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**UNIDROIT Working Group on Bank  
Insolvency**

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**SECRETARIAT'S REPORT ON THE BACKGROUND, STATUS OF THE PROJECT  
AND INTERSESSIONAL DEVELOPMENTS**

1. This report provides an update on the work carried out by the Working Group on Bank Insolvency and the three informal Subgroups that were created at the first session of the Working Group. The update is based on the outcome of the second session of the Working Group held on 11-13 April 2022, which discussed substantive issues based on Reports prepared by the three Subgroups (see the Summary Report of the Second session; Study 84 – W.G. 2 – Doc 3).
2. This report is accompanied by additional documents, which will be the main object of the deliberations at the third Working Group session:
  - **Report of Subgroup 1** for the third session of the Working Group, on: Scope and Definitions; Objectives; Institutional models; Procedural and Operational Aspects.
  - **Report of Subgroup 2** for the third session of the Working Group, on: Preparation; Grounds for opening liquidation proceedings; Tools and Powers; Funding.
  - **Report of Subgroup 3** for the third session of the Working Group, on: Creditor Hierarchy; Financial Contracts; Banking Groups; Cross-border Aspects and Safeguards.
3. Each of the above-mentioned Reports contains, for each subtopic, a description of issues, possible solutions, and questions to guide the discussion of the Working Group during the third session. In addition, the Working Group received the survey for the stock-taking exercise and, on a confidential basis, the responses to that survey received by the Secretariat.

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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 small and medium-sized banks to which, in some jurisdictions, the resolution framework would not apply. In addition, national insolvency laws still play a key role in the resolution of systemic banks, 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 98<sup>th</sup> 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 99<sup>th</sup> 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 of 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 99<sup>th</sup> 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 100<sup>th</sup> session (see [UNIDROIT 2020 – C.D. \(99\) B.21, para. 117](#)).

5. The Governing Council at its 100<sup>th</sup> 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 September session of the 100<sup>th</sup> UNIDROIT Governing Council ([C.D. \(100\) B.4](#)). On that occasion, the Governing 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***

4. 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.

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

- [Ms Stefania Bariatti, \(Chair\), Professor, University of Milan \(Italy\), UNIDROIT Governing Council member](#)
- [Ms Anna Gelpert, 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 Nottingham \(United Kingdom\)](#)
- [Ms Janis Sarra, Professor, University of British Columbia \(Canada\)](#)
- [Mr Reto Schiltknecht, Attorney-at-law \(Switzerland\)](#)

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

7. The project is undertaken in cooperation and with the support of the BIS Financial Stability Institute (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 different 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 are part of the Working Group as observers:

- [Australian Prudential Regulation Authority \(APRA\)](#)
- [Banca d'Italia](#)
- [Banco de España](#)

- Bank of Ghana
- Banque de France / Autorité de Contrôle Prudentiel et de Résolution (ACPR)
- Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Germany)
- Central Bank of Brazil
- Central Bank of Nigeria (CBN) and Nigerian Deposit Insurance Corporation (NDIC)
- Central Bank of Paraguay
- De Nederlandsche Bank (DNB)
- Deposit Insurance Corporation of Japan (DICJ)
- 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
- International Monetary Fund (IMF)
- National Bank of Belgium
- 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

8. UNIDROIT may involve industry associations and other private sector stakeholders in the work of the Working Group at a later stage, to ensure that the guidance document will address those stakeholders’ needs. The latter may also assist in promoting the implementation and use of the instrument.

### ***Methodology and Timetable***

9. 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.

10. The Working Group meets at least twice a year (for two-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 – as the Single Resolution Board (Brussels, Belgium) kindly did for this third Working Group session. Remote participation is possible, although experts are expected to attend in person if circumstances permit.

11. The Bank Insolvency Project is a high priority project on the UNIDROIT Work Programme for the period 2020-2022. However, given that the project started in the second half of 2021, it is not feasible to complete the entire project during the current Work Programme. The following is a tentative calendar.

