeholders will ensure that regional perspectives are taken into account in the development and adoption of the instrument. It is also anticipated that the cooperating organisations will assist in the regional promotion, dissemination and implementation of the instrument once it has been adopted. Strong collaboration with existing standard setters in the area is of particular relevance in this project. The following organisations and institutions were invited to participate in the Working Group as observers:¹

- Australian Prudential Regulation Authority (APRA)
- Banca d'Italia (BdI)

¹ The Monetary Authority of Singapore (MAS) joined as a new Working Group Observer after the fourth session. In addition, representatives of the Chinese National Financial Regulatory Administration and of the Chinese Deposit Insurance Corporation are observing the fifth session.

- Banco de España (BdE) and Fondo de Garantía de Depósitos en Entidades de Crédito (FGD) (Spain)
- Bank of England (BoE)
- Bank of Ghana (BoG)
- Banque de France / Autorité de Contrôle Prudentiel et de Résolution (ACPR)
- Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Germany)
- Central Bank of Argentina (BCRA)
- Central Bank of Brazil (BCB)
- Central Bank of Nigeria (CBN) and Nigerian Deposit Insurance Corporation (NDIC)
- Central Bank of Paraguay (BCP)
- De Nederlandsche Bank (DNB)
- Deposit Insurance Corporation of Japan (DICJ) and the Financial Services Agency of Japan (JFSA)
- European Banking Institute (EBI)
- European Central Bank (ECB)
- European Commission
- Federal Deposit Insurance Corporation (FDIC) (United States)
- Federal Reserve Bank of New York
- Swiss Financial Market Supervisory Authority (FINMA)
- Fondo de Garantías de Instituciones Financieras (Fogafín) and Superintendencia Financiera de Colombia (Colombia)
- Financial Stability Board (FSB)
- Hong Kong Monetary Authority (HKMA)
- International Association of Deposit Insurers (IADI)
- International Insolvency Institute (III)
- International Monetary Fund (IMF)
- Monetary Authority of Singapore (MAS)
- National Bank of Belgium (NBB)
- National Bank of Moldova (NBM)
- Perbadanan Insurans Deposit Malaysia (PIDM)
- People’s Bank of China (PBC)
- Reserve Bank of India (RBI)
- Single Resolution Board (SRB)
- South African Reserve Bank (SARB)
- United Nations Commission on International Trade Law (UNCITRAL)
- World Bank Group

Methodology and Timetable

12. Under the guidance of the Chair of the Working Group and UNIDROIT Governing Council Member, Professor Stefania Bariatti, the Working Group undertakes its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT’s practice, the Working Group has not adopted any formal rules of procedure and seeks to make decisions through consensus. Meetings are held in English without translation. Working Group meetings are conducted under Chatham House rules in order to encourage open discussion among all participants in the Working Group.

13. The Working Group meets at least twice a year, for three days. Meetings are in principle held at the premises of UNIDROIT in Rome, unless other institutions offer to host a meeting in a different location. Remote participation is possible, although experts are expected to attend in person if circumstances permit.

14. The Bank Insolvency Project was a high priority project on the UNIDROIT Work Programme for the period 2020-2022. Given that the project started end-2021, it was not feasible to complete the entire project during that Work Programme. It therefore remained in the Institute's Work Programme for 2023-2025, with the same high priority status.

15. The tentative calendar for the Bank Insolvency project anticipated the preparation of the draft instrument over five in-person sessions in 2021-2023, followed by the adoption by the Governing Council of the complete draft at its 103rd session in 2024. Given the number and complexity of the issues considered by the Working Group, it is proposed to organise at least one additional (sixth) Working Group session.

C. Working Group sessions and Intersessional work

First Working Group session (December 2021)

16. The first session of the Working Group was held at the UNIDROIT premises in Rome and remotely on 13-14 December 2021. The discussions during this session were guided by an Issues Paper ([Study LXXXIV – W.G. 1 – Doc. 2](#)) prepared by the Secretariat in collaboration with the FSI.

17. Regarding the project's scope, the Working Group underlined that bank liquidation regimes should be a seamless complement to resolution frameworks. The scope of the instrument would therefore be defined by exclusion, i.e., it would apply to banks that are outside the scope of a resolution regime, or parts of banks that are liquidated within the context of a resolution process. Consideration was given to using the term 'bank failure management' as an overarching notion, that is, to encompass both bank resolution and bank liquidation proceedings. Further, a first discussion took place on the type of banks that should be covered by the instrument (for instance, whether this should include bank holding companies, investment banks and/or FinTechs). It was also proposed that liquidation proceedings should be understood as referring to a process ending with the disappearance of a legal entity – while not excluding a transfer of certain parts of the bank's business to another entity as a going-concern.

18. Moreover, the Working Group discussed the possible objectives of a bank liquidation regime. To this end, it considered the application to bank liquidation of corporate insolvency's key objective of value maximisation, on the one hand, and a broader public interest objective such as financial stability (the main driver in the context of bank resolution), on the other. Also in the discussion on the grounds for opening insolvency proceedings, a comparison was made between the grounds for initiating corporate insolvency proceedings (balance sheet insolvency and illiquidity) and the triggers for bank resolution (principally, non-viability), which, in light of the special characteristics of banking business, must allow for early action and include forward-looking elements.

19. Other matters examined during the first session include preparatory actions (e.g., the sharing of data between authorities to facilitate a pay-out to insured depositors); institutional arrangements (analysing the possible involvement of courts and administrative authorities in the liquidation process); the ranking of claims (with the Working Group concluding that the instrument should mainly analyse the relative rank of specific claims rather than prescribing an absolute creditor hierarchy); and procedural aspects such as whether individual creditors should have legal standing to file for the insolvency of a bank.

20. For more information, reference is made to the Summary Report of the Working Group's first session (Study LXXXIV – W.G. 1 – Doc. 3).

Intersessional work (January – March 2022)

21. At its first session, the Working Group decided to establish three thematic Subgroups to advance the work on the project during the intersessional periods. Both members and observers were invited by the Secretariat to express their interest in participating in one or more of the Subgroups. The Subgroups would identify issues per subtopic, and start looking at possible solutions. Subgroup topics were not meant to be exhaustive, nor to reflect the final structure of the instrument, but to represent a starting point for the deliberations of the Group.

22. Three Subgroups were set up accordingly:

- **Subgroup 1** on Scope and definitions; Objectives; Institutional models; Procedural and operational aspects of the liquidation procedure. Co-Chairs: Ms Elsie Addo Awadzi (Bank of Ghana) and Ms Ruth Walters (FSI).
- **Subgroup 2** on: Preparation; Grounds for opening liquidation proceedings; Tools; Funding. Co-Chairs: Mr Christos Hadjiemmanuil (University of Piraeus) and Mr Rastko Urbaski (FSI).
- **Subgroup 3** on: Creditor hierarchy; Financial contracts; Banking Groups; Cross-border aspects; Safeguards. Co-Chairs: Ms Anna Gelpern (Georgetown Law) and Ms Irit Mevorach (University of Nottingham).

23. Between January and March 2022, nearly all Working Group members and observers were involved in an intense working schedule established by the Co-Chairs of the Subgroups and supported by the Secretariat. Each of the Subgroups met virtually twice, to discuss the organisation of their work and the subtopics assigned to them, mainly to suggest more precise parameters for each subtopic and to identify different approaches and possible solutions to specific issues. Written input was provided by the Subgroup participants to advance the work. Moreover, the Secretariat organised meetings between the Co-Chairs of the Subgroups to discuss common issues and coordinate the work. The below provides an overview of the meetings held during the first intersessional period:

- Co-Chairs Coordination Meeting – 18 January 2022, 17:00 – 18:00 (CET)
- SG 1 – First Meeting – 24 January 2022, 13:00 – 15:00 (CET)
- SG 2 – First Meeting – 1 February 2022, 12:30 – 13:30 (CET)
- SG 1 – Second Meeting – 2 February 2022, 13:00 – 15:00 (CET)
- SG 3 – First Meeting – 16 February 2022, 17:00- 19:00 (CET)
- Co-Chairs Coordination Meeting – 21 February 2022, 14:00 – 14:45 (CET)
- SG 2 – Second Meeting – 8 March 2022, 13:00 – 14:00 (CET)
- Co-Chairs Coordination Meeting – 15 March 2022, 16:00 – 16:45 (CET)
- SG 3 – Second Meeting – 17 March 2022, 13:45 – 15:15 (CET)

24. The intersessional work conducted by the Subgroups resulted in three comprehensive reports, one for each Subgroup, which were the main object of the deliberations at the second session of the Working Group.

Second Working Group session (April 2022)

25. The second session of the Working Group took place in Rome and online on 11–13 April 2022. The deliberations mainly focused on the Reports prepared by the three Subgroups,

accompanied by a Revised Issues Paper with questions to guide the discussion ([Study LXXXIV – W.G. 2 – Doc. 2](#)).

26. Subgroup 1 had prepared a document that encapsulated its discussions and consolidated the written contributions from its members. On matters of scope, the Report discussed whether the future instrument should cover all institutions accepting deposits and granting loans ('functional approach') or be restricted to institutions with a banking licence ('institution-focused approach'). On the basis of the arguments and views set out in the Subgroup 1 Report, the Working Group discussed the objectives of insolvency procedures applicable to banks, possible institutional set-ups, and procedural aspects (e.g., legal standing and liability).

