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SUMMARY REPORT

OF THE FOURTH SESSION

(29 - 31 March 2023)

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1. The fourth session of the Working Group on Bank Insolvency (the Working Group) took place on 29, 30 and 31 March 2023 and was hosted by the Financial Stability Institute (FSI) in Basel. Online participation was possible for those who were unable to attend the session in person.

2. The session was attended by 10 members and 37 observers, including representatives from transnational organisations, central banks, deposit insurance agencies and resolution authorities, as well as staff of the FSI and the UNIDROIT Secretariat (the list of participants is available in Annex I).

Item 1: Opening of the session and welcome

3. *The Chair* opened the session and welcomed all participants to the meeting. She invited the Chair of the FSI to take the floor.

4. *The Chair of the FSI* welcomed the participants and noted that recent events in the banking sector had further emphasised the need to identify good practices for bank failure management, including for the design of effective bank liquidation frameworks. He noted the importance and timeliness of UNIDROIT's Bank Insolvency Project, which counted on the strong support of the FSI. He considered that the project had reached an important milestone with the preparation of a first preliminary draft of the future instrument. After touching upon various subtopics covered in the Guide (objectives, institutional models, tools, funding), he wished the Working Group a productive meeting and looked forward to the further development of the Guide.

5. *The Chair* and *the Secretary-General* sincerely thanked the FSI for the kind invitation to hold this session at its premises in Basel.

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

6. *The Chair* introduced the annotated draft agenda and the organisation of the session. *The Working Group adopted the draft agenda (UNIDROIT 2023 – Study 84 – W.G. 4 – Doc. 1, available in Annex II) and agreed with the proposed organisation of the session.*

Item 3: Adoption of the Summary Report of the third session

7. *The Chair* noted that the Secretariat had shared the Summary Report of the third session with all participants. *The Working Group confirmed the adoption of the Summary Report (UNIDROIT 2022 – Study LXXXIV – W.G. 3 – Doc. 6).*

Item 4: Update on intersessional work and developments since the third Working Group session

8. Upon invitation by the Chair, *a member of the UNIDROIT Secretariat* welcomed several new observers to the Working Group: the Bank of England, Central Bank of Argentina, National Bank of Moldova, and the Spanish Deposit Guarantee Fund.

9. She recalled that the Working Group had decided during its third session that the future instrument should take the form of a Legislative Guide. Furthermore, the Secretariat had been authorised to establish a Drafting Committee. During the third intersessional period: (i) the three Subgroups had analysed the responses to the survey on bank liquidation laws, which had resulted in a Report with the Analysis of Survey Responses (Study LXXXIV – W.G. 4 - Doc. 4 confidential); and (ii) the newly established Drafting Committee had prepared a first preliminary draft of the Legislative Guide (Study LXXXIV – W.G. 4 - Doc. 3 confidential, also "Master Copy"). She explained that the Drafting Committee – consisting of ten experts and representatives of the IMF and the World Bank as reviewers – had developed the Chapters of the Master Copy in January-February 2023 and had integrated the results of the survey in the draft Chapters as appropriate. Subsequently, the Chapters had been subject to review within the Drafting Committee.

10. In line with the Secretariat's Report (Study LXXXIV – W.G. 4 - Doc. 2), the Working Group was invited to focus in its discussions specifically on aspects of legislative design and to consider for which aspects guidance was needed and where instead references to existing standards would be sufficient.

Item 5: Consideration of work in progress

11. *The Chair* drew the attention of the Working Group to the next item on the agenda and invited the members of the Drafting Committee to introduce the draft Chapters of the Master Copy.

a) Master Copy

1. <u>Chapter 1: Introduction</u>

12. *Drafting Committee members* introduced Chapter 1. Among other things, they invited participants' views on the following aspects: (i) the definitions in the Glossary, in particular those of 'home jurisdiction', 'group home jurisdiction', 'host jurisdiction', and 'bank', (ii) whether the discussion on 'single-track' and 'dual-track' regimes should be retained, (iii) the guidance on the scope of bank liquidation frameworks, which was based on the concept of a 'bank' and the regulatory perimeter of licensed banks, while leaving flexibility for jurisdictions to tailor the scope of their framework to their financial sector, (iv) the objectives of bank liquidation, and the explanations about different ways in which these could be incorporated in a bank liquidation framework.

13. *The drafters* explained that there were no recommendations in Chapter 1, because it was more in the nature of discursive scene-setting. Participants were asked if they agreed with this approach.

(a) Preconditions for effective bank liquidation frameworks

14. A suggestion was made to include a set of preconditions for effective bank liquidation frameworks in a preamble or introduction to the Guide. These would cover effective supervision, deposit insurance schemes and resolution frameworks.