- (a) Development of the future instrument over five in-person or, depending on the circumstances, hybrid sessions of the Working Group in 2021-2023:
  - (i) First session: 13-14 December 2021
  - (ii) Second session: 11-13 April 2022
  - (iii) Third session: 17-19 October 2022
  - (iv) Fourth session: March 2023
  - (v) Fifth session: September 2023
- (b) Consultations and finalisation: Second half of 2023.
- (c) Adoption by the Governing Council of the complete draft in 2024.

### **C. Working Group sessions and Intersessional work**

#### ***First Working Group session (December 2021)***

12. 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 84 – W.G. 1 – Doc. 2](#)) prepared by the Secretariat in collaboration with the FSI.

13. 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. 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 business to another entity as a going-concern.

14. 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.

15. 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.

16. For more information, reference is made to the Summary Report of the Working Group's first session (Study 84 – W.G. 1 – Doc. 3).

### ***Intersessional work (January – March 2022)***

17. At its first session, the Working Group decided to establish three thematic Subgroups to advance the work on the project during the intersessional period. 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.

8. 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 Vrbaski (FSI).
- Subgroup 3 on: Creditor hierarchy; Financial contracts; Banking Groups; Cross-border aspects; Safeguards. Co-Chairs: Ms Anna Gelpert (Georgetown Law) and Ms Irit Mevorach (University of Nottingham).

9. 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)

10. 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)***

18. 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 84 – W.G. 2 – Doc. 2](#)).

19. 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 license ('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 (maximisation of the value of the insolvency estate and depositor protection, while financial stability would also play a role), possible institutional set-ups, and procedural aspects (e.g., legal standing and liability).

20. 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 failing 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 license.

21. 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.

22. 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.

23. For more information, reference is made to the Summary Report of the Working Group's second session (Study 84 – W.G. 2 – Doc. 3).

### ***Intersessional work (May – September 2022)***

24. 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.



25. 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. 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.

26. 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.

27. 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 teams<sup>1</sup> 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 is the Report of Subgroup 3 as circulated to the Working Group for its third session.

28. 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)

29. The Reports of the three Subgroups are 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***

30. At its second session, the Working Group agreed to conduct a stock-taking exercise within the Working Group 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

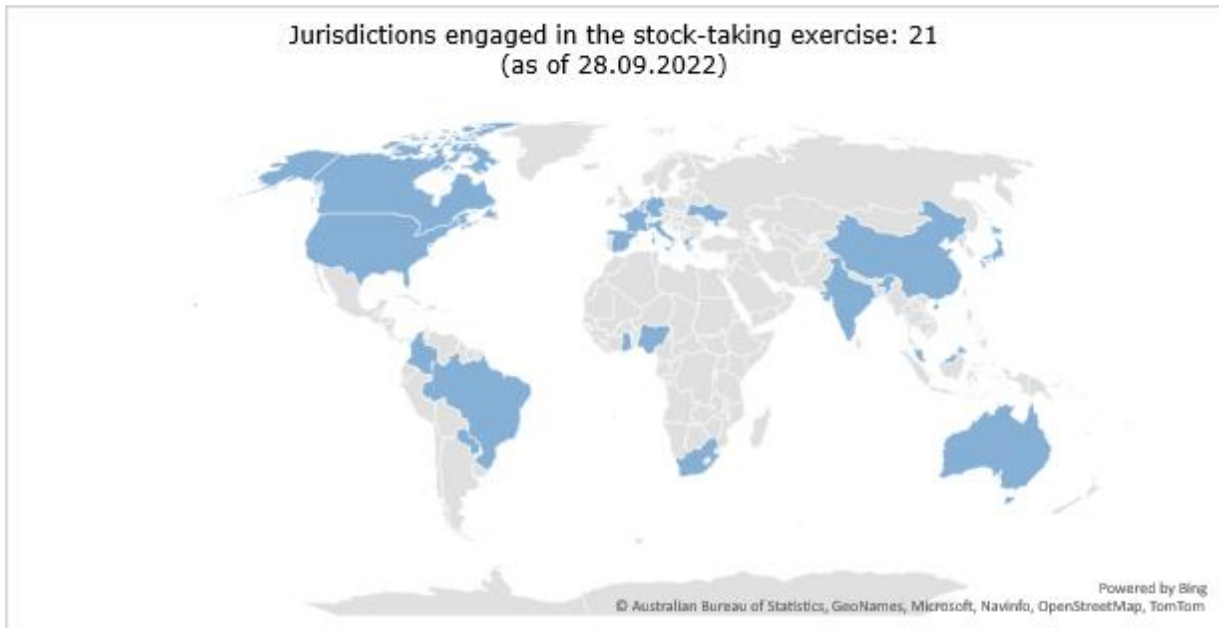
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<sup>1</sup> The Subgroup 3 drafting teams on cross-border aspects and safeguards were merged, in line with the preference expressed by the Working Group at its third session to consider safeguards in their specific context.