27. The Report of Subgroup 2 reflected the discussions and written contributions by subgroup members on the topics of 'preparation', 'grounds for opening insolvency proceedings', 'tools' and 'funding'. During the second session of the Working Group, the Co-Chairs of Subgroup 2 introduced these subtopics by focusing mainly on the areas of agreement within the Subgroup, proposing to continue the discussion on highly technical and/or contentious issues at a later stage. For instance, there was general consensus that the toolkit of the person in charge of the bank liquidation procedure should extend beyond atomistic liquidation, allowing also the transfer of (large parts of) the non-viable bank's assets and liabilities to another entity. Participants agreed that external funding may be needed to address bank failures and that the deposit insurer should play some role in such matters. Moreover, the Working Group discussed the possible grounds for opening bank liquidation procedures – which, it was agreed, should differ from ordinary corporate insolvency grounds – and the interaction with the revocation of the banking licence.

28. The Report of Subgroup 3 had been prepared by small drafting teams and contained a detailed description of the main issues of each subtopic, together with options or recommendations to be considered by the Working Group. On this basis, among others, the Working Group discussed how to treat banking groups in the insolvency process (and related aspects, e.g., intragroup liabilities) and cross-border issues such as coordination, recognition and support. The Working Group also analysed aspects relating to the ranking of claims; arguments for and against the enforceability of close-out netting provisions upon commencement of insolvency proceedings; and safeguards for creditors, such as due process and the protection of legitimate expectations.

29. As a general matter, the Working Group discussed how it would be beneficial to conduct a cross-jurisdictional survey to collect information and data on relevant aspects of, and experiences with, bank liquidation regimes worldwide.

30. For more information, reference is made to the Summary Report of the Working Group's second session ([Study LXXXIV – W.G. 2 – Doc. 3](#)).

Intersessional work (May – September 2022)

31. Pursuant to the mandate received at the second session of the Working Group, the Secretariat continued to provide support to the Working Group members and observers for the organisation of intersessional meetings to advance the understanding of certain issues and/or the preparation of draft documents.

32. The Co-Chairs of Subgroup 1, in cooperation with the Secretariat, drew up a draft workplan for the second intersessional period that was circulated to all Subgroup 1 participants for comments. The outline set out issues to be covered for each of the four topic areas assigned to Subgroup 1, based on the discussions at the second Working Group session and the specific mandates that were given to Subgroup 1. Subgroup 1 members were invited to express their interest in taking part in one or more drafting teams. On that basis, four drafting teams were constituted. These teams developed text on the Subgroup 1 topics during July and August 2022. The contributions of the four

teams were consolidated into a draft Report that was circulated to all Subgroup 1 members for review. The draft Subgroup 1 Report was discussed during a virtual meeting on 22 September 2022 and members of Subgroup 1 were able to submit written comments by 23 September 2022.

33. The Co-Chairs of Subgroup 2, in cooperation with the Secretariat, drew up a draft outline with issues to be covered by Subgroup 2 that was circulated to all Subgroup 2 participants. The Co-Chairs organised four thematic (virtual) meetings to discuss specific aspects in the remit of Subgroup 2 that had been suggested by the Working Group (e.g., moratoria and clawback powers) or that merited further discussion following the second Working Group session. The inputs provided by members of Subgroup 2 during the thematic meetings were integrated in an updated version of the Report of Subgroup 2 for the second Working Group session.

34. The Co-Chairs of Subgroup 3 invited the drafting teams that had been established during the first intersessional period to update and further develop the Subgroup 3 Report in line with the discussions and outcome of the second session of the Working Group. The drafts of the four drafting teams² were consolidated by the Secretariat, submitted to all Subgroup 3 members for review and discussed during a meeting on 29 August 2022. The members of Subgroup 3 had the opportunity to submit written comments by 14 September 2022, following which the drafting teams revised their drafts and the Secretariat streamlined the consolidated report. The result of this process was the Report of Subgroup 3 as circulated to the Working Group for its third session.

35. The below provides an overview of the meetings held during the second intersessional period:

- Co-Chairs Coordination Meeting – 7 June 2022, 18:30 – 19:15 (CEST)
- SG 3 Meeting – 29 August 2022, 14:00 – 15:30 (CEST)
- SG 2 – First Meeting – 30 August 2022, 13:00 – 15:00 (CEST)
- SG 2 – Second Meeting – 1 September 2022, 13:00 – 15:00 (CEST)
- SG 2 – Third Meeting – 8 September 2022, 13:00 – 15:00 (CEST)
- SG 2 – Fourth Meeting – 9 September 2022, 13:00 – 15:00 (CEST)
- SG 1 Meeting – 22 September 2022, 13:00 – 15:00 (CEST)

36. The Reports of the three Subgroups were the main object for deliberation by the Working Group at its third session. The Secretariat, in coordination with the Subgroup Co-Chairs, added questions to the Working Group in each of the three Subgroup Reports to guide the discussion.

Stock-taking exercise

37. At its second session, the Working Group had agreed to conduct a stock-taking exercise to gather information on bank liquidation regimes across the world. This would ensure that the Group had a comprehensive overview of different possible approaches to the various subtopics, and their potential strengths and weaknesses, which could be considered when drafting the instrument.

38. To this end, the Secretariat in cooperation with the three Subgroups drew up a survey consisting of approximately 65 questions covering all the subtopics considered by the Working Group so far. In addition, the survey contained questions concerning the characteristics of jurisdictions' banking sector and it invited jurisdictions to provide examples of actual bank failures and how they were dealt with under the applicable regime.

² The Subgroup 3 drafting teams on cross-border aspects and safeguards were merged, in line with the preference expressed by the Working Group at its third session to consider safeguards in their specific context.

39. The Secretariat received confirmation from experts in 25 jurisdictions³ that they were willing to participate in the stock-taking exercise. Before the third Working Group session, responses from 13 jurisdictions had been received. Before the fourth Working Group session, the responses had increased to 21. One additional submission was received following the fourth session.

Third Working Group session (October 2022)

40. The third session of the Working Group was hosted by the SRB in Brussels and online from 17-19 October 2022. The deliberations focused mainly on the (confidential) Reports prepared by the three Subgroups, which included questions for discussion by the Working Group. Furthermore, the Working Group considered the Secretariat's Report for the third session ([Study LXXXIV - W.G.3 - Doc. 2](#)) and participants received, on a confidential basis, the survey submissions that had been received by 28 September 2022.

41. Subgroup 1 had prepared a report which reflected the input received from the drafting teams under Subgroup 1 in the second intersessional period, edited by the Co-Chairs and the UNIDROIT Secretariat. The Subgroup 1 Report introduced a first set of draft definitions, which included those developed by Subgroup 3. The report also contained a deeper analysis of options as to the scope of bank liquidation frameworks. The Working Group supported the proposal of Subgroup 1 to recommend an essentially regulatory approach to the scope of application of the bank liquidation framework, which would still allow jurisdictions to adapt the scope to the specifics of their financial sector. Furthermore, the Subgroup 1 Report contained a detailed analysis of objectives and similar considerations that may be relevant for bank liquidation frameworks and ways to balance those. The Working Group was in favour of referring to a set of key objectives in the introductory chapter of the Guide. The Subgroup 1 Report also identified institutional requirements for a successful liquidation procedure, highlighting that administrative authorities should play a role in the process, and provided an initial text on possible remedies. The section of the Subgroup 1 Report on Procedural and Operational Aspects indicated issues that Subgroup 1 proposed to cover, relating to: (i) the liquidator; (ii) the creditors; and (iii) the bank's management, with which the Working Group agreed.

42. The Report of Subgroup 2 was prepared by the representatives of the FSI and the UNIDROIT Secretariat, on the basis of the four Subgroup 2 meetings in the second intersessional period. The Report discussed aspects of (i) Preparation; (ii) Grounds for Opening Liquidation Proceedings; (iii) Tools and Powers; and (iv) Funding. The Working Group agreed with the proposal to maintain 'Preparation' as a separate chapter in the future Guide. The guidance in that chapter should not pertain to banking supervision. Rather, with reference to existing standards where relevant, it would outline successful practices of authorities in the phases prior to the opening of a bank failure management process, with a view to providing a range of options (and possibly recommendations) that would facilitate a smooth continuum between supervision and failure management. The Report also focused on issues such as: the identification of grounds and challenges associated with defining or specifying forward-looking assessments and the concept of non-viability; the discretion available to relevant authorities; and the interaction between failure management processes and licence withdrawal. On this basis, the Working Group discussed the relevance of a margin of appreciation and agreed to refrain from defining the concept of non-viability as a standalone ground for intervention. Some support was voiced for including a discussion of practices involving voluntary liquidation. The Subgroup 2 Report also outlined issues related to the use of transfer tools for managing bank failures and aspects of funding (in particular, the role of the deposit insurer in providing funding when a transfer strategy is pursued).

³ Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, France, Germany, Ghana, Greece, India, Italy, Japan, Malaysia, Moldova, the Netherlands, Nigeria, Paraguay, South Africa, Spain, Switzerland, Ukraine, the United Kingdom, the United States. For some of these jurisdictions, the work on the survey commenced after the third Working Group session.

43. The Subgroup 3 Report reflected the inputs received from the drafting teams established under Subgroup 3, edited by the Secretariat. The Subgroup 3 drafting teams had tried as far as possible to formulate their input as draft guidance rather than as a discussion of issues. Regarding treatment of financial contracts in bank liquidation proceedings, the Working Group agreed, in principle, with the proposal of Subgroup 3 recommending a power for the person in charge of a bank liquidation process to order a temporary stay of close-out netting where the operation of close-out netting would undermine the efficiency of specific liquidation tools. It was also agreed that it would be important to consult the industry on this, and to conduct further analysis. Regarding the creditor hierarchy, it was agreed to further develop the options on depositor ranking for consideration by legislators, addressing separately: (i) general depositor preference, (ii) no depositor preference; and (iii) insured or tiered depositor preference. Moreover, the drafting team would consider suggestions made during the third session on aspects such as the use of transfer tools, the treatment of temporary settlement accounts, and the treatment of secured creditors. On Banking Groups, the Working Group discussed the distinction between advance group liquidation planning and the need for coordination and implementation of measures after the opening of liquidation proceedings. Different views were expressed about the proposals of Subgroup 3 regarding group-level liquidation. On Cross-border aspects and safeguards, the Working Group generally agreed with the Subgroup's draft recommendations on issues related to cooperation and coordination in a cross-border context; recognition, assistance and relief; and safeguards.

