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SUMMARY REPORT

OF THE SEVENTH SESSION

(18 - 20 November 2024)

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1. The seventh session of the Working Group on Bank Insolvency ("the Working Group") took place on 18, 19, and 20 November 2024 at the headquarters of UNIDROIT in Rome. Online participation was possible for those who were unable to attend the session in person.

2. The session was attended by twelve individual experts and over 60 representatives of the Working Group's institutional observers, which include international and regional bodies and organisations, and banking supervisors, resolution authorities and deposit insurers from all over the world, as well as staff of the FSI and the UNIDROIT Secretariat (the list of participants is available in Annexe I).

Item 1: Opening of the session and welcome

3. *The Chair* opened the session and welcomed all participants to the meeting.

Item 2: Adoption of the agenda and organisation of the session

4. *The Chair* introduced the draft agenda and invited *a member of the UNIDROIT Secretariat* to introduce the organisation of the session. It was proposed that the Draft Legislative Guide on Bank Liquidation be considered chapter by chapter in numerical order, having regard to (i) the comments received during the online public consultation process, and (ii) the feedback from Working Group participants.

5. *The Working Group adopted the draft agenda (UNIDROIT 2024 – Study 84 – W.G. 7 – Doc. 1, available in Annexe II) and agreed with the proposed organisation of the session.*

Item 3: Update on developments and activities since the sixth Working Group session

6. Upon invitation by the Chair, *a member of the UNIDROIT Secretariat* recalled that, following the sixth session in March 2024, the Draft Legislative Guide had been updated and submitted to the Working Group for fatal flaw review. It had then been submitted for consideration to the UNIDROIT Governing Council which, at its 103rd session (May 2024), had authorised the Secretariat to commence a consultation on the draft instrument. Accordingly, an online public consultation was held between 5 June and 11 October 2024, which had been promoted through various events and channels. The Secretariat had received 22 consultation submissions, consisting of 414 comments, which had been organised by chapter and paragraph number in document *UNIDROIT 2024 – Study 84 – W.G. 7 – Doc. 3 rev*. In addition, several Working Group observers had provided feedback on the Draft Legislative Guide, which had been shared with the Working Group on a confidential basis. Finally, 17 stakeholders had participated in a survey on technical legal aspects concerning bank liquidations, which had been conducted in parallel with the consultation. The Secretariat expressed gratitude to all those who had participated in the consultation and/or the survey.

7. It was proposed that the deliberations focus on comments that the Secretariat and/or members of the Drafting Committee had identified as meriting discussion by the Working Group. This meant that comments that could easily be addressed by the Drafting Committee and comments on aspects that had previously been considered by the Working Group would in principle not be discussed. However, the participants were welcome to raise any other comments or questions for discussion.

Item 4: Consideration of the Draft Legislative Guide on Bank Liquidation

a) Comments received during the consultation process

General comments

8. *A member of the UNIDROIT Secretariat* directed the group to the sections marked "General Comments" in the two documents with feedback on the Draft Legislative Guide. Most of those comments were an expression of appreciation for the Draft Guide and did not require discussion.

9. On comment 2, it was agreed to (i) reflect on whether there was a need for additional text on the protection of valuable information in the context of Chapter 6 (Section G), and (ii) mention in Chapter 3 that liquidators could make use of the technical tools available to them, including artificial intelligence. It was decided not to provide detailed guidance on the latter, since it was a general matter that may be relevant for any liquidation process.

10. With regard to comment 4 on institutional protection schemes (IPS), *the Working Group* agreed to (i) clarify in Chapter 1 that preventative measures by IPS were outside the scope of the Guide, and (ii) mention in Chapter 2 (Section E) that an IPS could be a deposit insurer in certain jurisdictions, provided that specific criteria were met. It was also suggested that the Guide recognise that IPS could play a role in preventing a bank's failure. *One participant* noted that it was uncertain whether IPS could provide funding to facilitate liquidation strategies.

11. Following a comment by a Working Group observer, it was agreed to add a footnote in paragraph 39 recognising that while the Guide applied to any type of bank, additional provisions might be needed in the legal framework for certain types of banks and group structures. The Drafting Committee would consider the responses to the technical survey, which *inter alia* contained input on cooperative banks. Furthermore, it was agreed to cross-refer to Chapter 9 and acknowledge in the latter chapter that in some jurisdictions, it was possible to open a single liquidation proceeding that would also cover non-bank entities, and that coordination was important in such cases.

12. *The Working Group* agreed not to add additional references to jurisdictions in the Guide. The approach to jurisdictional references had been extensively discussed and the agreed approach was confirmed, i.e., to only make minimal references to jurisdictional examples in certain footnotes.

Chapter 1: Introduction

13. With regard to comment 15, it was considered too challenging to specify metrics to measure the implementation of liquidation objectives. Furthermore, concrete examples of coordination mechanisms were covered in Chapter 4, which referred, e.g., to legislative provisions and memoranda of understanding.

Section A. Background and scope of the Legislative Guide

Paragraph 3

14. Following a comment by a Working Group observer, it was agreed to replace "*systemic financial institutions*" by "*financial institutions that could be systemic in failure*". Furthermore, it was agreed to refer to "*minimising the risk of loss to public funds*" in the Guide, which was deemed sufficiently comprehensive (adding "*and cost to taxpayers*" would be redundant), while recognising that the *FSB Key Attributes* used the formulation "*without exposing taxpayers to loss*".

Paragraph 4

15. Following comment 20 and a comment by a Working Group observer, it was agreed to rephrase the third sentence as follows: "*t]his minimum scope of application allows jurisdictions to apply their resolution regime more broadly to all banks rather than limiting it to those that are systemic in their failure*" (or similar).

Paragraphs 5 - 7

16. With regard to comments 21 and 23, it was agreed to take up the suggestion to start the last sentence of paragraph 5 with "*[w]hile the FSB Key Attributes specify…*", and to leave it to the Drafting Committee to consider whether any changes should be made to the sequence of the sentences in paragraphs 6 and 7 without changing the substance. It was agreed not to change the text of footnote

5, as had been suggested in comment 24, since it adequately indicated that the creditor hierarchy in liquidation governed the allocation of losses in bank resolution proceedings.

Section B. Organisation and purpose

17. To address comment 28, it was agreed to add to paragraph 11 a cross-reference to Section F of Chapter 1.

18. To address comment 29, it was agreed to refer in the second sentence of paragraph 12 to jurisdictions that "*do not yet have a bank liquidation framework or specific rules for the liquidation of non-systemic banks*" (or similar). Furthermore, *the Working Group* agreed to add a reference to the possible use of the Legislative Guide by international and regional organisations for purposes of technical assistance to jurisdictions.

Section C. Glossary

19. It was agreed to make the following changes to the Glossary:

- To delete the word "delegated" in the definition of "administrative authority" (point a).
- To add "*or national types of banking institutions such as*" (or similar) in the definition of "bank" (point b), before referring to "*Cajas de Ahorro*" and others.
- To add a definition of the "no creditor worse off" safeguard, in line with possible definitions in existing instruments.
- To align the language on piecemeal liquidation in the definition of "sale as a going concern" (point z) with point (v).
- To add "*or applicable law*" after "*liquidation authority*" in the definitions of "liquidator" (point t) and "prospective liquidator" (point w).
- To add "whole" before "business" in the definition of "piecemeal liquidation" (point v).

20. It was agreed not to refer to covered bonds in the definition of "financial contract" (point m) since the latter definition was in line with the definition in the *FSB Key Attributes Assessment Methodology for the Banking Sector*, and because the focus in the section on financial contracts was on close-out netting (which is not a specific contractual feature of covered bonds). Furthermore, it was considered sufficiently clear from the definition of "resolution" (point x) that it covered also situations in which banks were "likely" to fail. Moreover, it was agreed to keep the definition of "subordination" rather than add details on the treatment of trust creditors, which might differ across jurisdictions.

21. *The Working Group* confirmed its earlier decision not to add a definition of "non-systemic bank", which concept was deemed sufficiently described in paragraph 5.

22. *The Working Group* considered whether the term "sale as a going concern" should be amended or replaced by a different term (e.g., "transfer of operations"), but it ultimately decided to maintain the current wording, and not to add a separate definition of "going concern" since its meaning was deemed sufficiently clear.