subtopics, and their potential strengths and weaknesses, which could be considered and reflected in the final instrument.

31. To this end, the Secretariat in cooperation with the 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 small and medium-sized bank failures and how they were dealt with under the applicable regime.

32. The Secretariat received confirmation from experts in 21 jurisdictions<sup>2</sup> that they were willing to participate in the stock-taking exercise.



33. Survey respondents were asked to submit their contributions to the Secretariat by 5 September 2022. By 28 September 2022, responses from 13 jurisdictions had been received (Belgium, Brazil, China, Colombia, France, Greece, Ghana, Italy, Japan, the Netherlands,<sup>3</sup> Nigeria, South Africa, Spain).<sup>4</sup> Individual survey responses would not be made public; they would only be shared within the Working Group, on a confidential basis.

Questions and suggestions for the Working Group:

- *Should information and data on relevant aspects of, and experiences with, bank liquidation regimes be sought from any additional jurisdictions?*
- *It is suggested to:*
  - (i) ask the three Subgroups to analyse the survey responses pertaining to their respective subtopics during the next intersessional period; and*
  - (ii) reflect the analysis of survey responses in the relevant sections of each chapter of the final instrument. For instance, input on the ranking of deposits and the deposit insurance scheme (DIS) across jurisdictions would be included in the Chapter 'Creditor hierarchy',*

<sup>2</sup> Australia, Belgium, Brazil, Canada, China, Colombia, France, Germany, Ghana, Greece, India, Italy, Japan, Malaysia, the Netherlands, Nigeria, Paraguay, South Africa, Spain, Ukraine, the United States. For some of these jurisdictions, the work on the survey commenced after the deadline.

<sup>3</sup> The Netherlands participated in the stock-taking exercise only with regard to the Subgroup 2 topics.

<sup>4</sup> The Secretariat wishes to thank Jeremy Cummings and Stefanie Constance (Auxlaw, Australia) for their assistance in compiling the survey responses and grouping them in an organised manner.

section 'Bank deposits' (see also below under 'Format'). To this end, placeholders have been included in the Reports of the three Subgroups.

*Does the Working Group agree with the suggested approach?*

- *How should the final instrument reflect the input from the stock-taking exercise: Could/should the names of jurisdictions be mentioned or should references be anonymous (e.g., 'some jurisdictions', 'many legal systems', 'a number of countries' etc.)?*

### **Next sessions of the Working Group and intersessional work**

34. The Secretariat suggests that two Working Group sessions be held in 2023, one in spring and the other one in the second half of the year. An early decision on the dates is strongly encouraged. The next two Working Group sessions will be, by preference, held in person at the seat of UNIDROIT or the FSI.