44. As a general matter, the Working Group considered that the three Subgroups could usefully analyse the responses to the survey, so that these could be considered in the next iteration of drafting. In addition, the Working Group agreed that a Drafting Committee should be established and tasked with the preparation of a preliminary draft of the Guide.

45. For more information, reference is made to the Summary Report of the Working Group's third session ([Study LXXXIV – W.G. 3 – Doc. 6](#)).

Intersessional work (November 2022 – March 2023)

46. Pursuant to the mandate received at the third session of the Working Group, the intersessional work in the period November 2022 to March 2023 consisted of:

- (a) an analysis of survey responses by teams within the three Subgroups; and
- (b) the development of a preliminary draft of the Guide by a Drafting Committee established in accordance with that mandate.

(a) Analysis of survey responses

47. The Secretariat shared the responses to the survey (those received by 30 November 2022) with the Subgroups, having organised the answers by subtopic to facilitate analysis. Teams within the Subgroups produced a first analysis of the survey results pertaining to each subtopic. The analyses of the survey answers concerning Subgroup 3 topics were shared within Subgroup 3 on 17 January 2023, for comments by 30 January 2023. The draft survey analyses concerning Subgroup 1 topics were shared with the Subgroup 1 participants on 31 January 2023, and Subgroup 2 received the survey analyses on 8 February 2023.

(b) Drafting Committee

48. The Secretariat invited selected experts to be part of the Drafting Committee and received a positive answer from: Mr Marco Bodellini; Ms Anna Gelpert; Mr Christos Gortsos; Mr Christos Hadjiemmanuil; Mr Marco Lamandini; Ms Rosa Lastra; Mr Stephan Madaus; Ms Irit Mevorach; Mr David Ramos Muñoz; Ms Janis Sarra. The representatives of the IMF and the World Bank agreed to participate in the Drafting Committee as reviewers.

49. The Drafting Committee met twice (virtually):

- First Meeting of the Drafting Committee – 12 January 2023, 17:00 – 18:00 (CET)
- Second Meeting of the Drafting Committee – 20 February 2023, 17:00 - 18:30 (CET)

50. During its first meeting, the Drafting Committee mainly allocated the work, ensuring that at least two experts would work on each Chapter, which would be submitted to the relevant reviewer(s). Following the first meeting, the Secretariat shared a drafting example, to guide the work of the Drafting Committee. In addition, the members of the Drafting Committee received the analyses of the survey responses produced by the three Subgroups.⁴ During the second meeting, the Drafting Committee discussed the development of the various draft Chapters and common issues, such as terminology, the format of draft Recommendations and ways to reflect the results of the stock-taking exercise in the drafts.

51. The draft Chapters prepared by the members of the Drafting Committee were shared with the reviewers for feedback, and subsequently edited and streamlined by the UNIDROIT Secretariat and the FSI, which integrated the drafts into a preliminary draft of the Legislative Guide.

Fourth Working Group session (March 2023)

52. The fourth session of the Working Group was hosted by the FSI in Basel and online from 29-31 March 2023. The deliberations focused mainly on the (confidential) draft Chapters of the Legislative Guide prepared by the Drafting Committee, accompanied by a Secretariat's Report for the fourth session, including questions for the Working Group ([Study LXXXIV – W.G. 4 – Doc. 2](#)).

53. For draft Chapter 1, following the discussions, the Drafting Committee was asked to (i) develop a section on preconditions for an effective bank liquidation framework; (ii) further analyse the definition of 'bank', develop new definitions of 'affected jurisdiction', 'subordination' and 'statutory subordination', keep distinct definitions for 'home jurisdiction' and 'group home jurisdiction'; and (iii) consider whether to add guidance on how to balance possible frictions between financial stability and other objectives.

54. Regarding draft Chapter 2, the Working Group agreed that more emphasis should be placed on the advantages of an administrative model (both in the text and in the Key Considerations). The Drafting Committee was also asked to revise the text on synergies that might be gained from assigning liquidation responsibilities to a specific type of administrative authority, which was considered to be a matter of policy.

55. Regarding draft Chapter 3, the Working Group agreed to reflect on whether a definition of 'administrative authorities' was needed, considering their role in bank liquidation proceedings. Furthermore, it was suggested to reorganise the sections in Chapter 3, starting with the duties of banks' management and separating the petition for opening liquidation proceedings from the section on creditor involvement. The Working Group also proposed to (i) revise the text on the independence of the liquidator and on the possible appointment of the deposit insurer as liquidator; (ii) revisit the guidance on credit involvement, focusing on the special nature of banks and the role of administrative authorities in the process; (iii) address the need for coordination among banking authorities, after a bank's management considered it was nearing the point of non-viability; (iv) update the text and draft Recommendations on liability and legal protection of the liquidation authority and appointed liquidators.

⁴ The Secretariat also shared with the Drafting Committee the survey responses from experts in Malaysia, Moldova and Switzerland, which were received after the cut-off date for the analysis by the three Subgroups.

56. The Working Group suggested to restructure draft Chapter 4, by moving several parts to other Chapters (e.g., preparatory actions needed to execute a transfer to Chapter 6), and to revisit Section D 'Interaction between pre-liquidation measures and liquidation' to minimise overlap with supervisory topics that were outside the scope of this project.

57. Regarding Chapter 5, the discussion on the concept of non-viability was considered key. The Working Group discussed the section on discretion and suggested to focus instead on a principle of deference to a banking authority's technical assessment, distinguishing between the standard for the *ex-post* judicial review of an administrative decision, on the one hand, and the court's decision to open bank liquidation proceedings based on a petition of an administrative authority, on the other. The Working Group also considered the relationship between liquidation and the revocation of the banking licence. The Drafting Committee was invited to streamline and adapt the text where appropriate, and to develop draft Recommendations for this Chapter.

58. Regarding Chapter 6, the Working Group agreed to focus mainly on legislative guidance for the purchase and assumption (P&A) tool. It did not reach consensus on the extent to which other tools should be discussed in the Guide. Furthermore, Chapter 6 would provide specific guidance on the piecemeal liquidation of banks, while referring to existing standards where appropriate. The Working Group agreed that guidance on a creditor safeguard would be helpful, especially for creditors whose claims were left behind in a residual entity. It was also suggested to update the text on the possible need to retain the banking licence for a limited period of time following the opening of bank liquidation proceedings. Finally, the Working Group made a number of concrete drafting suggestions regarding the section on the treatment of financial contracts.

59. Regarding Chapter 7, the Working Group agreed (i) that deposit insurers could play an important role in 'filling the gap' in case transfer tools were applied; (ii) to recommend in the Guide that bank liquidation frameworks allow the use of DIS financing in liquidation beyond a 'pay-box' function, subject to the safeguards in the *IADI Core Principles*; and (iii) to recommend that the legal framework recognises the subordination rights of the deposit insurer. Most participants favoured a flexible approach to funding in the Guide, without restrictions as to the type of interventions.

60. Regarding Chapter 8, the Working Group agreed to retain a discussion on all the options for depositor ranking in the text, while favouring depositor preference – with a specific emphasis on general depositor preference – and recognising that the choice for a specific type of depositor preference was influenced by a number of policy considerations. The Working Group agreed to retain guidance on the treatment of temporary settlement accounts (although it could be moved to another Chapter), while the section on e-money and runnable liabilities would be deleted. The Working Group also suggested to develop additional guidance on related party claims and to reflect on a possible recommendation concerning the subordination of such claims. Finally, it was suggested to develop new guidance on the ranking of shareholders, the ranking of post-liquidation financing, the ranking of inter-bank deposits, and the position of the deposit insurer, and its ability to file a claim in the liquidation estate.

61. Regarding Chapter 9, it was agreed to focus mainly on group liquidation planning and procedural consolidation. It was suggested to discuss the remaining topics of draft Chapter 9 within Subgroup 3 before presenting, possibly, a revised proposal to the Working Group. It was agreed to remove in any case Part G on group-level restructuring.

62. Regarding Chapter 10, the Working Group discussed the definitions of 'home' and 'host' jurisdiction; aspects of cross-border recognition; the need to distinguish between subsidiaries and branches; the difference between administrative processes and court-based processes; and remedies of affected persons. It was suggested to align the guidance on cross-border aspects with the *FSB Key Attributes* and to reduce the number of Recommendations.

63. As a general matter, the Working Group agreed that: (i) the Drafting Committee would update the Master Copy in line with the outcome of the discussions, (ii) Subgroup meetings would be organised as appropriate, (iii) a consultation with Subgroups for written feedback on the draft Guide would be organised after the Drafting Committee had revised the text.

64. For more information, reference is made to the Summary Report of the Working Group's fourth session (Study LXXXIV – W.G. 4 – Doc. 5).

Intersessional work (April – September 2023)

65. Pursuant to the mandate received at the fourth session of the Working Group, the intersessional work in the period April 2023 to September 2023 primarily focused on updating the preliminary draft Guide by the Drafting Committee.