Section D. Legal framework for managing bank failures

23. It was agreed to take up the drafting suggestion in comment 46 concerning paragraph 14.

Section E. Neutrality of the Guide

24. It was agreed not to take up the suggestion by a Working Group observer to specify in paragraph 18 that a jurisdiction's legal design should not undermine the integrity and effectiveness

of bank resolution arrangements, since the suggested text was not entirely clear and because the Guide was not deemed the appropriate place to indicate this.

25. In line with comment 52, it was agreed to add the words "*in a separate section of*" (or similar) before "*general insolvency law*" in the first sentence paragraph 21, to ensure that bank-specific provisions in an insolvency law were easily discernible. Furthermore, in line with paragraph 21 and considering comment 53, it was suggested that Recommendation 1 specify that provisions governing bank liquidation should ideally be included in a dedicated bank liquidation law.

Section F. Bank liquidation and the broader legal and operational environment

26. It was agreed not to take up the suggestions made in comment 55 concerning single-track and dual-track regimes.

Paragraph 27

27. Following comment 58 and a suggestion by a Working Group observer, it was agreed to delete the second part of the second sentence, so that it would end after "*exercised by the central bank*".

Paragraph 28

28. *The Working Group* agreed not to add a reference to "*international best practices*" in the first sentence of paragraph 28, as had been suggested by a Working Group observer, since it would be unclear what this would encompass and any best practices were expected to be in line with the *IADI Core Principles* that were already mentioned in this paragraph. *One participant* added that "international best practices", depending on their nature, were also not necessarily suitable for all jurisdictions. Furthermore, it was agreed to specify that depositors were protected "*up to a specified amount*", in line with comment 59, while it was agreed not to refer to investors (as had been suggested in the same comment) given that this paragraph discussed deposit insurance systems.

Paragraph 33

29. To address comment 63 and in line with Chapter 2, it was agreed to add that the judiciary should have "*appropriate expertise and experience*".

Section G. Scope of a bank liquidation framework

30. *The Working Group* agreed not to take up a suggestion by a Working Group observer to add in paragraph 35 that limbo situations wherein a bank was no longer viable but its licence could not be withdrawn due to pending court proceedings, should be avoided. Chapter 1 was not deemed the appropriate place to address this.

31. Following the suggestion of a Working Group observer, it was agreed to delete the last part of the second sentence in paragraph 38, namely "*if the legal framework allows some of the entity's operations to continue during liquidation*", since it wrongly suggested that a sale as a going concern could only take place if the bank continued some of its business.

32. It was agreed not to take up the suggestion of a Working Group observer to add in paragraph 40 that the objectives of liquidation regimes for entities other than banks might differ from the objectives of a bank liquidation framework, because it already followed clearly from paragraph 40 that certain parts of the Guide may not be fully applicable to non-bank liquidation frameworks.

Section H. Key objectives of an effective bank liquidation framework

33. Following a suggestion by a Working Group observer, it was agreed to add two points to the introduction of Section H, namely that: (i) the objectives or their prominence might change depending on the stage of the liquidation process, and (ii) the relevance of the objectives can be different for different stakeholders (e.g., some objectives might be more relevant for the liquidator,

while others might be more relevant for administrative authorities). It was left to the Drafting Committee to develop text on these points.

34. With regard to comment 69, *the Working Group* decided not to take up the proposal that value preservation and maximisation be presented as "overriding" objective, in line with its earlier decision not to rank the objectives. *The participants* agreed with the substance of proposed additional objective 3 in the same comment – i.e., that liquidation should support any preceding bank resolution actions – but this was not deemed to be an objective. It was rather considered a general principle that had informed certain aspects of the guidance, or a reflection that coordination was needed between resolution and liquidation rules. It was left to the Drafting Committee to verify whether this followed sufficiently from other parts of the Guide or whether additional text was needed.

Subsection 1. Value preservation and maximisation

35. With regard to comment 72, *the Working Group* discussed that undertaking new business was more challenging in a bank liquidation process than in a regular business insolvency process, due to the requirements for licencing and supervision. Therefore, it was agreed not to add specific guidance on the objective of value maximisation in the context of existing or new business activities.

Subsection 2. Depositor protection

36. *The Working Group* agreed not to add guidance on set-off of claims, as had been suggested in comment 73, since it had previously considered this and had concluded that it was preferable not to cover this in the Guide.

37. In line with comment 75, it was agreed to delete the word "some" in the second sentence of paragraph 46, and to add a reference to "businesses" in the third sentence.

Subsection 3. Financial stability

38. Following comments by two Working Group observers, it was agreed to change the first sentence of paragraph 51 as follows: "*Maintaining financial stability is generally an overarching objective of any framework for prudential regulation and supervision, and it is often an explicit part of the mandate of banking authorities and central banks*." This way, it was recognised that maintaining financial stability was not necessarily an "overarching objective" of central banks or part of their mandate, even if it was generally agreed that central banks pursued or contributed to financial stability in the execution of their functions.

39. *The Working Group* agreed to delete the word "principally" in the seventh sentence of paragraph 52. It was agreed to retain the reference to "*confidence in the banking sector*" in the sixth sentence of the same paragraph, since it was deemed accurate that a sale as a going concern generally better maintained confidence compared to piecemeal liquidation, as had been recognised also in other parts of the Guide.

Subsection 5. Certainty and predictability

40. To address comment 80, it was agreed to add a reference to transparency in this subsection, with a cross-reference to Chapter 2, Section C (subsection 7).

Subsection 6. Balancing the objectives of a bank liquidation framework

41. To address comment 81, *the Working Group* agreed to add an example in paragraph 61 to illustrate how public interest objectives may be in tension with maximising value for creditors. It was mentioned that there may be cases in which public interest objectives would be best served by a quick sale whereby at least insured deposits would be transferred to an acquirer, while it might be in the interest of value maximisation (and creditors whose claims would not be preferred) to take more time for the sale with the view to obtain a higher price.

42. It was agreed not to follow a suggestion by a Working Group observer to add "*in a preceding resolution*" after "*the continuity of the transferred business*" in paragraph 62, since there might also be a need to continue the provision of services to business transferred in a sale as a going concern in the context of a bank liquidation proceeding. Furthermore, the final sentence of paragraph 62 already emphasised that this may be particularly relevant following a transfer of critical functions in a resolution process.

43. Following a suggestion by a Working Group observer, it was agreed to add the final sentence of paragraph 63 (or similar wording) in Recommendation 2, namely: "*As a general principle, value maximisation should not compromise public interest objectives such as depositor protection or continuity of transferred functions*." Furthermore, *one participant* suggested clarifying the concept of "public interest objectives" in the text, noting that it seemed to refer to depositor protection, financial stability, and continuity of business. *Another participant* suggested adding a cross-reference to Recommendation 14, so that it was clear from the outset that any financial stability issues that may arise during a bank liquidation proceeding should be assessed by a banking authority. Moreover, in order to complement Recommendation 14, it was agreed to add in the main text of Chapter 2 that the liquidator should consult with the banking authority in case of a possible friction between public interest objectives and value maximisation during the liquidation process.

Chapter 2: Institutional Arrangements

General comments

44. *The Working Group* agreed to retain the existing approach to different institutional models, i.e., underlining the advantages of an administrative model for bank liquidation proceedings while acknowledging that the appropriate model in any jurisdiction also depends on jurisdiction-specific factors. It was discussed whether purely court-based models were inappropriate for bank liquidation proceedings, since banking authorities always needed to have a strong role in the process. To avoid confusion on this point and in line with a suggestion by a Working Group observer, it was agreed to consistently refer to a "*predominantly court-based model*" or a "*court-based model with administrative involvement*", including in the Key Considerations and Recommendations. Furthermore, the Drafting Committee was asked to review the instances in which reference was made to "hybrid" models, to ensure that this was only used to express that any model in bank liquidation proceedings was hybrid in nature, due to a strong role of a banking authority combined with judicial scrutiny.

45. *A participant* suggested that it was important in jurisdictions with a predominantly court-based model that the banking licence could be maintained for some time, especially if a sale as a going concern was envisaged. *Another participant* explained that it was already stated in Chapters 5 and 6 of the Guide that there would be merit in providing some flexibility in retaining the banking licence or postponing the effects of a revocation decision for some time if necessary to facilitate a transfer.