35. The continuation of the very fruitful intersessional work is highly encouraged. For the next intersessional period, the Secretariat suggests (i) retaining the three Subgroups, primarily for the analysis of survey responses; (ii) considering the establishment of a Drafting Committee to prepare a first draft of the instrument based on the discussions and input collected so far; and (iii) organising virtual intersessional meetings on specific issues, if needed.

#### Questions and suggestions for the Working Group:

- *It is suggested to discuss the date for the next Working Group meeting (tentatively scheduled for March 2023).*
- *Does the Working Group agree with the proposed approach for the next intersessional period?*

## **D. General matters concerning the instrument**

### **Relationship with existing international instruments**

36. 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.

37. 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.

38. 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.

39. 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.

40. The *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Key Attributes, adopted originally in 2011) of the Financial Stability Board (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 2011 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).

41. The *Core Principles for Effective Deposit Insurance Systems* (Core Principles, revised 2014) of the International Association of Deposit Insurers (IADI) are intended as a framework supporting effective deposit insurance practices by jurisdictions across the world. Jurisdictions can use the *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.

42. UNCITRAL has developed a number of international instruments in the area of corporate insolvency law. The *UNCITRAL Model law on Cross-Border Insolvency* (MLCBI, 1997) is designed to assist States to address cross-border corporate 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 four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

43. 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* (2011, updated in 2013), 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.

44. The *UNCITRAL Legislative Guide on Insolvency Law* (2004, last addition 2021) provides a comprehensive statement of the key objectives and principles that should be reflected in a State's corporate insolvency law. It is intended to inform and assist insolvency law reform around the world. The *Legislative Guide* is divided into five parts. Part three addresses the treatment of enterprise groups in insolvency, both nationally and internationally. Part five was added most recently (2021), and 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 topic of applicable law in insolvency proceedings.

45. 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.

46. 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.

47. 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 (MSMEs). 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**

48. As consistent with all UNIDROIT instruments, the prospective instrument should be relevant for countries irrespective of their legal tradition and would aim to help countries make their bank liquidation frameworks more effective, allowing practitioners, judges, legislators, regulators, bank supervisors, resolution authorities and market participants to better deal with failures of (especially small and medium-sized) banks.

49. The primary addressees could be legislators seeking to reform or refine their bank liquidation regime. The instrument would, however, also be addressed to policy makers in general, including entities and organisations with the authority to develop secondary legislation or regulations, other organisations actively supporting legal reform in specific regions of the world, and stakeholders that may be influential in the development of law reform.

### Question for the Working Group:

- *Does the Working Group agree that the primary addressees of the instrument would be legislators seeking to reform or refine their bank liquidation regime?*

### **Format**

50. 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 the Secretariat and the FSI in June 2021, the Secretariat proposed to the Governing Council at its 100<sup>th</sup> session (September 2021) that the instrument could take the form of a Legal or Legislative Guide, or similar (e.g., Principles or Best Practices).<sup>5</sup> 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

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<sup>5</sup> 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.

[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.

51. The Working Group did not decide the format of the future instrument during its previous sessions. During the last intersessional period, the need was raised to agree on a tentative standard format of presentation for ongoing work on the instrument.

52. For examples of different formats of soft law instruments, reference is made to existing UNIDROIT instruments such as the [UNIDROIT Principles on the Operation of Close-Out Netting Provisions](#), the [UNIDROIT Legislative Guide on Intermediated Securities](#) and the [UNIDROIT Principles of International Commercial Contracts](#).