66. The Drafting Committee met twice (virtually):

- First Meeting of the Drafting Committee – 16 May 2023, 17:00 – 18:30 (CEST)
- Second Meeting of the Drafting Committee – 13 September 2023, 17:00 – 19:00 (CEST)

67. During the summer of 2023, the IMF and the World Bank reviewed several draft Chapters as revised by the members of the Drafting Committee. Subsequently, between August-September 2023, the draft Chapters were submitted to the respective Subgroups for comments:

- **Subgroup 1:** draft Chapter 1 was sent on 18 August 2023, draft Chapters 2 and 3 followed on 29 August 2023;
- **Subgroup 2:** draft Chapters 5 and 7 were sent on 7 September 2023; draft Chapter 6 on 11 September 2023; and draft Chapter 4 on 15 September 2023;
- **Subgroup 3:** draft Chapter 8 was sent on 23 August 2023; draft Chapter 10 on 18 September 2023; and draft Chapter 9 on 20 September 2023.

68. During the second meeting of the Drafting Committee, the drafters updated each other on the main changes in each Chapter, and several common issues were discussed (e.g., the concept of 'non-systemic banks' as used in the draft Guide and how to reduce overlap in the Chapters).

69. Following the consultations in the Subgroups, the drafters updated the Chapters in cooperation with the UNIDROIT Secretariat and the FSI, and the latter edited the draft Chapters and consolidated them into the (revised) Master Copy (Study LXXXIV – W.G. 5 – Doc. 3).

Next session of the Working Group and intersessional work

70. The continuation of the fruitful intersessional work is highly encouraged. For the next intersessional period, the Secretariat suggests providing the Drafting Committee with a mandate to finalise the draft Guide as much as possible, in line with the outcome of the discussions during the fifth session, and to streamline the text in cooperation with the UNIDROIT Secretariat and the FSI.

71. The Secretariat suggests that the next Working Group session be held early-2024, at the premises of UNIDROIT. After that, it may be considered to organise a consultation and one final session before submitting the draft Legislative Guide to UNIDROIT's Governing Council for adoption.

Question for the Working Group:

- *Does the Working Group agree with the proposed way forward?*
- *Do members have views on the timing for the next Working Group meeting and the possible organisation of a consultation?*

D. General matters concerning the instrument

Relationship with existing international instruments

72. The future instrument will focus on the key aspects of liquidation procedures applicable to banks, for which there is currently a lack of international guidance. There are several international instruments that are relevant when developing the instrument. The terminology and concepts used in the future instrument would be harmonised with those of existing instruments to the extent possible, and uniformity and consistency with their provisions ought to be ensured, while avoiding overlap in scope.

73. The publication *Orderly and Effective Insolvency Procedures: Key Issues* (1999) of the IMF's Legal Department outlines the key issues that arise in the design and application of orderly and effective insolvency procedures, including an analysis of the major policy choices that countries need to address when designing an insolvency system, a discussion of the advantages and disadvantages of these choices, and a number of specific recommendations.

74. The joint IMF-World Bank publication *An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency* (2009) discusses the principal features of the framework that countries may put in place in order to deal effectively with cases of bank insolvency. The IMF's *Resolution of Cross-Border Banks—A Proposed Framework for Enhanced Coordination* (2010) advocates a framework for enhanced cross-border coordination regarding the resolution of international financial groups.

75. The *Core Principles for Effective Banking Supervision* (adopted originally in 1997, revised in 2011) of the Basel Committee on Banking Supervision (BCBS) are the *de facto* minimum standard for sound prudential regulation and supervision of banks and banking systems. Amongst others, it requires supervisors to cooperate with relevant authorities regarding the orderly resolution of a problem bank situation (Core Principle 11). The *Report and Recommendations of the Cross-Border Bank Resolution Group* (2010) of the BCBS sets out ten recommendations to address the challenges arising in the resolution of a cross-border bank, on the basis of a stocktaking exercise of legal and policy frameworks and lessons learned from the financial crisis.

76. The *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes, adopted originally in 2011) of the FSB were developed after the 2008 Global Financial Crisis as an international standard and aim to enable authorities to resolve institutions that are systemic in failure in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions. The *Key Attributes* were complemented by general and sector-specific guidance in 2014, incorporated as Annexes to the *Key Attributes*. In addition, the *FSB Principles for Cross-border Effectiveness of Resolution Actions* (2015) set out statutory and contractual mechanisms that jurisdictions should consider including in their legal frameworks to give cross-border effect to resolution actions in accordance with the *Key Attributes*. The *FSB Key Attributes Assessment Methodology for the Banking Sector* (2016) sets out essential criteria to guide the assessment of the compliance of a jurisdiction's bank resolution framework with the *Key Attributes*, and is used by the IMF and World Bank in assessments of jurisdictions' resolution frameworks in the context of the Financial Sector Assessment Program (FSAP).

77. IADI's *Core Principles for Effective Deposit Insurance Systems* (Core Principles, revised 2014) are intended as a framework supporting effective deposit insurance practices by jurisdictions across the world. Jurisdictions can use the *IADI Core Principles* as a benchmark for assessing the quality of their deposit insurance systems, for identifying gaps in their deposit insurance practices and measures to address them. The *Core Principles* are also used by the IMF and the World Bank to assess the effectiveness of jurisdictions' deposit insurance systems and practices within the FSAP.

78. UNCITRAL has developed a number of international instruments in the area of business insolvency law. The *UNCITRAL Model law on Cross-Border Insolvency* (MLCBI, 1997) is designed to assist States to address cross-border business insolvency proceedings more effectively. It focuses on authorising and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. In particular, it concentrates on the following elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance), cooperation among courts and insolvency representatives and coordination of concurrent proceedings.

79. The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) refers to actual cases to provide information for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. Further, the *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (adopted in 2011 and updated in 2013 and 2022), offers general guidance on the issues a judge might need to consider, based on the intentions of those who developed the MLCBI and the experiences of those who have used it in practice.

80. The *UNCITRAL Legislative Guide on Insolvency Law* (presently consisting of five parts adopted at different time points between 2004 and 2021) provides a comprehensive statement of the key objectives and principles that should be reflected in a State's business insolvency law. It is intended to inform and assist insolvency law reform around the world. Parts one and two (adopted in 2004) address key objectives, the structure and core provisions of an effective and efficient insolvency law. Part three (2010) addresses the treatment of enterprise groups in insolvency, both nationally and internationally. Part four treats directors' obligations in the period approaching insolvency (2013), including obligations of directors of enterprise group members (added in 2019). Part five, added most recently (2021), aims at assisting States with establishing a simplified insolvency regime to address the insolvency of individual entrepreneurs and micro and small businesses of an essentially individual or family nature with intermingled business and personal debts (collectively referred to as MSEs). Special considerations arising from the insolvency of banks are not specifically addressed in the *Legislative Guide*. UNCITRAL is currently conducting work on the topics of applicable law in insolvency proceedings and civil assets tracing and recovery in insolvency proceedings.

81. The *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (MLIJ, 2018) was adopted to assist States in establishing a framework of provisions for recognising and enforcing insolvency-related judgments, and the *Guide to Enactment* to provide background and explanatory information.

82. The *UNCITRAL Model Law on Enterprise Group Insolvency* (MLEGI, 2019) was designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the MLCBI and part three of the *UNCITRAL Legislative Guide*. The MLEGI focuses on insolvency proceedings relating to multiple debtors that are members of the same enterprise group, which may be located in one or more jurisdictions. The UNCITRAL Model Laws explicitly allow jurisdictions to exclude banks from their scope.

83. The *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes* (ICR Principles, originally developed in 2001) are a distillation of international best practice on design aspects of corporate insolvency and creditor/debtor systems, emphasising contextual, integrated solutions and the policy choices involved in developing those solutions. The ICR Principles were revised several times; most recently (in 2021) to help policymakers build and improve the insolvency and bankruptcy systems that support micro, small and medium enterprises. The *Insolvency and Creditor Rights Standard* (ICR Standard, 2011), based on the ICR Principles and the *UNCITRAL Legislative Guide*, is designed as a tool to assist countries in their efforts to evaluate and improve insolvency and creditor/debtor regimes. Lastly, the World Bank *Study on Out-of-Court Debt*

Restructuring (2011) offers an overview of out-of-court restructuring techniques as forming a continuum to address the problem of corporate distress.

Target audience

84. As consistent with all UNIDROIT instruments, the future instrument should be relevant for countries irrespective of their legal tradition and would aim to help countries make their bank liquidation frameworks more effective. To this end, during its third session, the Working Group agreed that the primary addressees of the future Guide would be legislators and policymakers seeking to reform or refine their bank liquidation regime.

Format and structure

85. The Working Group was mandated to develop a soft law guidance document on bank liquidation proceedings, with a focus on smaller banks. Following the Exploratory Workshop that was jointly organised by UNIDROIT and the FSI in June 2021, the Secretariat proposed to the Governing Council at its 100th session (September 2021) that the instrument could take the form of a Legal or Legislative Guide, or similar (e.g., Principles or Best Practices).⁵ An analysis of the different systems for bank liquidation would be conducted and, on that basis, the Working Group would proceed to identify international best practices and/or recommendations where appropriate (see [UNIDROIT 2021 – C.D. \(100\) B4](#)). A more precise determination of the type and format of instrument was left to the discretion of the Working Group.

86. During the third Working Group session, it was agreed that the instrument would take the form of a Legislative Guide that would contain, for each subtopic: an introduction and explanations regarding the main issues; a comparative analysis of approaches in different jurisdictions; an analysis of different options; and a box with principles or recommendations, where possible.

87. During the fourth Working Group session, it was decided to include country references in the Guide only where this was considered helpful to illustrate solutions advocated in the Guide. This approach would significantly reduce the references to jurisdictions' laws and practices.

88. Accordingly, the Drafting Committee has significantly reduced references to the laws and practices of specific jurisdictions in the revised Master Copy. During the Subgroup consultations in August-September 2023, some participants expressed a preference for not including any references to specific jurisdictions in the Guide.