46. With regard to comment 88, *the Working Group* agreed to maintain the existing text on *ex-ante* and *ex-post* judicial scrutiny, while adding a reference to the option of expedited procedures in the main text, in line with Recommendation 11(b). It was agreed that no additional guidance was required on the manner of appointment of an administrative authority as liquidation authority, since it already followed from the definition of "liquidation authority" and the main text that the legislator was expected to designate an existing banking authority as liquidation authority by law. To address the point raised in the second paragraph of comment 88, the Drafting Committee was asked to verify whether the text on the role of the administrative authority in the opening of bank liquidation proceedings in paragraphs 120 and 200 was consistent.

47. With regard to comment 90, it was noted that Chapter 3 contained guidance on desirable qualities for liquidators. It was deemed unnecessary to refer to the use of judgments, orders, and

advisory opinions as reference to guide future cases since this was expected to be done in any case, and was not specific to bank liquidation proceedings. Furthermore, *the Working Group* considered that paragraph 103 and Recommendation 14 already sufficiently addressed the suggestions in Recommendation 5.1 of comment 90. *The Working Group* agreed that the guidance in Recommendation 14 should also be reflected in the main text of Chapter 2.

48. Regarding comment 91, *the Working Group* recalled that it had previously decided not to refer to "specialised courts" (or similar). It confirmed its approach, i.e., to recommend that the judiciary should have "appropriate expertise" (as was done, e.g., in paragraph 90 and Recommendation 15) while not entering into details on the organisation of the court system since that depended on jurisdiction-specific factors and was beyond the scope of the Guide.

Section B. Institutional models

49. Following a comment by a Working Group observer, it was agreed to delete footnote 34. It was left to the Drafting Committee to consider comments 94, 95, and 96 and to make any changes in the text as it deemed appropriate.

Section C. Considerations in the design of institutional arrangements

Subsection 1. Objectives

50. To address comment 100, *the Working Group* agreed to replace "*administrative authorities with supervisory knowledge*" by "*banking authorities*" in the fourth sentence of paragraph 82.

Subsection 3. Expertise, efficiency and access to information

51. To address a comment by a Working Group observer, the Drafting Committee was asked to consider recognising in the text that, in some jurisdictions, there was limited judicial practice on business insolvency, let alone on bank failures.

52. Regarding comment 106, *the Working Group* decided to leave the fourth sentence of paragraph 91 as it was, since it already provided banking authorities that acted as liquidator with the possibility to delegate certain liquidation powers to a natural or legal person. It was considered preferable to leave it to jurisdictions whether to place any limits on the scope of such possible delegation, while the banking authority should in any case not be released from its responsibility, as was indicated in the last sentence of paragraph 91. It was also observed that, where a banking authority was the liquidation authority and it appointed an external liquidator (which was the second scenario discussed in paragraph 91), the law would normally specify the tasks of the liquidator.

Subsection 5. Independence

Paragraph 97

53. To address comment 111, *the Working Group* agreed to add a reference to the need for sufficient financial resources in paragraph 91. It was decided not to change the last sentence of paragraph 97, since the reference to supervision and liquidation was only one example of possible multiple mandates of banking authorities.

54. With regard to comment 112, it was noted that paragraph 33 (Chapter 1) already contained a reference to "*relevant international technical and ethical standards and guidelines*". If needed, that text could be further expanded or similar general language could be added in paragraph 97.

Paragraphs 98 – 112

55. *The Working Group* agreed that the Drafting Committee would consider comments 113 to 122 and amend the text as appropriate without making major substantive changes.

Section E. The role of deposit insurers

56. With regard to comment 123, *the Working Group* agreed to add in paragraph 115 a cross-reference to paragraph 156. It was decided not to take up the other drafting suggestions given that the Working Group had previously decided to remain neutral on which authority to designate as liquidation authority and since the last sentence reflected the consensus that had been reached by the Working Group on private deposit insurers.

Recommendation 3

57. With regard to comment 131, regarding the addition of guidance on the allocation of responsibilities concerning protective measures in Chapter 6, Section G, *a participant* expressed caution about such possible guidance since the issue depended on the circumstances and jurisdiction-specific factors. It was therefore agreed to keep the text as it was.

Recommendation 6

58. With regard to comment 134, it was agreed to keep Recommendation 6 as it was, since it was considered preferable to leave it to jurisdictions to decide on the source of potential compensation following a successful legal challenge.

Recommendation 11

59. With regard to comment 135, it was agreed to consider referring to potential liability risks for board members in Chapter 3, Section C.

Recommendation 12

60. It was agreed to provide the Drafting Committee with a mandate to address comment 136, third bullet point (on a prospective liquidator) in Chapter 4, paragraph 171 or 172.

61. *One participant* suggested adapting Recommendation 12 to put more emphasis on the possibility of involving a prospective liquidator (e.g., replacing "can" by "should" in the first sentence, or deleting "for instance" and replacing "could" by "should" in the second sentence). This was left to the Drafting Committee.

Recommendation 13

62. With regard to comment 138, it was agreed to keep Recommendation 13 as it was, while adding text on possible preferred voting powers for banking authorities in Chapter 3, paragraph 155.

63. Following a suggestion by a Working Group observer, it was agreed to add in Recommendation 13(e) a reference to legal standing for the banking authority to request the court to issue an instruction to the liquidator.

Chapter 3: Procedural and Operational Aspects

Section B. Notification duty of the bank's management or Board of Directors in the period approaching liquidation

Paragraph 122

64. *A member of the Secretariat* referred to a comment from a Working Group observer on paragraph 122, suggesting deletion of the sentence starting with "*[t]o ensure appropriate coordination*", which contained an obligation for the banking supervisor to inform the resolution authority and the liquidation authority of a bank's approaching non-viability. *That observer* considered that the timing for the notification obligation was unclear, that the added value of such obligation was limited, and that it could create liability risks for the supervisor. He considered that

the obligation for the bank to notify several authorities referred to in the last sentence of paragraph 122 was sufficient, and he suggested replacing "could" with "should" in that sentence.

65. In the ensuing discussion, *some participants* were in favour of keeping the obligation for the supervisor to notify the other banking authorities. They recalled that the rationale for this requirement had been that non-systemic banks had an ongoing relationship with their supervisor while they might not be in direct contact with the resolution and liquidation authorities. It would therefore be sensible for a bank to notify its supervisor and for the latter to inform the other authorities. *Other participants* were in favour of amending the sentence and suggested referring generally to the need for cooperation between the supervisor and other banking authorities, rather than imposing a notification obligation on the supervisor. *Still other participants* supported the suggestion to delete the sentence. They agreed that the notification obligation should be on the bank and considered that other parts of the Guide already sufficiently encouraged cooperation between the various authorities. For instance, *one participant* pointed to references to cooperation in paragraphs 187 and 92, and suggested adding a reference to "*including the exchange of information*" in the latter paragraph. Reference was also made to Recommendation 38, which covered cooperation between authorities in the preparatory phase. *Another participant* mentioned that paragraph 181 was sufficient, which also clarified the timing for the supervisor's obligation ("*as early as possible*"). Ultimately, it was agreed to delete the relevant sentence in paragraph 122 and it was left to the Drafting Committee to verify whether the Guide was sufficiently clear on the need for cooperation between the banking supervisor and other banking authorities.

Paragraph 124

66. *The Working Group* agreed to delete the phrase "*in cases of bad faith or negligence*" in the third sentence of paragraph 124. Furthermore, the point was raised that it was unclear whether the last sentence referred to administrative consequences or also to civil and criminal liability. It was suggested to clearly distinguish between those two (possibly by splitting the paragraph in two parts and elaborating on both). Other suggestions made by participants were to delete the word "solely" in the last sentence or to keep the paragraph more generic. Ultimately, the Drafting Committee was asked to review and clarify the wording of paragraph 124.

Section C. Initiation of bank liquidation proceedings

67. *A member of the Secretariat* drew the attention of the Working Group to comment 149, which suggested clarifying in the Guide whether shareholders of a bank were entitled to initiate bank liquidation proceedings. *The Working Group* discussed that a majority of shareholders could normally file an application for the insolvency of a company following a meeting of the general assembly, while individual or minority shareholders would not be entitled to make such application. It was agreed that the reference to "*the bank itself*" in paragraph 127 was sufficient, since further details would be governed by jurisdictions' general company law. Similarly, it was deemed unnecessary to refer explicitly to a possible notification to the banking supervisor by one or more individual board members of a bank in paragraph 129.

Paragraph 127

68. With regard to comment 152, it was agreed to replace "*the supervisor's assessment*" by "*the relevant banking authority's assessment*".