15. *The Drafting Committee was asked to develop a discussion of preconditions for an effective bank liquidation framework, to be incorporated in Chapter 1.*

(b) Definitions

16. In the definition of 'bank' – which referred to both accepting deposits or repayable funds from the public and the granting of loans – it was suggested to explicitly refer to the licensed status of an institution. Furthermore, some discussion took place on the existence of deposit-taking institutions that did not grant loans. For instance, e-money issuers may be covered by the deposit insurance scheme (DIS) in some countries in respect of the funds received, but may not be allowed to grant loans. It was agreed that the question of whether the instrument should apply to institutions that take deposits but do not lend should be discussed further at the next meeting.

17. Regarding the definition of 'host' jurisdictions, it was noted that the concept had a wide scope in general insolvency instruments, reflecting the needs of cross-border recognition, and a narrower scope in a supervisory context, where it was based on the existence of regulated and supervised activities in a jurisdiction. It was suggested to add a new definition 'affected jurisdiction' for purposes of cross-border recognition, to capture jurisdictions where there may not be physical operations, but where there are creditors or which is relevant for reasons of governing law.

18. It was suggested to keep distinct definitions for 'home jurisdiction' and 'group home jurisdiction', and to consider adding definitions of 'subordination' and 'statutory subordination'.

19. It was agreed to further review the definitions once the instrument was further developed.

20. *It was agreed to (i) further analyse the definition of 'bank', (ii) develop a new definition of 'affected jurisdiction', (iii) keep distinct definitions for 'home jurisdiction' and 'group home jurisdiction', (iv) consider developing new definitions of 'subordination' and 'statutory subordination', (v) retain the discussion on the distinction between 'single-track' and 'dual-track' regimes.*

(c) Scope and objectives

21. Support was expressed for the discussion of advantages of a 'regulatory approach' to defining the scope of bank liquidation frameworks as entities within the scope of prudential supervision of banks in a given jurisdiction.

22. It was suggested to add 'tools' and 'funding' as elements in Box 1 about bank-specific modifications to corporate insolvency regimes.

23. Support was expressed for the non-prescriptive discussion of objectives and the ways in which they could be integrated in a bank liquidation framework.

24. *The Secretary-General* invited views on whether recommendations might be desirable for objectives or other contents of Chapter 1.

25. With regard to financial stability, different views were expressed and some favoured the use of a different terminology. However, the Working Group generally appreciated the way this objective had been described in Chapter 1.

26. *Several participants* expressed doubts about giving financial stability a special status as a liquidation objective. It was observed that it could make the distinction with resolution more complex and it could lead to a lack of clarity about sources of funding or constraints on the use of deposit insurance funds. Moreover, in a dual-track regime, a second financial stability check after the choice had been made for liquidation would be an unnecessary duplication.

27. *Other participants* underlined the important role of financial stability also in bank liquidation proceedings. Even if financial stability was not a statutory purpose of liquidation, it was argued that it was a necessary consideration that should be taken into account by the competent liquidation authority in the design of the liquidation strategy and choice of tools.

28. *Several participants* strongly supported retaining financial stability as an objective, bringing forward several arguments. First, even if financial stability informed the choice of the procedure in certain jurisdictions, this would not mean that it could be disregarded where the chosen procedure was liquidation. Second, liquidation should not be considered in isolation from resolution, because it was relevant for the winding up of a residual entity following a partial transfer in resolution. Third, depositor confidence and financial stability were interrelated and it would not be consistent to identify only one of them as an objective. Fourth, classifying financial stability as a consideration (rather than an objective) may not be consistent with the recommendation that administrative authorities should be involved in the process. Finally, a motivating purpose of the Legislative Guide was that bank liquidation was different from corporate insolvency, given the special role of banks and the possible broader repercussions in case of their failure.

29. *The Working Group generally agreed with the description of objectives in draft Chapter 1. The Drafting Committee was invited to consider whether to add guidance on how to balance possible frictions between financial stability and other objectives.*

2. Chapters 2 and 3: Institutional Arrangements and Procedural and Operational Aspects

30. *Members of the Drafting Committee* introduced Chapters 2 and 3, which were discussed together. Chapter 2 first discussed an administrative institutional framework, within which variation was possible (e.g., an administrative authority may appoint a receiver or there may be a limited role

for courts). In a court-based model, the liquidation process happens under the auspices of a court but this was also not a 'pure' model. An administrative authority could have a key role as the gatekeeper to the initiation of the court-based process or could be appointed as receiver or otherwise be involved in decision-making in the liquidation process. The theoretical models may in practice thus take hybrid forms, as was corroborated by the survey results. The Working Group was invited to consider whether the Guide should retain the concepts and description of the two main models.