Question for the Working Group:

- *The Working Group is invited to express its views on the approach to be taken with respect to country references in the Guide. Should country references still be included where helpful to illustrate solutions advocated in the Guide?*

It is suggested to discuss for each Chapter whether the country references included in that Chapter should be retained, modified or removed.

Title

89. The title of the Guide could be the 'UNIDROIT Legislative Guide on Bank Liquidation', the 'UNIDROIT Legislative Guide on Effective Bank Liquidation Regimes' or similar.

⁵ There was general agreement that it would not be appropriate or feasible to draft a binding international instrument, nor a legislative instrument structured as a comprehensive code such as a Model Law.

Suggestion for the Working Group:

- *The Working Group is invited to reflect on a title for the Legislative Guide.*

Terminology and translations

90. One of the challenges of uniform law is how to ensure that the instrument adopt a terminology which is sufficiently technical and precise, but also as neutral as possible as regards specific legal systems and accessible to users with different legal and linguistic backgrounds (or at least capable of translation into different languages). This is particularly important in the case of instruments aimed at providing guidance to national legislators.

91. The Working Group agreed that there should be consistency, as far as possible and appropriate, with the terminology used in other UNIDROIT instruments and that used in relevant international standards and instruments developed by other organisations (in particular, those of UNCITRAL, the FSB and IADI as mentioned in the section '*Relationship with existing international instruments*' above) bearing in mind, however, the different scope of the present project.

92. Draft Chapter 1 of the Master Copy contains a draft Glossary. It is suggested that the Working Group reflects on the draft definitions as part of the discussion on Chapter 1.

93. While the Working Group's only working language is English, consistent with UNIDROIT's practice the final instrument will be approved in two language versions: English and French. Bearing this in mind, thought should be given to the best way to ensure that a consistent text is developed in both languages by the time of approval of the instrument.

II. CONTENT OF THE LEGISLATIVE GUIDE

94. This Part II contains, for each draft Chapter (i) an overview of main changes made to the Chapter as compared to the fourth Working Group session; and (ii) questions the Working Group may wish to consider during its fifth session.

A. Chapter 1. Introduction

95. **A. Background and purpose of the Legislative Guide:** Following the feedback received during the Subgroup consultation, the drafters streamlined the text, added explanations regarding the scope of bank resolution regimes, and introduced the concept of "non-systemic banks" for the purposes of the Guide. Also, a sentence was added to clarify that the Guide was not intended to serve as standard by international organisations to assess jurisdictions' frameworks.

96. **C. Glossary:** New definitions were introduced for "administrative authority"; "affected jurisdiction"; "statutory subordination"; "subordination"; and "subordination agreement". On the other hand, in line with changes made in other draft Chapters, the following definitions were removed: "group liquidation plan"; "group liquidator"; the "Law"; "liquidation agreement"; "liquidation solution".

97. Finally, changes were made to the definitions of "bank" (to clarify that it includes any licensed deposit-taking institution); "contractual subordination"; "deposit" (which used to be "bank deposit"); "financial contract"; "liquidation authority" (which used to be "competent liquidation authority"); "group home jurisdiction"; "group liquidation" (which used to be "group liquidation solution"); "home jurisdiction"; "host jurisdiction".

Questions for the Working Group:

- *The Working Group is invited to discuss the relationship between the concepts "bank liquidation proceedings" (h) and "winding-up" (ee). The current definition of "winding-up" refers to the final phase of a liquidation proceeding (and may be understood as referring to the piecemeal liquidation of a residual entity), whereas the definition of "bank liquidation proceedings" refers to winding-up in a broader manner.⁶*

Should a definition of "piecemeal liquidation" be added?

98. **D. Legal framework for managing bank failures:** New text was added concerning the introduction of bank liquidation rules in a jurisdiction's framework (paras 16-18). Box 1 was updated and now provides an overview of recommended key features of bank liquidation laws based on the guidance in draft Chapters 2 to 10 of the Master Copy.

99. **E. Preconditions for an effective bank liquidation framework:** This new Part was added following suggestions made during the fourth Working Group session and refers to (i) robust frameworks for bank supervision (Precondition 1); an effective deposit insurance system (Precondition 2); an effective bank resolution framework (Precondition 3); and an effective broader legal and judicial framework and an adequate system of support professionals (Precondition 4).

100. **F. Scope of a bank liquidation framework:** Explanations were added as to why there is a need for special bank liquidation rules even after a bank's licence has been removed (par. 36); the content of former Box 3 'Business models and legal structures of banks' was included in the main text; and former Box 4 'Examples of non-bank entities that carry on bank-like activities and the scope of bank liquidation frameworks across jurisdictions' was removed.

101. During the Subgroup consultation, some participants proposed removing Box 2 'illustration of different approaches in relation to licensed banks' or retaining only the part on cooperative banks.

Question for the Working Group:

- *Should Box 2 be retained, be retained partially (e.g., only the part on cooperative banks) or be removed? If the Working Group considers that only part of the information should be retained, it is proposed to include it in the main text.*

102. **G. Key objectives of an effective bank liquidation framework:** The text was shortened; and former Table 1 'Objectives in bank liquidation frameworks' across jurisdictions was removed. Furthermore, in line with the mandate provided by the Working Group at its fourth session, the drafters added guidance on how the liquidation objectives could be balanced (see par. 63).

Question for the Working Group:

- *The Working Group is invited to express its views on the guidance regarding the balancing of liquidation objectives in the legal framework (par. 63).*

⁶ The Working Group may wish to take into consideration that in the *IADI Core Principles*, "liquidation" is defined as "the winding-down (or "winding-up" as used in some jurisdictions) of the business affairs and operations of a failed bank through the orderly disposition of its assets after its licence has been revoked and it has been placed in receivership. In most jurisdictions, it is synonymous with "receivership".

B. Chapter 2. Institutional Arrangements

103. **General:** In line with the outcome of the fourth Working Group session, Chapter 2 now places more emphasis on the advantages of an administrative model for bank liquidation proceedings, while retaining a discussion of court-led models with a role for administrative authorities, presenting key factors and considerations that may help jurisdictions in designing the appropriate institutional model, and providing draft Recommendations for both models. The Chapter is neutral about which administrative authority should act as liquidation authority, and references to the deposit insurer – which may or may not be an administrative authority – were added throughout the text. The references to specific jurisdictions in Chapter 2 were significantly reduced.⁷

104. **C. Considerations in the design of institutional arrangements:** Following the Subgroup consultation, former key factors 2 (timeliness) and 4 (expertise, efficiency and access to information) were streamlined and merged, since they were interrelated. During the consultation, a suggestion was made to add a reference to 'technical resources' in factor 8 (adequate resources). This may be understood as e.g., IT and systems that allow a liquidation authority and/or appointed liquidators to manage, process and analyse information received from other authorities and banks.

Question for the Working Group:

- *Does the Working Group agree to add a reference to 'technical resources' in key factor 8 (adequate resources) and the accompanying Key Consideration?*

105. **Key Considerations and Recommendations:**

106. The following changes were made to the draft Key Considerations and Recommendations:

- In draft Recommendation 2, a reference has been added to non-judicial accountability mechanisms (recommending the extension of existing non-judicial accountability mechanisms to banking authorities' role in bank liquidation proceedings);
- A new draft Recommendation 3 on operational independence and good governance has been developed;
- The content of draft Recommendation 4 has been expanded and now (i) includes an explicit reference to the protection of third parties that have acquired assets, rights and liabilities in good faith, and (ii) recommends that the review of an administrative decision should not have automatic suspensive effect;
- In draft Recommendation 5, the oversight by an administrative authority over an appointed liquidator has been qualified by reference to phases of the liquidation where public interest objectives are relevant;
- A new draft Recommendation 7 has been added on arrangements to ensure that adequate preparation can take place in jurisdictions that do not adopt a fully administrative model;
- Draft Recommendation 8 contains an additional option for ensuring a strong role for the relevant banking authority during the bank liquidation proceedings, namely by allowing it to be an expert to the court;

⁷ The following elements were removed: Former Table 2 'Examples of administrative authorities in charge of bank liquidation proceedings in selected jurisdictions with an administrative model'; former Table 3 'Role of administrative authorities under an administrative model'; former Table 4 'Competent courts and role of administrative authorities in selected jurisdictions with court-led bank liquidation proceedings'; former Box 6 'Possible impact of legal challenges concerning the administrative authority's decision'; former Box 7 'Scope of court-based bank liquidation proceedings'. Some of the information included in these former boxes was retained in footnotes in the main text.

- The wording on possible specialised judicial bodies in draft [Recommendation 9](#) has been nuanced;
- New draft [Recommendation 10](#) indicates that appeal proceedings should not suspend the execution of liquidation measures;
- The former Recommendations on (i) legal protection and (ii) the right to petition for the opening of bank liquidation proceedings were moved to Chapter 3.

Question for the Working Group:

- *The Working Group is invited to express its views on revised Chapter 2, and in particular on the updated Key Considerations and Recommendations.*

C. Chapter 3. Procedural and Operational Aspects

107. **General:** In line with the outcome of the fourth Working Group session, the sections in Chapter 3 were reorganised as follows: (A) Introduction; (B) Duties of the bank’s management in the period approaching liquidation; (C) Initiation of bank liquidation proceedings; (D) The bank liquidator; (E) Creditor involvement during the liquidation process. The references to specific jurisdictions in Chapter 3 were significantly reduced.⁸

108. **B. Duties of the bank’s management in the period approaching liquidation:** The scope of the proposed requirement for the bank’s management to notify the supervisory authority in a timely manner of a bank’s approaching non-viability has been extended to the resolution authority and the liquidation authority (see par. 115 and draft [Recommendation 11](#)). Such obligation would supplement any notification requirements under an early intervention regime. Furthermore, it has been clarified that any possible obligation for the bank’s management to file for insolvency in a timely manner should only be possible following the prior notification and consent of the supervisory authority.