Section D. The bank liquidator

Subsection 3. Remuneration

69. With regard to comment 165, *the Working Group* agreed not to provide guidance on the advantages and disadvantages of each remuneration model or identify a preferred method, since different approaches existed across jurisdictions and the matter was deemed to be sufficiently

covered in general business insolvency law. However, it was agreed to recognise in the text that a specific feature of banks was that the amount of assets tended to be large and that the overall remuneration should be adequate (i.e., expressing a word of caution that a remuneration system based on assets could lead to an excessively high remuneration).

70. *One participant* suggested to consider, and possibly refer to, existing guidance on remuneration for key officers of banks as appropriate. This was left to the Drafting Committee.

Subsection 5. Personal liability and legal protection

71. *The Working Group* decided not to take up the suggestion in comment 170 about court permission to sue a liquidator since it did not seem necessary and because there might also be other ways of preventing frivolous claims.

Section E. Creditor involvement during the liquidation process

Subsection 1. General aspects

72. It was agreed to consider comment 175 on the applicable law to *actio pauliana* cases in the context of Chapter 10.

Subsection 2. Involvement of the deposit insurer as a creditor

Paragraph 156

73. *The Working Group* decided not to take up the suggestion in comment 179 to add wording on the potential advantages of having a deposit insurer as liquidation authority or liquidator since the text was deemed balanced, and a neutral approach was taken in the Guide as to which authority to designate as liquidation authority.

74. With regard to a comment by a Working Group observer asking whether the intention had been to refer in paragraph 156 to the deposit insurer's right to appoint a representative to the liquidation committee rather than the creditors' committee, *the Working Group* agreed that the reference to the creditors' committee was correct. It was not a given that all creditors would be part of the creditors' committee, so it was deemed useful to specify that this should be the case for the deposit insurer. It was agreed to add a reference to the possible establishment of a liquidation committee (as was the practice, e.g., in the United Kingdom) elsewhere in the Guide.

Recommendation 20

75. *A member of the Secretariat* drew the attention of the Working Group to a suggestion from a Working Group observer to add the words "where available" in the third sentence of Recommendation 20 so that it would read *"[I]n addition, where available, the liquidator should have appropriate knowledge and technical expertise on the functioning of banks, as well as expertise in insolvency cases*".

76. In the ensuing discussion, *some participants* supported adding "where available" or "ideally", since they recognised the possible challenges in some jurisdictions to find adequate liquidators. On the other hand, it was noted that solutions could be found in cases where it was challenging to find a single liquidator with appropriate knowledge and expertise (e.g., involving foreign experts or appointing several liquidators with complementary expertise). It was also noted that it was in the nature of a Legislative Guide to recommend a preferred outcome. Ultimately, *the Working Group* decided to keep the text of Recommendation 20 as it was. It was only suggested to mention expertise in insolvency cases before referring to expertise on the functioning of banks, and to perhaps clarify in the main text what level of knowledge of banks was expected from liquidators.

Recommendation 28

77. It was decided not to take up the suggestions in comment 188 concerning Recommendation 28. It was noted that the recommendation was agnostic about whether a replaced liquidator should absorb costs incurred and it was preferred to leave this to the discretion of jurisdictions. Furthermore, it was evident that any possible prudential duties (e.g., reporting requirements) would need to be complied with by the bank, represented by the liquidator, which would remain in contact with the supervisor.

Recommendation 34

78. Comment 190, on whether special provisions would be required in respect of illiquid or long tail assets or liabilities, was understood to refer situations in which assets could not easily be sold in the financial markets or for which the outcome of judicial proceedings had to be awaited. *Several participants* noted that such situations might also arise in regular business insolvency proceedings. *The Working Group* discussed whether there would be bank-specific issues or concerns, but it was ultimately concluded that no special provisions for bank liquidation proceedings would be necessary.

79. *One participant* noted that, as a related matter, the Italian framework contained a provision indicating that pending litigation did not preclude the closure of the compulsory administrative liquidation proceeding of a bank. *Another participant* explained that a bank liquidation proceeding in the Netherlands had taken a long time but the issue had not been the length of the proceeding, but rather the consequences of the outcome on the no creditor worse off principle since all creditors had been fully repaid and had even received interest on their claims (a provision allowing the payment of interest had been specifically added in Dutch law governing bank liquidations).

Chapter 4: Preparation and Cooperation

Section B. Need for preparation

Paragraph 162

80. *A member of the Secretariat* asked whether a reference should be made to the possibility of providing details on the preparatory steps for bank liquidation proceedings in policy guidance, in line with the suggestion in comment 197. *The Working Group* concluded that this fell outside the scope of the Guide, which focused on legislative provisions for bank liquidation proceedings.

Section D. Cooperation between all actors in the period approaching liquidation

Subsection 3. Cooperation with the bank

81. With regard to comment 204, suggesting the possible addition of specific guidance on cooperation with the bank depending on whether it was a branch or the head office, *the Working Group* concluded that such situations would be relevant mostly in a cross-border context. Therefore, it would be considered by the Drafting Committee in the context of Chapter 10.

82. The discussion then turned to a comment raised by a Working Group observer on paragraph 186, suggesting deletion of the option to request the banking supervisor to gather relevant information from the bank in the run up to the opening of a bank liquidation proceeding. *That observer* explained that it was operationally challenging for a supervisor to be asked to collect information from a bank for non-supervisory purposes since that fell outside its mandate. He considered it sufficient if the liquidation authority had the power to collect information from the bank. If an alternative was deemed necessary, he proposed explicitly empowering the supervisor to act on the instruction of the liquidation authority (i.e., as an agent of the latter).

83. In the ensuing discussion, *the participants* expressed a preference for keeping the text as it was, i.e., referring both to a power for the liquidation authority to collect information directly from

the bank and the possibility of requesting the banking supervisor to gather the information. It was noted that collecting information through the supervisor was also an effective method and that it was appropriate for the supervisor to contact the bank in the preparatory phase since the bank still had a licence and was being supervised, while a direct request by the liquidator might be sensitive and create panic. The current text was deemed appropriate and adaptable to any institutional model. If needed, it was suggested that the Drafting Committee could consider deleting the second sentence of paragraph 186, and referring in the third sentence to a power for "*the banking authorities*" to request information from the bank while leaving the details on cooperation between different administrative authorities to national jurisdictions. However, *the Working Group* generally preferred to retain the existing text.

Recommendation 38

84. *The Working Group* agreed to keep the text of Recommendation 38 as it was. Streamlining the text, as had been suggested by a Working Group observer, would result in a rather generic recommendation, while it was considered useful to refer to proportionality and factors such as the nature and size of the bank.

85. With regard to comment 208, it was recalled that the Working Group had extensively discussed possible regular liquidation planning and the conclusion was to leave this to jurisdictions while focusing on contingency planning. Whether planning was carried out on an insolvent or solvent basis depended on the liquidation strategy that would be pursued. *The Working Group* therefore agreed to keep the text as it was.

Recommendation 39

86. A suggestion had been made by a Working Group observer to add in Recommendation 39 that the legal framework should "*at least not impede*" coordination between the bank, the banking authorities and other relevant authorities. *Some participants* recognised that there might be situations in which it was not necessary to "specify" in the legal framework that coordination had to take place since the mandate of the authorities might already allow such cooperation and it may also be challenging to be specific on this point in the law. As an alternative, it was suggested to indicate that "*[t]he legal framework should enable*" cooperation. *Most participants* preferred to keep the text of Recommendation 39 as it was, i.e., recommending that the legal framework "*should specify*" that coordination needs to take place. This was in line with the main text (paragraph 177) and clearly emphasised the need for cooperation.

87. *One participant* suggested adding in the Guide that, for banks that had issued securities that were traded on the financial markets, the bank's management should notify the competent body to effect a possible suspension of trading in such securities. This would complement Recommendation 39. It was left to the Drafting Committee to consider adding such additional notification obligation in the Guide.

Recommendation 40

88. Following a comment by a Working Group observer, it was agreed that the Drafting Committee would review the wording of Recommendation 40 and consider replacing the word "smoothly".