Question for the Working Group:

- *The Working Group is invited to reflect on the type and format of the future instrument to facilitate the work going forward.*

*For instance, the future instrument could take the form of a Legislative Guide that would contain, for each subtopic:*

*(i) an introduction and explanations regarding the main issues;*

*(ii) a comparative analysis of approaches in different jurisdictions (based on input from the stock-taking exercise);*

*(iii) an analysis of different options; and*

*(iv) a box with 'key considerations', 'principles' or 'recommendations', where possible. It is proposed that the type and level of detail be differentiated in relation to the various issues that will be addressed by the instrument. For instance, as previously discussed by the Working Group, concrete recommendations (indicating, e.g., that 'the Law should [...]') could be formulated in the section on cross-border aspects, but this may not be feasible or desirable for all subtopics.*

*In addition, the future instrument could contain a Glossary at the beginning of the instrument. Relevant case studies or illustrations of actual bank failures could be included at the end of the instrument or in the Chapters as appropriate.*

*To guide the discussion on the format of the prospective instrument, it is suggested to consider the format and structure of the Report of Subgroup 3 as an example.*

**Title**

53. Depending on the outcome of the discussion on the format of the future instrument, the title of the instrument could, e.g., be the 'UNIDROIT Legislative Guide on Bank Liquidation', the 'UNIDROIT Principles on Effective Bank Liquidation Regimes' or similar. The Governing Council's endorsement would be sought for this title and any revisions thereof.

Question for the Working Group:

- *The Working Group is invited to reflect on a working title for the future instrument.*

**Terminology and translations**

54. One of the challenges of uniform law is how to ensure that the planned instrument adopt a terminology which is sufficiently technical and precise, but also as neutral as possible in respect to 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.

55. More specifically, while the 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 final approval of the instrument.

56. It is envisaged that the instrument will contain a Glossary of shared terms and definitions, which will be gradually developed as the project progresses. The Working Group agreed that there should be consistency, as far as possible and reasonable, with the terminology used in other UNIDROIT instruments (for example, the [UNIDROIT Principles on the Operation of Close-Out Netting Provisions](#)) and with the terminology 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.

### **Structure of the instrument**

57. The below draft structure for the instrument was prepared for consideration by the Working Group based on the discussions so far and the work conducted by the Subgroups in the last intersessional period. The text included under the Chapter titles in form of bullet points is not proposed as headings, but merely as a prompt for the contents.

#### Question for the Working Group:

- *The Working Group is invited to consider the draft structure for the future instrument and propose any additional content that should be included as well as any rearrangement of chapters as appropriate.*

<b>Heading</b>	<b>Contents</b>
<b>Chapter 1. Preliminary Remarks</b>	<ul style="list-style-type: none"> <li>• Background and aim of the instrument</li> <li>• Existence of different legal frameworks (single v dual track regimes)</li> </ul>
<b>Chapter 2. Glossary</b>	<ul style="list-style-type: none"> <li>• Definitions of bank; bank liquidation proceedings; bank failure management; etc.</li> </ul>
<b>Chapter 3. Scope</b>	<ul style="list-style-type: none"> <li>• Relationship with existing international instruments and bank resolution (FSB <i>Key Attributes</i>)</li> <li>• Entities covered by the instrument</li> </ul>
<b>Chapter 4. Objectives</b>	<ul style="list-style-type: none"> <li>• Key objectives</li> <li>• Relevant considerations/guiding principles</li> <li>• Potential frictions</li> </ul>
<b>Chapter 5. Institutional model</b>	<ul style="list-style-type: none"> <li>• Relationship with jurisdiction-specific features</li> <li>• A predominantly administrative model (strengths and weaknesses)</li> <li>• A predominantly court-based model (strengths and weaknesses)</li> </ul>