109. During the Subgroup consultation, a suggestion was made to delete par. 116 on the sanctioning regime for a failure to comply with a notification requirement to the supervisory authority, resolution authority and liquidation authority. It was noted that such sanctions may be governed by substantive supervisory rules and therefore fall outside the scope of this project.

Questions for the Working Group:

- *According to draft [Recommendation 11](#), the triggers for an obligation for the bank’s management to notify the relevant authorities in a timely manner of the bank’s approaching non-viability should be specified in the legal framework. Should the Guide specify that the triggers should derive from the grounds for opening bank liquidation proceedings?*
- *The Working Group is invited to discuss whether par. 116 should be retained. Alternatively, the Guide could provide a more general statement that the notification requirement for bank’s management vis-à-vis the supervisory authority, resolution authority and liquidation authority should be accompanied by appropriate sanctions and penalties for non-compliance, and leave it to jurisdictions to decide what those are.*

⁸ The following elements were removed: Former Box 1 ‘Illustration of required qualities for liquidators’; former Box 2 ‘Remuneration practices’ across jurisdictions; former Box 3 ‘Approaches to protection from liability for liquidators – country examples’; former Box 4 ‘Approaches to creditor involvement in bank liquidation’; former Box 5 ‘Creditor rights to petition for bank liquidation’; former Box 6 ‘Management duties in the period approaching liquidation’. As a result, Chapter 3 no longer contains Boxes. However, some of the information included in these former boxes has been retained in footnotes.

110. **C. Initiation of bank liquidation proceedings:** Initially, the text and accompanying draft Recommendation 12 were revised after the fourth Working Group session to express a clear preference for granting an administrative authority the exclusive right to initiate bank liquidation proceedings. Following the Subgroup consultation, the text has been nuanced.

Question for the Working Group:

- *The Working Group is invited to express its views on Part C and accompanying draft Recommendation 12.*

111. **D. The bank liquidator:** The text in point 1 (Desirable qualities) has been updated to recognise that the liquidator may be an administrative authority or an appointed natural or legal person. In an administrative model, the legal framework could allow the liquidation authority to act as liquidator itself. However, such an authority should also have the power to delegate liquidation tasks to a liquidator (e.g., an official of the administrative authority or a person from the private sector) that would perform those tasks under the oversight of the administrative authority.

112. In point 2 (Selection and appointment procedure), guidance has been added for jurisdictions with an administrative model, recommending that the legal framework confers the competence to select and appoint a person as liquidator exclusively on the relevant administrative authority (see par. 125 and new draft Recommendation 14). Draft Recommendation 15 has been included for jurisdictions with a court-led model. It has also been clarified in the text that the selection of a liquidator should take into account the specific circumstances of the case, including the nature of the failing bank (type, size, location, operations carried out) in order to ensure the appointment of a liquidator with an appropriate profile.

113. During the Subgroup consultation, participants were asked whether the Guide should address the possible notification/publication of the appointment of the liquidator.⁹ Subgroup 1 participants have expressed different views on this matter.

Questions for the Working Group:

- *Should the Legislative Guide cover the possible notification/publication of the appointment of a liquidator?*
- *Should the Legislative Guide provide guidance on the type of general powers¹⁰ that a liquidator should have or would a reference to general insolvency law be sufficient (see also Chapter 6)?*

114. In point 3 (Remuneration), the text has been updated to (i) indicate that, where a public authority acts as liquidator, that authority should be entitled to recover its liquidation expenses, and the basis for calculating that should be set out in law; (ii) clarify that, where private sector persons act as liquidator, their remuneration could be covered in rules or principles – whereby principles may have the advantage of permitting to tailor the remuneration to specific cases; (iii) specify that, in jurisdictions where bank liquidators are appointed by an administrative authority, the legal framework should indicate that the terms of the liquidator's compensation should be determined by

⁹ For instance, in some jurisdictions with an administrative bank liquidation regime, the law specifies that the appointment of a liquidator by the administrative authority shall be effective as of the date of issuance of an appointment letter/administrative decision to that end; and notification requirements may include e.g., posting a notice in each office of the bank and in newspapers for general circulation.

¹⁰ For instance, recommending that the legal framework specifies that the liquidator should be the sole legal representative of the bank and succeeds in the rights and powers of the bank's shareholders and management; that it should be able to take possession of the books and records of the bank; to continue or interrupt any operation of the bank; to repudiate contracts, etc.

that administrative authority. The accompanying draft Recommendations 16 and 17 were updated accordingly, and two new draft Recommendations (18 and 19) were added.

Question for the Working Group:

- *The Working Group is invited to express its views on the updated text concerning remuneration of the liquidator and the accompanying draft Recommendations 16 to 19. Should any additional guidance be provided?*

115. In point 4 (Transparency, oversight and accountability), guidance has been added for jurisdictions with an administrative framework for bank liquidation (par. 131). In particular, it is suggested that the legal framework specifies that the liquidator should act in accordance with the directions, instructions and guidance provided by the administrative authority in the course of the liquidation process. The framework may also require a liquidator to obtain the approval of the administrative authority for specified actions. The liquidator should be accountable to the administrative authority for the performance of its tasks as liquidator. Furthermore, the legal framework could require the liquidator to report regularly (e.g., monthly) to the administrative authority to ensure that the latter is duly informed about the performance of the liquidator's tasks and the progress of the proceeding. Such a regular reporting requirement could be complemented by an obligation for the liquidator to provide additional information if requested by the administrative authority. This has also been reflected in new draft Recommendations 21 and 22.

Question for the Working Group:

- *In case a liquidator is appointed by an administrative liquidation authority and conducts its work under the direction and oversight of that authority (see par. 131):*
 - i. *Should the Guide address the extent to which the liquidator may be able to deviate from directions of the administrative liquidation authority (e.g., should the liquidator have discretion about how it fulfils its mandate)?*
 - ii. *Should the Guide specify that a liquidator appointed by an administrative authority should be accountable exclusively to that authority or could/should the liquidator in addition be accountable to others (e.g., creditors)? Similarly, should the liquidator report regularly only to the relevant administrative authority or also to creditors?*

116. In point 5 (Personal liability and legal protection), the text has been streamlined and a clearer distinction has been made between administrative and court-based models.

117. **E. Creditor involvement during the liquidation process:** The text and accompanying draft Recommendation have been updated to clarify that for bank liquidation proceedings, the public policy objectives and the involvement of administrative authorities justify more limited provision for creditor involvement compared to ordinary business insolvency proceedings (par. 144 and new draft Recommendation 28). Furthermore, the text on the involvement of the deposit insurer as a creditor in bank liquidation proceedings has been revisited. For the situation where the deposit insurer is also the liquidation authority, it has been clarified that potential conflicts of interest can be mitigated by governance arrangements to secure that the deposit insurer acts independently for all parties involved.

Question for the Working Group:

- *The Working Group is invited to express its views on new draft Recommendation 28 (see also par. 144). During the Subgroup consultation, it was suggested to limit creditors' involvement at any stage of the liquidation process to ensure efficiency. In light of this suggestion, should the text be amended?*

118. **Key Considerations and Recommendations:** In addition to the aspects mentioned above, it is suggested to discuss new draft Recommendation 30 on the termination of bank liquidation proceedings.

Questions for the Working Group:

- *The Working Group is invited to express its views on new draft Recommendation 30 on the termination of bank liquidation proceedings. Should guidance be added in the main text along these lines?*

During the Subgroup consultation, a suggestion was made to clarify that the liquidator should remain accountable and maintain standing in possible litigation proceedings following the closure of the bank liquidation process. Should this be added?

- *Should guidance be added in Chapter 3 to recommend that insured depositors should be exempt from the requirement to declare claims in bank liquidation proceedings in relation to any amounts covered by deposit insurance schemes?¹¹*

D. Chapter 4. Preparation and Cooperation

119. In line with the outcome of the fourth Working Group session, the text in Chapter 4 has been significantly reduced. The former boxes in this Chapter¹² and the part on the interaction between pre-liquidation measures and liquidation have been deleted. The parts on Moratorium and on Valuation have been removed too, since these aspects are now covered in Chapter 6.

120. Revised Chapter 4 focuses on contingency preparation and cooperation. Part B sets out the need for preparation for bank liquidation proceedings. Part C discusses enabling provisions in the legal framework and the timing for preparatory actions. Part D covers cooperation between all actors in the period approaching liquidation (based on former Part G 'Cooperation between stakeholders'). The draft Recommendations have been updated accordingly.

Questions for the Working Group:

- *The Working Group is invited to express its views on the new focus, and revised content, of Chapter 4, including draft Recommendations 31-32. Should any additional matters be covered in this Chapter?*
- *Chapter 4 recognises that it is not possible to identify a precise moment when preparatory actions for bank liquidation proceedings should start since this is contingent on the circumstances of each case (par. 160). During the Subgroup consultation, a suggestion was made that the Guide could nevertheless present some general criteria to be taken into account for deciding whether to begin the contingency preparatory phase. Should such criteria be formulated?*

E. Chapter 5. Grounds for opening bank liquidation proceedings

121. After the fourth Working Group session, the drafters of Chapter 5 streamlined the text and revised the sequence of the Parts in this Chapter as follows: (A) Introduction and general

¹¹ This has previously been suggested, based on the results of the stock-taking exercise.