Chapter 5: Grounds for Opening Bank Liquidation Proceedings

General comments

89. Following a suggestion by a Working Group observer on paragraph 216, it was agreed to add an additional paragraph in the introduction of Chapter 5 in which it would be recognised that, in dual-track regimes, following a non-viability assessment, it was first for the resolution authority to decide whether to take resolution action in respect of the bank, while the potential liquidation of the bank

or a part thereof would follow such decision. This was covered in Section D, but it was considered preferable to mention it from the outset in the introduction. It was noted that it would not be accurate to say that the resolution authority was always the "lead authority" to decide on the market exit of the bank (as had been suggested in the comment) since it was also possible that a bank left the market following a revocation of its licence by the supervisor based on non-financial grounds.

90. With regard to comment 211, the Working Group considered that the reference to indicators of non-viability in footnote 106 were sufficient.

Section B. Types of grounds

Subsection 2. Difference between the financial grounds for bank liquidation and the traditional financial grounds in general business insolvency law

91. *The Working Group* decided not to take up the drafting suggestion in comment 219 about digital technologies since it would risk dating the document.

92. It was agreed to accept the suggestion by a Working Group observer to add the following sentence in paragraph 195: "*Moreover, banks may have access to a central bank's regular monetary policy refinancing operations where available*." Furthermore, when referring to the central bank's capacity as lender of last resort, it was suggested to add a reference to emergency liquidity assistance as an example.

93. It was agreed not to take up the suggestion in comment 221 to add a recommendation that, where appropriate, the banking authority should be required to consult the IPS. It was observed that such requirement would add procedural complexity and that IPS generally already had a comprehensive insight into their members banks, as was recognised in the comment. Therefore, it seemed that an IPS might only be less informed in a scenario of sudden and rapid deterioration of a bank's situation, in which case a consultation requirement seemed inappropriate.

3. "Negative" condition

94. With regard to comment 222, *the Working Group* agreed to add a footnote in paragraph 201 that would refer to possible preventative measures by the DIS or IPS as examples of alternative measures to deal with the bank's situation.

C. Interaction with licence revocation

Paragraph 206

95. Following discussion on a comment by a Working Group observer, it was agreed to keep the text of paragraph 206 as it was, since the rationale for the comment had been addressed by the envisaged new introductory paragraph about the interplay between resolution and liquidation in dual-track regimes (see above, paragraph 89).

Paragraph 209

96. It was agreed to delete "relevant" before "authorities" in the last sentence of paragraph 209, following a comment from a Working Group observer that the Guide should be neutral on which authority should decide whether to permit a bank to continue operations for a short period following licence revocation. It was agreed not to take up the other text suggestions from the Working Group observer on the same paragraph. *The Working Group* took note of comment 225, but it was not deemed necessary to make changes to the text.

Paragraph 210

97. *One participant* proposed clarifying in paragraph 210 that voluntary liquidation remained an option. However, *other participants* considered that such a reference was not needed, also because it already followed from paragraph 206 that it was not addressed in this section.

Paragraph 212

98. *The Working Group* agreed to accept the suggestions by a Working Group observer to add references to resolution proceedings in paragraph 212. It was agreed that reference should be made first to resolution proceedings and then to liquidation proceedings. It was agreed not to take up the suggestion by the same Working Group observer on paragraph 213 since the comment would be addressed by the envisaged new paragraph in Section A.

Paragraph 215

99. *The Working Group* agreed to (i) keep the first sentence as it was, but place a full stop after "*necessary outcomes of the former*"; (ii) update the rest of the paragraph in line with the suggestions made by a Working Group observer, without, however, referring to an exceptional permission "*for some parts of the banking business*" (instead, reference could be made, e.g., to "*specific activities*"). It was suggested that it may be confusing to refer to the "lapsing" of a licence since, even if it followed directly from the initiation of a bank liquidation proceeding that the licence would "lapse", this might still need to be confirmed in a formal act.

Section D. Interaction with triggers for resolution

100. With regard to comment 229, it was agreed to keep the text as it was. It was noted that, at least in the European Union, it was already mandatory to wind up an entity if it was no longer viable but resolution action was not deemed to be necessary in the public interest.

Key Considerations

101. *The Working Group* agreed to provide the Drafting Committee with a mandate to update the text of the Key Considerations considering the drafting suggestions of a Working Group observer and the outcome of the discussion on the main text of Chapter 5, ensuring consistency between the main text and the Key Considerations and Recommendations.

102. *One participant* suggested adding "*or revocation takes place during liquidation*" (or similar wording) after "*[W]here licence revocation is a ground for opening bank liquidation proceedings*" in the last Key Consideration. *Another participant* pointed out that the term "ground" as used in the Working Group observer's text suggestion for an additional Key Consideration might be problematic in jurisdictions with a court-based model with administrative involvement since the court would determine whether the grounds for opening liquidation proceedings were met. It was agreed that the Drafting Committee would consider these two points when updating the text.

Chapter 6: Liquidation Tools

General comments

103. The Working Group took note of the input from a Working Group observer on the liquidation of banks in Venezuela, but no changes to the text were deemed necessary. The same applied to comments 233 and 235. With regard to comment 234, *a member of the Drafting Committee* noted that the Guide already recognised (and did not impede) the possible combination of different tools (e.g., a transfer in combination with the piecemeal liquidation of a rump entity).

Section B. Traditional insolvency tools and the need for transfer-based tools

Paragraph 225

104. Regarding comment 236, it was noted that possible incentives concerning tax or general law were outside the scope of the Guide.

105. Following discussion on a comment from a Working Group observer, it was decided to delete the phrase "*to a third-party acquirer*" while keeping the rest of paragraph 225 as it was.

Paragraphs 226-228

106. With regard to comments 237 and 238, it was agreed that no changes to the text were necessary. Specifically, comment 237 expressed agreement with paragraph 226, and comment 238 suggested to clarify that it should be possible to transfer non-mature claims, but the Guide already left this option open since it did not differentiate between mature and non-mature claims.

Paragraph 229

107. *A member of the Drafting Committee* drew the attention of the Working Group to a comment from a Working Group observer on paragraph 229, suggesting deletion of the sentence that indicated that the failure of a small bank could reduce confidence in the wider banking system and lead to contagion. *Several participants* considered it important to keep the sentence since it recognised that, based on past experience, even the failure of small banks could have broader effects depending on the situation and that a transfer tool protected not only insured depositors but also other stakeholders. It was agreed to keep the sentence.

Section C. Transfer-based tools: nature and applicability

Subsection 1. Types of transfer-based tools

108. In response to several comments concerning share deals, *the Working Group* agreed to provide the Drafting Committee with a mandate to develop new text on the possible use of special purpose vehicles (SPVs) in bank liquidation proceedings. It was noted that the use of an SPV was a classic tool in general business insolvency proceedings. In a bank liquidation proceeding, such vehicle could be created as a subsidiary of the failing bank with the purpose of maintaining certain assets for a short period of time (preferably those whose management did not require a licence), followed by the sale of the SPV's shares to a third-party acquirer.

109. It was agreed that the text should clearly distinguish between (i) bridge banks, (ii) the transfer of a failing bank's shares, and (iii) short-term SPVs. It was discussed that the text on bridge banks should remain as it was, while the new text on the possible use of SPVs could be included at the beginning of Section C and would refer to such tool as a technical mechanism for executing a sale as a going concern in bank liquidation proceedings. Reference could also be made to the possibility of transferring the shares that the failing bank held in a subsidiary. With regard to the transfer of shares of the failing bank itself, *some participants* were in favour of reducing the level of cautiousness in the current language, while *other participants* considered that the text was sufficiently balanced, rightly indicating that such share deals were unlikely to be particularly useful in bank liquidation, while not fully precluding them.

Subsection 2. Tools in the procedural organisation of the bank failure management regime

110. In response to comment 241, it was agreed to delete the phrase "*the manner in which the available tools can be used*" in the second sentence of paragraph 236. No further changes to the text of paragraph 236 were deemed necessary.

Subsection 3. Discretion in the choice of tools

111. With regard to comment 244, it was agreed that the text would be updated to recognise that the liquidator might be involved in the selection of the tool, depending on the institutional model. In

an administrative system, the tool would be selected by the liquidation authority, while in a court-based model with administrative involvement, the liquidator might play a role in that selection (e.g., in the United Kingdom, the tool was selected by the liquidator in conjunction with the liquidation committee, which was composed of banking authorities).

Subsection 4. Legal and other prerequisites

112. With regard to comment 245, it was agreed to add "*unless otherwise stated in the act governing the transfer*" or "*subject to the agreement with the purchaser*" (or similar) in the last sentence of paragraph 240.