	<ul style="list-style-type: none"> <li>• Hybrid models</li> <li>• Arrangements to facilitate smooth cooperation between courts and administrative authorities</li> <li>• Phases of the liquidation process and desired outcomes or priorities for each phase</li> <li>• Involvement of particular administrative authorities</li> <li>• Judicial review in administrative models</li> <li>• Rights of appeal in court-based models</li> </ul>
<b>Chapter 6. Procedural and operational aspects</b>	<ul style="list-style-type: none"> <li>• Legal standing to file for insolvency</li> <li>• The person in charge of the liquidation procedure (selection and appointment, supervision, remuneration, accountability, transparency, legal protection)</li> <li>• Creditor involvement and procedural safeguards</li> <li>• Role of the bank's management in the liquidation proceedings</li> </ul>
<b>Chapter 7. Preparation</b>	<ul style="list-style-type: none"> <li>• Introduction and proportionality</li> <li>• Advance planning</li> <li>• Cooperation and information exchange with the banking supervisor</li> <li>• Interaction between pre-liquidation measures and liquidation</li> <li>• Cooperation with the bank</li> <li>• Cooperation with the deposit insurer</li> </ul>
<b>Chapter 8. Grounds for opening liquidation proceedings</b>	<ul style="list-style-type: none"> <li>• General considerations (e.g., concerning the relation with grounds for corporate insolvency and alignment with resolution triggers)</li> <li>• Financial grounds</li> <li>• Non-financial (regulatory) grounds</li> <li>• License revocation</li> <li>• Liquidation as part of a resolution process</li> </ul>
<b>Chapter 9. Tools</b>	<ul style="list-style-type: none"> <li>• Introduction</li> <li>• General principles (proportionality; no hierarchy of tools; relationship with existing practices)</li> <li>• General moratoria</li> <li>• Atomistic liquidation</li> <li>• Transfer to a private acquirer</li> </ul>



	<ul style="list-style-type: none"> <li>○ Preparation and timing (valuation, marketing, contractual information, confidentiality)</li> <li>○ Legal prerequisites</li> <li>○ Procedure</li> <li>○ Specific considerations (assets and liabilities, shares)</li> <li>○ Factors that affect the effective application of the transfer tool</li> <li>○ Safeguards</li> <li>• Other tools <ul style="list-style-type: none"> <li>○ Bridge bank</li> <li>○ Asset management company</li> </ul> </li> <li>• Clawback</li> </ul>
<b>Chapter 10. Funding</b>	<ul style="list-style-type: none"> <li>• Need for external funding</li> <li>• Sources of private or market-based funding</li> <li>• Purposes of funding (pay-out, transfer)</li> <li>• Constraints on the use of deposit insurance funds</li> <li>• Burden-sharing</li> <li>• Public funding</li> </ul>
<b>Chapter 11. Creditor hierarchy</b>	<ul style="list-style-type: none"> <li>• Introduction and general principles on ranking</li> <li>• Bank deposits</li> <li>• Secured creditors</li> <li>• Subordinated claims (contractual subordination; statutory subordination; equitable subordination and intra-group subordination)</li> </ul>
<b>Chapter 12. Financial contracts</b>	<ul style="list-style-type: none"> <li>• General principles on close-out netting</li> <li>• Financial collateral</li> <li>• Repos and securities lending</li> <li>• Margin loans</li> </ul>
<b>Chapter 13. Group dimension</b>	<ul style="list-style-type: none"> <li>• General principles and planning</li> <li>• Procedural coordination</li> <li>• Upstreaming and down-streaming of losses and funds</li> <li>• Cooperative groups and other structures (e.g., institutional protection schemes)</li> <li>• Exceptions in a group context</li> <li>• (Group-level restructuring agreements)</li> </ul>

<b>Chapter 14. Cross-border aspects</b>	<ul style="list-style-type: none"><li>• Cooperation and allocation of competences between home and host authorities</li><li>• Recognition of foreign proceedings and actions; recognition and giving effect to specific measures; parallel proceedings</li><li>• Safeguards or grounds for refusing recognition/support/cooperation, non-discriminatory treatment of creditors</li></ul>
<b>Chapter 15. Case studies</b>	<ul style="list-style-type: none"><li>• Examples of actual failures of small and medium-sized banks and how they were dealt with</li></ul>

**ANNEX I****ADDITIONAL RESOURCES**UNIDROIT Instruments

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[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346\\_mloegi.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11346_mloegi.pdf).

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Other International Documents

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[https://www.bis.org/basel\\_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215](https://www.bis.org/basel_framework/chapter/BCP/01.htm?inforce=20191215&published=20191215)

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[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>

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