¹² The following elements were removed: Former Box 10 'Advance planning for small and medium-sized banks'; former Box 11 'Removal and/or substitution of senior management in the EU'; former Box 12 'Special administration'; former Box 13 'Moratorium applicable in the run up to the bank liquidation proceedings'; former Box 14 'Example of a mechanism for promoting cooperation between courts and administrative authorities' (the contents of this box has been retained).

considerations; (B) Types of grounds; (C) Interaction with licence revocation; (D) Interaction with triggers for resolution. The former boxes in this Chapter have been removed¹³ and the former separate section on Discretion has been deleted too. On the other hand, the drafters have developed draft Key Considerations and Recommendations for consideration by the Working Group.

122. Part B of Chapter 5 explains that the grounds for opening bank liquidation proceedings should not be limited to, or overly reliant on, traditional insolvency grounds but should include additional grounds. In line with the discussion during the fourth Working Group session, it is recommended that the concept of non-viability be a guiding principle for opening bank liquidation proceedings (paras 175, 183 and draft [Recommendation 34](#)). With regard to the criteria for non-viability, it is suggested to take into account the existing guidance in the *FSB Key Attributes Assessment Methodology for the Banking Sector*. In the section regarding the 'negative condition', it has been added that the introduction of a statutory negative condition may not be needed also because it may already be covered by the proportionality principle that the banking authorities are subject to during administrative decision-making.

123. Part C on the interaction between bank liquidation proceedings and licence revocation now distinguishes between three different situations: (i) licence revocation as a ground for opening liquidation proceedings; (ii) parallel licence revocation and liquidation proceedings; and (iii) impact of the opening of liquidation proceedings on the banking licence. The text advises against distinct grounds for licence revocation and liquidation, and recognises the clear benefits of licence revocation as a prescribed ground for liquidation (paras 192, 197 and new draft [Recommendation 35](#)).

Questions for the Working Group:

- *The Working Group is invited to express its views on updated Chapter 5 and, in particular, on the newly developed draft [Recommendations 33-36](#).*
- *The main message in Part B is that the concept of non-viability could usefully inform the design of the grounds for opening bank liquidation proceedings. Would the Working Group agree to further streamline the text in this Part and focus on this key message?*
- *The last paragraph in Chapter 5 indicates that it could be useful to introduce an explicit provision in the legal framework that would ensure a smooth transition from resolution to liquidation in situations where the prospects of a successful resolution procedure are weak. Given that different views have been expressed during the Subgroup consultation, should this part be kept?*
- *Should Chapter 5 (or any other Chapter) cover voluntary liquidation proceedings?*

F. Chapter 6. Liquidation Tools

124. Based on the discussions during the fourth Working Group session, the main changes made to Chapter 6 are as follows: The text on safeguards has been revisited and no longer refers to the No Creditor Worse Off principle (Part C.6); a new section has been developed on transfers to related parties (Part C.7 and draft [Recommendation 48](#)); a new Part has been developed on piecemeal liquidation (Part E and draft [Recommendations 50-51](#)); a new Part has been developed on the

¹³ The following elements have been deleted: Former Box 15 'Interaction between licence revocation and liquidation in selected jurisdictions'; former Table 5 'Grounds for opening liquidation proceedings'; former Box 16 'Grounds applied in selected jurisdictions'; Table 6 'Grounds for the transition from resolution to liquidation (selected examples)'.

protection of the liquidation estate, including moratorium and avoidance (Part F and draft Recommendations 52-55). Minor revisions have been made in Part G on financial contracts.¹⁴

125. In addition, the drafters of Chapter 6 have sought to address the feedback received from Subgroup 2 participants during the consultation process.

Questions for the Working Group:

- *It is suggested to provide the Drafting Committee with a mandate to streamline/shorten the text in Chapter 6.*
- *Draft Chapter 6 currently uses 'sale as a going concern' as the terminology for a transfer of assets and liabilities to a sound acquirer. Does the Working Group agree with this terminology or should a different term be used (e.g., P&A, sale of business, transfer tool)?*
- *Draft Chapter 6 focuses on the transfer of 'assets and liabilities'. During the Subgroup consultation, it has been raised that, from an accounting perspective, these notions may fall short of capturing rights and obligations that do not give rise to items that are reflected with a financial value in the bank's books or give rise to a debtor-creditor relationship. Against this background, should it be clarified in Chapter 6, or in Chapter 1 (Glossary) that references in the Guide to a transfer of 'assets and liabilities' are meant to cover not only debts, or claims, but also any right or obligation that belongs to the bank?*
- *The Working Group is invited to express views on whether the discussions on pre- and post-insolvency liabilities in par. 206 should be kept.*
- *Should draft Recommendation 39 on the irreversibility of the outcomes of a transfer be kept, considering draft Recommendation 4 in Chapter 2?*
- *The Working Group is invited to express views on whether the Legislative Guide should maintain a reference to different forms of transfer, or whether these should be deleted? Specifically:*
 - i. *References to share deals (paras 217-219)?¹⁵*
 - ii. *References de-mergers and spin-offs (par. 243) and to securitisation (par. 266)?¹⁶*
 - iii. *References to bridge banks and asset management companies (Part D and draft Recommendation 49)?*
- *Part C.4 of Chapter 6 discusses the bidding process to implement the transfer of assets and liabilities of a non-viable bank to a potential acquirer. It indicates, among others, that the selection of the winning bid must be based on clearly established criteria (see par. 252, whereby reference is made in the footnote to the practice in the United States). Should guidance be provided on such criteria (e.g., to what extent the winning bid should be determined based on the price and other financial variables)?*

¹⁴ In line with the outcome of the fourth Working Group session, the title of Part G has been amended to better reflect its contents; former draft Recommendation 14 has been deleted; the last part of former draft Recommendation 15 (now 56) has been deleted; in Recommendation 57, the text has been amended to clarify that the substantive obligations under the contract need to continue to be performed (without implying that this necessarily needs to be done by the failed bank).

¹⁵ The former Recommendation on share deals has been deleted.

¹⁶ The former Recommendation on specific corporate law transactions (mergers de-mergers, spin-offs, securitisation) has been deleted.

- *Should additional guidance be provided on the topic of valuation (see Part C.5)? If so, what should such guidance entail? E.g., should reference be made here (or in relation to the determination of the price by bidding) to the 'least cost' test?*
- *The Working Group is invited to express its views on the new Parts in Chapter 6 on Piecemeal liquidation (Part E) and Protection of the liquidation estate (Part F).*

Regarding piecemeal liquidation, which bank-specific specialties should be contemplated, i.e., for which substantive aspects should the Guide recommend introducing bank-specific rules? On the other hand, for which substantive aspects could the Guide indicate that bank liquidation frameworks can draw on general insolvency law?

It is suggested to discuss, e.g., the legal consequences of the opening of bank liquidation proceedings (notably on contracts, e.g., the accrual of interest rate; undue debts becoming due; and non-monetary obligations transforming into monetary obligations); avoidance; set off; and the stages of the liquidation procedure (e.g., inventory, opening balance sheet, invitation to register claims, acceptance/dismissal of claims, sale of assets, distribution).

Should any of these aspects be addressed in other Chapters (e.g., Chapter 3)?

G. Chapter 7. Funding

126. The main changes in Chapter 7 since the fourth Working Group Session concern the following: (i) the text has been streamlined; (ii) explanations have been added regarding the least cost safeguard (distinguishing between a 'net' and 'gross' application); (iii) the guidance on advance payouts to depositors in jurisdictions without a deposit insurance system has been moved to Chapter 7 (from Chapter 8); (iv) former Part E on burden sharing has been deleted; (v) draft Key Considerations and Recommendations have been developed (draft Recommendations 60-63). The key message in Chapter 7 is that the legal framework should allow the use of deposit insurance fund resources beyond payout to facilitate orderly liquidation, subject to the safeguards in the *IADI Core Principles*.

Questions for the Working Group:

- *Should the Legislative Guide cover aspects of methodology for calculating the limit on the use of deposit insurance fund resources (e.g., costs to be taken into account for the least cost principle, see par. 306)?*
- *The Working Group is invited to consider ways in which a deposit insurer could contribute cash to help fund a transfer of assets and liabilities, e.g., by transferring resources directly to an acquirer (on behalf of the failed bank) or by first transferring the resources to the failed bank. Would there be a preferred approach, depending on whether the deposit insurer should be able to file a claim in the liquidation estate?*

H. Chapter 8. Creditor Hierarchy

127. **General:** Since the fourth Working Group Session, the drafters text of Chapter 8 have streamlined the text and deleted most tables/boxes.¹⁷

¹⁷ The following elements have been removed: Former Table 1 'Approaches to the ranking of deposit claims across jurisdictions'; former Box 3 'Example: Tiered depositor preference in the EU'; former Box 4 'Treatment of temporary settlement accounts across jurisdictions'; former Box 5 'Treatment of secured creditors in liquidation proceedings'; former Box 7 'Treatment of contractually subordinated debt'; former Box 8 'Specific rules for subordinated bank instruments in creditor hierarchy'; former Box 9 'Equitable subordination in different jurisdictions'. Some of the information included in these former boxes has been retained in footnotes.

128. **C. Ranking of depositors:** New guidance has been developed on: (i) the position of the deposit insurer in case of the application of a transfer tool under a 'net' and 'gross' least cost (par. 335); (ii) the ranking of related party deposits (par. 336 and draft [Recommendation 69](#)); (iii) the treatment of interbank deposits (par. 337 and draft [Recommendation 69](#)). As suggested during the fourth Working Group session, the former draft Recommendation on insured or tiered depositor preference has been removed.