113. In response to comments 246 and 267, *a member of the Drafting Committee* noted that the relevance of possible anti-trust requirements had been recognised in a general manner in subsection 8 (execution aspects), but that a specific reference to antitrust law and other rules (e.g., concerning foreign direct investment) could be added there.

114. It was left to the Drafting Committee to consider providing that the acquirer would not incur criminal liability, as was suggested in comment 247.

115. With regard to comment 248, it was agreed not to refer to the "least-cost" rule in Recommendation 46 since it was covered appropriately in Chapter 7.

116. In response to a comment by a Working Group observer, it was agreed to keep the words "*the operational and transactional continuity of the banking business*" in Recommendation 48. It was noted that maintaining continuity was also in the interest of value maximisation and that referring only to "*uninterrupted access to deposits*" would be too limited from the viewpoint that continuity of the banking business was important not only for creditors, including depositors, but also for borrowers, for payment and settlement functions, and the local economy as a whole.

Section D. Sale as a going concern: process and safeguards

Subsection 1. General approach and preparatory steps

Paragraph 244

117. Following a comment by a Working Group observer, it was agreed to add "- *if applicable*" at the end of the paragraph. It was decided not to refer to constitutional rights or data protection rules, as had been suggested in comment 249.

Paragraph 248

118. It was left to the Drafting Committee to consider replacing "may" by "shall" in paragraph 248, in line with comment 251. Comment 252 concerning the wider regulatory regime was considered to be sufficiently addressed in Chapter 1.

Paragraph 249

119. It was agreed to change the wording of point (i) into "*[…] all, or substantially all, assets and liabilities of the failing bank*", in response to a comment from a Working Group observer. Furthermore, to address the related comment 254, it was suggested to add at the end of paragraph 249 (e.g., in footnote 123) that there might be certain assets that would necessarily be left behind in the residual entity, cross-referring to the paper mentioned in the comment.

Subsection 2. Perimeter of the transfer, licensing, and succession

120. With regard to comment 253, *the Working Group* agreed that insured deposits would be included in the perimeter as a minimum, but it was left to the Drafting Committee to consider where to make this point in Chapter 6.

Paragraph 250

121. *The Working Group* agreed to update the text in line with the drafting suggestions made by a Working Group observer, while (i) adding "*accompanied by regulatory waivers, as necessary*" (or similar) after "*the effects of the revocation decision for a short period*" in order to address comment 256; (ii) keeping the reference to "*facilitate a going concern transfer*"; and (iii) leaving out "*if there are no other possible legal solutions within the legal framework*".

Paragraph 251

122. It was agreed to keep the first sentence, rather than moving it to Chapter 7 as had been suggested by a Working Group observer. In the second sentence, following comment 255, it was agreed to replace "*it is preferable*" with "*it might be preferable*".

Subsection 4. Disclosure of information to potential acquirers and bidding process

123. In order to address comments 259 and 263, *a member of the Drafting Committee* suggested adding language on the possible special rules that might apply in the marketing process of a failing bank that is a member of an IPS. *Other participants* suggested not to be too specific, but agreed that it could be recognised that IPS might play a role in measures that would avoid the opening of bank liquidation proceedings, in this subsection and/or elsewhere in the Guide. It was left to the Drafting Committee to develop language on such possible role of IPS.

Subsections 5 to 7

124. The remaining comments on subsection 4, as well as the comments on subsections 5 and 6, concerned drafting suggestions and aspects that had previously been addressed by the Working Group, and were therefore not discussed. It was agreed to accept the text suggestion from a Working Group observer on subsection 7 (paragraph 267) of the Guide.

Subsection 8. Execution aspects

125. In order to address comments 267-268 and two comments from within the Working Group, it was agreed to add language on the possible need to streamline the relevant authorisation procedures in urgent cases.

126. With regard to comment 269, which suggested specifying in the text and in a recommendation that the transfer should take legal effect on the same date as the decision of the liquidation authority, *the Working Group* agreed not to be prescriptive on this point since there might be circumstances in which the transfer would take effect slightly later (e.g., due to the possible need for approval by shareholders of the acquiring entity).

127. With regard to a suggestion from a Working Group observer that paragraph 270 clarify that the legal framework should facilitate the transfer of assets and liabilities in bulk, it was agreed to provide the Drafting Committee with a mandate to develop additional guidance on how to implement a transfer of different categories of items, ensuring that the assets were transferred in bulk. For instance, it could be explained that a transfer of assets as a going concern might normally require, depending on a jurisdiction's legal framework, certain notifications, authorisations or registrations. Such requirements should not apply in a bank liquidation proceeding, where the relevant legal act governing the transfer should be a valid and sufficient title to enable the transfer of assets in bulk, and to register them in the relevant registry *ex post* if required – including in cross-border situations (e.g., if the items to be transferred included shares in a foreign company). Furthermore, the text could elaborate on the treatment of contracts, and recognise that certain items might necessarily remain in the residual estate. It was noted that paragraph 270 already indicated that some assets may be subject to registration and that changes of title may need specific formal acts, which the liquidator should be able to execute a transfer swiftly. It was suggested to add that the legal act governing the transfer should suffice as title for transfer purposes.

128. It was agreed not to elaborate on the treatment of non-accrued interest in zero coupon bonds as had been suggested in comment 270, since the issue was deemed too specific and because the relevant sentence in paragraph 272 merely provided an example of matters that jurisdictions may wish to consider.

Section E. Other transfer-based tools: bridge bank and asset management company

129. In introducing the comments to Section E, *a member of the Drafting Committee* recalled that the bridge bank and asset management tools had been extensively discussed by the Working Group, and that the current text reflected the consensus that had been reached, i.e., to caution against the use of such tools for failing non-systemic banks. It was recalled that a reference to the possible use of SPV would be added in Section C (see above, paragraphs 108-109).

130. *Some participants* considered that the Guide should be cautious about the use of short-term vehicles too, given the complexities in their establishment and functioning, and attendant risks. *Other participants* underlined the potential usefulness of bridge banks, noting that in some jurisdictions such entities were readily available even when small banks fail, and that acquirers might prefer buying the shares of a bridge bank rather than acquiring assets and liabilities directly from a failed bank because such acquisition was a complicated process. Ultimately, *the Working Group* agreed to keep the text of Section E as it was, while new text would be developed on the possible use of short-term vehicles – which were to be distinguished from "bridge banks" – in Section C (see paragraph 109 above).

Section F. Piecemeal liquidation

Paragraph 283

131. With regard to comment 285, it was noted that paragraph 283 indicated that the liquidator could rely on the failing bank's records unless there were "*doubts as to the reliability of said records*". This formulation was considered to be sufficiently comprehensive, although a reference to fraud could be added as an example.

132. *The Working Group* agreed not to follow the suggestion made by a Working Group observer to limit the reliance by the liquidator on a bank's records to bank deposits only. It was therefore agreed to keep the text in paragraph 283 and Recommendation 55 as it was.

Paragraph 284 and Recommendation 56

133. With regard to comments 287, 288, and 290, *a member of the Drafting Committee* noted that it already followed from Recommendation 56 that creditors who were similarly situated should be treated in the same manner. It was agreed that further details on the practicalities of advance payments to depositors could be added after consulting authorities that had experience in this area.

Section G. Protection of the liquidation estate: stay on enforcement, contract termination and transaction avoidance

134. With regard to comment 295, it was agreed to develop text on the consequences of the opening of bank liquidation proceedings, including on the bank's management (e.g., in paragraph 285 or a previous Chapter of the Guide). Paragraph 289 could then cross-refer to such text.

Section H. Limited stay on enforcement of certain financial contracts

135. Upon invitation by the Chair, *a member of the Drafting Committee* introduced the comments on Section H and explained that several of them concerned drafting. For instance, in addition to derivatives, the text could mention securities repurchase and securities lending obligations (as had been suggested in comments 300 and 301), and the text of paragraph 298 could be reviewed in

order to address comment 303, without changing the substance. No changes were deemed necessary to paragraphs 299 and 302 (comments 304 and 305).

136. With regard to comment 306, *the Working Group* did not agree with the penultimate paragraph since the aim was to align the treatment of financial contracts in bank failure management procedures if a transfer strategy was executed.

137. *The Working Group* agreed that the text and Recommendations should clearly indicate that the safeguards in the *FSB Key Attributes* should apply to the temporary stay on early termination rights and close-out netting. To this end, the Drafting Committee was asked to verify and update the text on safeguards as needed.