Questions for the Working Group:

- *The Working Group is invited to express its views on whether the boxes on different types of deposit ranking should be deleted (par. 331) considering that the key points concerning depositor ranking are now covered in the main text (paras 328-330). Alternatively, the boxes could be deleted after adding certain aspects from the boxes to the main text.*
- *The Working Group is invited to express its views on the guidance and draft Recommendations in Part C, especially regarding the new elements. Specifically:*
 - i. *Different views have been expressed during the Subgroup consultation on new par. 335 regarding the position of the deposit insurer. Should the Guide cover this? If so, does the Working Group agree with the guidance currently provided?*
 - ii. *Different views have been expressed during the Subgroup consultation on new par. 336 and draft [Recommendation 69](#) regarding related party deposits. Should the Guide recommend that related party deposits should not benefit from any preferential treatment granted to other deposits (i.e., exclusion from depositor preference) or should their treatment be determined by rules on the subordination of related party claims?*
 - iii. *Different views have been expressed during the Subgroup consultation on new par. 337 and draft [Recommendation 69](#) regarding interbank deposits. Should the guidance remain as it stands or should the Guide recommend exclusion from general deposit preference?*

129. **D. Temporary settlement accounts:** The drafters of Chapters 8 have updated the text and developed new draft [Recommendation 71](#). In line with the outcome of the fourth Working Group session, the section on e-money and runnable liabilities has been deleted.

Question for the Working Group:

- *Should the Part on temporary settlement accounts be kept in Chapter 8 or moved to another Chapter (if so, which Chapter)?*

130. **E. Subordinated claims:** The drafters of Chapter 8 have updated the guidance on related party claims (paras 353-358 and draft [Recommendations 75-77](#)), indicating that the statutory subordination of related party claims offers various advantages.

131. **F. Ranking of shareholders:** This Part has been developed by the drafters following the fourth Working Group session.

Question for the Working Group:

- *The Working Group is invited to express its views on newly developed Part F, including draft [Recommendation 78](#).*

132. **G. Ranking of post-liquidation financing:** This Part has been developed by the drafters following the fourth Working Group session.

Question for the Working Group:

- *The Working Group is invited to express its views on newly developed Part G, including draft Recommendations 79-82.*
- *Should the Guide include advice on the possibility to grant secured post-liquidation financing creditors a preferential treatment over that of other secured creditors?*

133. **H. Secured creditors:** In line with the discussions during the fourth Working Group session, this Part has been moved to the end of Chapter 8; the former draft Recommendation concerning the enforceability of security interests has been removed; and it has been clarified that draft Recommendation 83 relates to the position of secured creditors of the bank (not the bank as secured creditor).

Question for the Working Group:

- *Should footnote 183 on the stay and secured creditors be removed or moved to Chapter 6, considering that it is covered in more detail there?*

I. Chapter 9. Group Dimension

134. Following the discussions in the fourth Working Group session, the Drafting Committee has made significant changes to draft Chapter 9. It deleted the former Parts on 'Ex Ante Group Liquidation Plans and Ex Post Group Liquidation Solutions'; on 'Upstreaming of losses, downstreaming of funds in liquidation proceedings of banking groups', on 'Exceptions to anti-avoidance rules, claw-back provisions, and subordination of intra-group financing and asset transfer'; and on 'Group-level restructuring agreements'.

135. Draft Chapter 9 now focuses on the liquidation of a non-viable bank that is part of a group, instead of discussing group-level liquidation solutions. Apart from the Introduction (A), it contains two Parts: (B) No group impediments to bank liquidation and the treatment of cooperative groups (including draft Recommendations 85-88); and (C) Coordinated actions between administrative authorities and courts (including draft Recommendations 89-94).

Questions for the Working Group:

- *How should the Legislative Guide treat instances of (i) post-liquidation intra-group funding; and (ii) pre-liquidation intra-group financing in the 'twilight' zone, for purposes of subordination, i.e., in case a bank received financing from group entities just before or during the liquidation proceeding? Are draft Recommendations 85 and 86 sufficient?*
- *Should draft Recommendation 90 on cooperation between different administrative liquidation authorities be kept in Chapter 9 or should it be moved to another Chapter (e.g., Chapter 2 or Chapter 4)?*
- *Chapter 9 provides guidance on the treatment of service agreements between a bank in liquidation and one or more group entities (par. 381 and draft Recommendation 87). The*

Working Group is invited to express its views on the guidance provided, considering also FSB Key Attribute 3.2 (iv)¹⁸.

- *Should Chapter 9 provide additional guidance on the powers of banking/liquidation authorities in relation to group entities, both during contingency planning and liquidation, to ensure that a group entity providing relevant services to a bank in liquidation (e.g., IT services) effectively cooperates with those authorities?¹⁹ Should the Guide recommend that the relevant banking/liquidation authorities have adequate general information gathering powers for that purpose? Would draft Recommendation 94 be sufficient?*
- *Should Chapter 9 (or any other Chapter) provide guidance on whether, and if so, how, the liquidation framework applicable to banks can contribute to the accountability/liability of bank owners and related parties for a bank's failure?*

J. Chapter 10. Cross-Border Aspects

136. Following the discussions in the fourth Working Group session and the Drafting Committee, significant changes have been made to draft Chapter 10. The text has been streamlined and the number of Recommendations has been reduced. The text now more explicitly refers to relevant existing guidance in the *FSB Key Attributes* and the *FSB Principles for the Cross-border Effectiveness of Resolution Actions*, and a clearer distinction is made between cross-border aspects in the liquidation of a single bank (e.g., with branches and/or assets abroad) and cross-border aspects when liquidating a group (see new Part E 'Liquidation of cross-border groups').

Questions for the Working Group:

- *The Working Group is invited to discuss the general approach to be taken in Chapter 10, considering the existing guidance in the FSB framework.*

In particular, does the Working Group agree to (i) include in Chapter 10 a general recommendation that jurisdictions should have in place a cross-border cooperation framework in line with the FSB Key Attributes and the FSB Principles mentioned above (while avoiding overlaps and duplication with such existing guidance in Chapter 10); (ii) focus on specificities that may arise in implementing a cross-border coordination regime based on the FSB framework in the context of bank liquidation?

Which legal specificities may arise in bank liquidation proceedings and would merit specific guidance? For instance, should the focus be on different institutional arrangements (see paras 401-403)? Should guidance be provided on cross-border cooperation between and with deposit insurers, taking into account IADI Core Principle 5?

- *The Working Group is invited to consider the use of the concepts (group) "home" and "host" jurisdiction in Chapter 10, having regard to the definitions in the Glossary (also of "affected jurisdiction"). What would be the appropriate terminology to be used in Chapter 10, especially in the context of cross-border recognition?*

¹⁸ Resolution authorities should have the power to "Ensure continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity; ensuring that the residual entity in resolution can temporarily provide such services to a successor or an acquiring entity; or procuring necessary services from unaffiliated third parties". See also *Key Attributes Assessment Methodology for the Banking Sector*, EC 3.6.

¹⁹ Normally, the bank's management in the period approaching liquidation, and the liquidator during liquidation, may be able obtain necessary information from group entities based on corporate control (over subsidiaries) or contract (outsourcing arrangements). Yet, there may be cases where corporate control and contracts could be insufficient.

ANNEX I**ADDITIONAL RESOURCES**UNIDROIT Instruments

UNIDROIT, Principles on the Operation of Close-Out Netting Provisions (2013)

<https://www.unidroit.org/wp-content/uploads/2021/06/netting-English.pdf>

UNCITRAL Instruments

UNCITRAL, UNCITRAL Legislative Guide on Insolvency Law (2004-2019)

https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law

UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment (2013)

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

UNCITRAL, UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf.

UNCITRAL, UNCITRAL Model law on Recognition and Enforcement of Insolvency-Related Judgments (2018)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf

UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (revised 2013)

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf>

UNCITRAL, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/practice_guide_ebook_eng.pdf

Other International Documents

Basel Committee on Banking Supervision (BCBS), Core Principles for effective banking supervision, revised (2012) and integrated into the consolidated Basel Framework (version 2019)

https://www.bis.org/basel_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215

BCBS, Report and Recommendations of its Cross-Border Bank Resolution Group (2010)

<https://www.bis.org/publ/bcbs169.pdf>

FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, revised (2014)

[Key Attributes of Effective Resolution Regimes for Financial Institutions \(fsb.org\)](https://www.fsb.org/wp-content/uploads/Key-Attributes-of-Effective-Resolution-Regimes-for-Financial-Institutions-(fsb.org))

FSB, Key Attributes Assessment Methodology for the Banking Sector (2016)

<https://www.fsb.org/wp-content/uploads/Key-Attributes-Assessment-Methodology-for-the-Banking-Sector.pdf>

FSB, Principles for Cross-border Effectiveness of Resolution Actions (2015)

<https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>

FSI Insights No 10, How to manage failures of non-systemic banks? A review of country practices (2018)

<https://www.bis.org/fsi/publ/insights10.pdf>

FSI, Insights No 45, Counting the cost of payout: constraints for deposit insurers in funding bank failure management (2022)

<https://www.bis.org/fsi/publ/insights45.pdf>

IADI, Core Principles for Effective Deposit Insurance Systems, revised (2014)

<https://www.iadi.org/en/assets/File/Core%20Principles/cprevised2014nov.pdf>

IADI Brief No 4, Depositor Preference and Implications for Deposit Insurance (2020)

<https://www.iadi.org/en/news/iadi-brief-on-depositor-preference-and-implications-for-depositor-insurance/>

IADI, Ways to Resolve a Financial Cooperative while Keeping the Cooperative Structure (2021)

<https://www.iadi.org/en/assets/File/Papers/Approved%20Guidance%20Papers/IADI%20Guidance%20Paper%20Ways%20to%20resolve%20a%20financial%20cooperative%20while%20keeping%20the%20cooperative%20structure.pdf>

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<https://openknowledge.worldbank.org/bitstream/handle/10986/35506/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf?sequence=1&isAllowed=y>

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<https://documents1.worldbank.org/curated/en/417551468159322109/pdf/662320PUB0EPI00turing09780821389836.pdf>