Chapter 7: Funding

138. Upon invitation by the Chair, *a member of the Drafting Committee* introduced the main comments that had been received on Chapter 7. He explained that several comments did not require discussion since they concerned mere drafting suggestions that could be considered by the Drafting Committee or aspects of policy that the Working Group had previously decided not to cover in the Guide (e.g., the treatment of temporary high deposit balances or the loss-absorbing capacity of non-systemic banks).

Section D. Design of DIF financing transactions

139. *The participants* discussed a comment from a Working Group observer suggesting that this section discuss how the deposit insurer would be integrated in the legal mechanism of the transfer if it was not the liquidation authority (e.g., whether the deposit insurer would be a party to the transfer contract if it provided funding that facilitated the transfer). *The Working Group* agreed to provide the Drafting Committee with a mandate to consider adding guidance on this point based on the input that had been collected through the technical survey.

Section E. Backstops and recovery mechanisms

Paragraphs 325-326

140. It was agreed to streamline paragraphs 325 and 326, while maintaining the core messages that public funding should not be available for the liquidation of non-systemic banks and that any use of public funding in case of systemic failures should be consistent with the *FSB Key Attributes*.

Chapter 8: Creditor Hierarchy

Section B. Establishing rules on creditor ranking

Paragraph 337

141. It was agreed to take up the drafting suggestion that had been made by a Working Group observer with regard to the second sentence of paragraph 337 on deviations from the *pari passu* treatment of creditors (i.e., adding "*in the liquidation of a non-systemic bank*").

Recommendation 70

142. *A member of the Drafting Committee* referred to a comment made by a Working Group observer on Recommendation 70, suggesting the reference to "*under commercial or other laws*" be reconsidered given that, for bank liquidation proceedings, a bank-specific creditor hierarchy might apply and that certain pre-insolvency rights might be constrained in the liquidation of a bank.

143. *The Secretary-General* explained that under business insolvency law, pre-insolvency entitlements – such as the creation of a security interest – should be recognised in insolvency but

the relevant international standards remained silent as to their ranking. For the liquidation of banks, the Guide could go further and recommend that pre-insolvency priorities should apply but that would need to be a conscious choice. *A member of the Secretariat* recalled that Recommendation 70 had been inspired by principle C12.1 of the *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes*. *A member of the Drafting Committee* added that the draft Recommendation had previously been discussed and considered appropriate for banks. *The Working Group* agreed with the approach in Recommendation 70. To address the comment on this Recommendation and avoid confusion between the applicability of commercial laws and bank liquidation rules, it was agreed to add the phrase "*subject to bank-specific rules*" (or similar).

Section C. Ranking of depositors

144. *The Working Group* agreed not to change the substance of the section on the ranking of depositors, since it had been subject to extensive discussion within the Working Group. However, the Drafting Committee was authorised to review and perhaps clarify the text in paragraphs 338 to 344.

145. With regard to comment 348 on paragraph 349 and Recommendation 74, which set out the principle of non-discrimination between creditors, the Drafting Committee was provided with a mandate to review the text as necessary following the discussion on Chapter 10 (e.g., adding a cross-reference to Chapter 10).

146. With regard to comment 349 on paragraph 352, it was agreed to clarify the text if needed following consultation with authorities that had experience with advance payments to creditors.

147. With regard to a comment from a Working Group observer on Recommendation 73, suggesting removal of the phrase "*if excluded from deposit insurance*", it was agreed to consult the International Association of Deposit Insurers, which had previously supported adding this phrase.

Section D. Subordinated claims

Subsection 1. Contractual subordination

148. With regard to comment 353, it was agreed that the recognition of "total" and "partial" subordination clauses was already sufficiently covered in the text.

Subsection 3. Equitable subordination

149. It was agreed to keep the text on equitable subordination as it was, since the Working Group had previously decided not to provide detailed guidance on this matter.

Subsection 4. Related party claims

150. *A member of the Drafting Committee* referred to several comments that had been made on the subordination of intra-group claims. He asked whether the text on the treatment of related party claims should be kept as it was (i.e., generally recommending the possibility of subordinating such claims) or whether an exemption should apply to certain related party claims, as had been suggested in some comments.

151. *The Secretary-General* indicated that the rationale under general business insolvency law for the subordination of related party claims was that support by related parties should normally take the form of equity or subordinated debt. However, approaches to the treatment of related party claims differed across jurisdictions, and only in certain jurisdictions were related party claims subject to statutory subordination. He asked whether there were specific reasons for encouraging the statutory subordination of related party claims in the banking context. In the ensuing discussion, it was recalled that prudential rules for banks concerning related party transactions were relatively strict, that statutory subordination could facilitate a transfer with lower litigation risk, and that not

all banks were able to issue subordinated bonds. *The Working Group* decided to retain the approach to related party claims as it was.

Subsection 5. Claims for post-liquidation interest

152. *The Working Group* took note of comment 361 and left it to the Drafting Committee to consider whether any changes to the text were needed.

Section E. Ranking of shareholders

Recommendation 79

153. Following a comment by a Working Group observer, it was agreed to (i) delete "*ordinary unsecured*" (i.e., maintaining only "creditors") in the first sentence, and (ii) delete the last sentence about leaving equity interests behind in the residual entity, since this was deemed evident.

Section G. Ranking of post-liquidation financing

Paragraph 382

154. To address comment 365, it was agreed to add a reference to the possible priority ranking of litigation funding in a footnote.

Recommendation 83

155. Following a comment by a Working Group observer, it was agreed to delete either the entire Recommendation or at least the reference to avoidance, since avoidance rules would not apply to post-liquidation financing. *One participant* suggested that the reference to "*setting aside of transactions*" could be kept since it could protect post-liquidation financing from subsequent legal challenges.

Section H. Secured creditors

156. It was agreed to replace the phrase "*something that may also happen*" in the second sentence of paragraph 386 by "*which often happens*", in line with the suggestion made by a Working Group observer. Other than that, it was agreed to keep the text on covered bonds as it was, while it was left to the Drafting Committee to consider adding a footnote on the different ways to segregate cover pool assets from the bank's estate.

Chapter 9: Group Dimension

General comments

157. No changes to the text were deemed necessary based on comments 367 and 368. It was agreed that the Drafting Committee would reflect on the recommendations in comment 369, although they seemed to be sufficiently addressed in Recommendation 93.

Section A. Introduction

158. *A member of the Drafting Committee* noted that he agreed in principle with the idea that measures taken in the context of a bank's failure should consider the impact on the entire group. However, he deemed it challenging and perhaps overly generic to add this in the text. *Another participant* noted that Chapter 10 contained wording on the relevance of the group as a whole, which could be considered in Chapter 9.

Section B. No group impediments to bank liquidation

Paragraphs 396-397

159. *The Working Group* agreed to distinguish between liquidity support provided by an entity of a banking group and liquidity assistance provided by an IPS, perhaps splitting paragraph 396 in two paragraphs. It was agreed to keep the text of paragraph 397 as it was.

Paragraphs 399-400 and Recommendations 87-88

160. To address comments from a Working Group observer that several issues in paragraphs 399-400 and Recommendations 87-88 were already addressed elsewhere in the Guide, it was agreed that the Drafting Committee would review the text and consider whether it could be streamlined with possible cross-references to other parts of the Guide.

161. It was agreed to take up the drafting suggestion for paragraph 400 in comment 375, on the understanding that it applied to intra-group service agreements only.

Section C. Coordinated actions between administrative authorities and courts

162. With regard to comments 378 and 379, it was agreed to keep the text in paragraphs 401-403 as it was since it was deemed sufficiently clear and it would be challenging to provide more detailed guidance. The proposal in comment 380 to provide a mediation panel for disputes among liquidators was appreciated but the Guide was not deemed the appropriate place to make such suggestion.

Recommendation 89

163. It was agreed to accept the drafting suggestions that had been made by a Working Group observer.

Recommendation 90

164. With regard to comment 381, it was discussed that Chapter 9 primarily covered domestic groups while cross-border groups were primarily covered in Chapter 10. Cross-references to Chapter 10 would be added in Chapter 9 as needed. It was agreed that the Drafting Committee would consider clarifying the wording of Recommendation 90 without changing the substance.

Recommendation 92

165. With regard to comment 382 and the possible benefits of pooling multiple entities in liquidation, *a participant* noted that substantive consolidation was a contentious issue, as had previously been discussed, but she suggested to take into account that the *UNCITRAL Legislative Guide on Insolvency Law* (Part Three) recognised that it may be an efficient tool in limited circumstances. At the same time, caution was expressed about possible wording on pooling in the context of bank liquidation since it might have specific implications for banks (e.g., on regulatory capital and the cost of capital). It was agreed that the Drafting Committee could consider adding a footnote with a cross-reference to the *UNCITRAL Legislative Guide*.

Chapter 10: Cross-Border Aspects

166. *A member of the Drafting Committee* noted that the participants in the consultation had recognised the need for a uniform approach to cross-border issues in bank liquidation proceedings and generally supported the content of Chapter 10. She highlighted several aspects for discussion.

167. First, it followed from some comments that the "modified universalism" approach as advocated in the Guide was not sufficiently clear. It was agreed that the Drafting Committee would clarify this point in paragraph 412.

168. Second, several comments suggested that a stronger legal instrument such as a model law might be useful for cross-border bank liquidation proceedings, since existing model laws in the area of business insolvency law were not tailored to banks. It was agreed to clarify in the text that the

references to existing model laws were not meant to suggest that those were suitable for banks; while inspiration could be drawn from them, the guidance in Chapter 10 went beyond those instruments and provided bank-specific guidance. On the possibility of a future model law in this area, it was agreed to acknowledge in a footnote in Chapter 10 or Chapter 1 that several commentators and academics had expressed the view that a model law on cross-border aspects in bank liquidation proceedings would be useful in the future.

169. Third, different views had been expressed on the liquidation of cross-border groups. A Working Group observer considered that this topic (Section E) should not be covered in the Guide, while other commentators had suggested expanding the guidance. For instance, it was suggested in comment 387 to distinguish between situations in which several group entities in different jurisdictions were subject to liquidation proceedings, on the one hand, and situations in which a single bank within a cross-border group was being liquidated, on the other. It was agreed that Section E would be kept and that the Drafting Committee would revise the text as needed, e.g., by clarifying that Section E was building on previous sections in Chapter 10, that there could be benefits in centralising the liquidation proceeding in the group home jurisdiction in case of liquidation of a cross-border group, and by adding guidance on the situation in which a single subsidiary was being liquidated.

170. Fourth, it was suggested in several comments to provide guidance on the applicable law in cross-border bank liquidation proceedings (e.g., comments 399 and 414). *A member of the Drafting Committee* noted that the issue of applicable law had been discussed in the Working Group in the past, and it was covered in a limited manner in paragraph 431 and Recommendation 101. She proposed that the Drafting Committee expand the guidance to some extent, e.g., referring to the possibility of following the host jurisdiction's law for the treatment of local creditors in order to avoid the opening of multiple proceedings. However, she suggested not to develop extensive guidance on applicable law in a separate section of Chapter 10. *The Working Group* agreed to follow a cautious approach on applicable law given that it was a sensitive topic in most jurisdictions.

171. It was agreed that the other comments on Chapter 10 would be addressed by the Drafting Committee as it deemed appropriate.

b) Other substantive issues

172. *A member of the UNIDROIT Secretariat* recalled that the Secretariat had conducted a survey on technical legal aspects that were relevant for the draft Legislative Guide. *The Working Group agreed to provide the Drafting Committee with a mandate to consider the survey responses and develop additional guidance on the technical issues covered therein as it deemed appropriate.*

Item 5: Discussion of next steps

173. *The Secretary-General* and *a member of the UNIDROIT Secretariat* explained that it was proposed to provide the Drafting Committee and the UNIDROIT Secretariat/FSI with a mandate to finalise the draft Legislative Guide in line with the outcome of the discussions during this session and considering the responses to the survey. It was recalled that the Drafting Committee would also consider the comments that had not been explicitly discussed during the session. The aim was to submit a redline version of the revised draft Legislative Guide to the Working Group for fatal flaw review in January 2025. In principle, no further Working Group meetings were envisaged, but an online session could be organised if deemed necessary based on the input during the fatal flaw review process. *The Working Group agreed with the proposed next steps.*

174. The Secretariat would continue with the preparation of the French version of the draft Legislative Guide in cooperation with the *Autorité de contrôle prudentiel et de résolution*, and an unofficial Chinese translation of the Guide would be prepared in due course in cooperation with the Chinese Deposit Insurance Cooperation.

175. The final draft Legislative Guide on Bank Liquidation would be submitted for adoption to the UNIDROIT Governing Council at its 104th session in May 2025.

Items 6 and 7: Any other business. Closing of the session

176. On behalf of the UNIDROIT Secretariat, *the Secretary-General* wholeheartedly thanked the FSI for the excellent cooperation throughout the project. He also thanked the members of the Drafting Committee for their extraordinary work, all members and observers of the Working Group for their valuable input over the last three years, and the Chair for her superb leadership. He expressed the hope that the Secretariat could continue to do work in the area of financial markets in the future.

177. In the absence of any other business, *the Chair* expressed her gratitude to the Working Group participants and the Secretariat, and closed the session.

ANNEXE I

LIST OF PARTICIPANTS

MEMBERS

Ms Stefania BARIATTI *Chair*	Professor University of Milan
Ms Anna GELPERN	Professor Georgetown Law
Mr Christos HADJIEMMANUIL	Professor University of Piraeus
Mr Matthias HAENTJENS *Excused*	Professor University of Leiden
Mr Marco LAMANDINI	Professor University of Bologna
Ms Rosa LASTRA	Professor Queen Mary University of London
Mr Matthias LEHMANN	Professor University of Vienna
Ms Irit MEVORACH	Professor University of Warwick
Ms Janis SARRA	Professor University of British Columbia
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	Mr Cristiano MARTINEZ Lawyer, Legal Service
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	Ms Katia DJEFFEL Legal Directorate
	Ms Camélia DRAGAN Senior Expert Bank Resolution
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	Ms Yasmin AL BABA Legal Officer
	Ms Anita SEKYI-YORKE Legal Officer
	Mr Bryan WONTUMI Legal Officer
BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT (BaFin)	Ms Anne SCHWALL Lawyer
	Ms Nicole STEPHAN Lawyer
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CENTRAL BANK OF BRAZIL	Ms Vivian GRASSI SAMPAIO Deputy-Head, Department of Resolution and Sanctioning Action
CENTRAL BANK OF PARAGUAY (BCP)	Ms Irene Cristina ESCRIBÁ SAKODA Head of the Legal Department
CHINA DEPOSIT INSURANCE CORPORATION	Ms Shaohua ZHANG Vice President

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	Mr Jian LIU Director, Department of Asset Management
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	Mr Ryuichi SHOGAN Deputy Governor
	Mr Hidemitsu OTSUKA Deputy Governor
DE NEDERLANDSCHE BANK (DNB)	Ms Yael DIAMANT Senior Legal Counsel, Legal Services
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	Ms Juana PULGAR EZQUERRA Professor Universidad Complutense Madrid Justinian
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EUROPEAN COMMISSION	*Excused*
EUROPEAN UNIVERSITY INSTITUTE	Mr Nicola COSTA Florence School of Banking and Finance
FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC) UNITED STATES OF AMERICA	*Excused*
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	Mr Tomoaki HAYASHI Deputy Division Chief, Recovery and Resolution Planning (RRP) Office
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	Mr Masakazu KUMAKURA Deputy Director, Banking Business Division I
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INTERNATIONAL ASSOCIATION OF DEPOSIT INSURERS (IADI)	*Excused*
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INTERNATIONAL MONETARY FUND (IMF)	*Excused*
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Ms Catherine BRIDGE ZOLLER	Senior Counsel, Legal Transition Team, EBRD
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Mr Rastko VRBASKI	Senior Advisor
Ms Ruth WALTERS	Senior Advisor

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Mr Ilya KOKORIN	Visiting Scholar, University of Leiden
Ms Diana RIVERA ANDRADE	Visiting Scholar, Founding partner - Rivera Andrade Law Firm
Ms Luiza BRAZ	Intern
Mr Piero MAZZOCCA	Intern
Mr Luigi PIGNA	Intern

ANNEXE II

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Update on developments and activities since the sixth Working Group session
4. Consideration of the Draft Legislative Guide on Bank Liquidation
   a) Comments received during the consultation process
   b) Other substantive issues
5. Discussion of next steps
6. Any other business
7. Closing of the session