31. Chapter 2 included nine considerations that could inform legislators' choice for a model and the specific design thereof. The Working Group was asked whether these should be reflected in the Key Considerations or whether it was sufficient to outline them in the text. The participants were also asked whether there were sufficient Recommendations relating to each model.

32. Chapter 3 covered three main issues: (i) the person(s) in charge of a bank liquidation, (ii) creditor involvement in the process, and (iii) the obligations of a bank's management in the period before liquidation.

(a) General remarks

33. *Several experts* considered that the Guide should express a clear preference for administrative or hybrid models. It was emphasised that there were no purely court-based models for banks. Furthermore, it was pointed out that the *Key Attributes* required an administrative authority to be responsible for resolution powers, which included the power to 'effect' the closure or wind down of an institution (KA 3.2). This had already been mentioned in the text but it was suggested to emphasise it more. It was also suggested to emphasise more that administrative models would better facilitate preparation and cooperation, which were essential for an orderly and timely liquidation. It was noted that the procedural steps within a liquidation were expected to be broadly the same irrespective of the model and that ex-post judicial review was compatible with administrative models. Finally, it was suggested to remove the box on a specific country case and to change the reference in the draft Guide to the synergies that might be gained from assigning liquidation responsibilities to a specific type of administrative authority, which was considered to be a matter of policy.

34. *It was agreed to (i) place more emphasis on the advantages of an administrative model, both in the text and in the Key Considerations, (ii) revise the text on synergies, and (iii) remove Box 6.*

(b) Involvement of the deposit insurer (DI)

35. *A participant* suggested reflecting in the text that there may be several reasons for involving the DI as liquidator. *Another participant* suggested adding a definition of 'administrative authority' in the Glossary and clarify whether this would include DIs. In response, it was noted that a DI may be a private entity, run by its member banks. In such case, the fact that it had a public mandate did not make it an administrative authority.

36. Furthermore, it was agreed to indicate in the text that, under an administrative system, the requirement for independence applied to the competent liquidation authority, rather than to a liquidator appointed by that authority.

37. *It was agreed to (i) revise the text on the appointment of the DI as liquidator, (ii) ask the Drafting Committee to reflect on whether a definition of 'administrative authorities' was needed, and (iii) revise the text on the independence of the liquidator.*

(c) Creditor involvement and right to petition for liquidation proceedings

38. *Participants* reiterated the view that if creditors had a right to petition for insolvency, appropriate safeguards needed to be in place to prevent such petition from having destabilising effects. It was discussed that the question of creditors' rights in petitioning for bank liquidation depended also on the grounds and the nature of the proceedings. It was noted that the grounds for opening proceedings might involve information that creditors do not have access to and that the

preferred approach would be for creditors to request action from the relevant administrative authority. If, in some jurisdictions, creditors could apply for court-based insolvency proceedings, the court should not take a decision without the consent of the relevant administrative authority.

39. *Several participants* expressed concerns with regard to draft Recommendation 12 on creditor involvement in the course of bank liquidation proceedings. It was underlined that the special nature of banks and the objectives of financial stability and depositor protection justified deviating from ordinary insolvency proceedings on this point, especially in administrative processes. It was acknowledged that it may be different once the proceedings were underway (e.g., a piecemeal liquidation of a residual entity) and in court-led proceedings.

40. A suggestion was made to reorder the text in Chapter 3, as follows: (i) duties of the bank's management, (ii) the petition for opening bank liquidation proceedings, (iii) the liquidator, and (iv) creditor involvement during the process, distinguishing between transfers and piecemeal liquidation.

41. Some discussion took place on the relationship between the DIS and other creditors. It was reiterated that an administrative model was preferable to ensure the process would proceed swiftly, while creditors would be protected by the right to (ex post) legal challenge.

42. *It was agreed to (i) reorganise the sections in Chapter 3 as suggested, and (ii) revisit the text on credit involvement and draft Recommendation 12, focusing on the special nature of banks and the involvement of administrative authorities in the process.*

(d) Obligations of banks' management

43. It was considered evident that a bank must inform its authority when it was nearing the point of non-viability. if the Guide crystallised this requirement, it should also consider what it meant for the authority that received the notification, e.g., whether it would trigger any automatic action and how the recipient authority should coordinate with other administrative authorities.

44. *It was agreed to address the need for broader coordination among authorities in the Guide, after a bank's management informed its authority it was nearing the point of non-viability.*

(e) Legal protection

45. On the topic of legal protection, it was discussed that a distinction should be made between different models. In court-based models, the liquidator would be the officer of the court and subject to a standard of liability available in business insolvency. It was noted that personal liability might function as an incentive for private sector liquidators to discharge their functions properly.

46. For public authorities, legal protection was linked to public policy objectives, and relevant existing standards (e.g., the *Basel Core Principles* (BCPs) and *Key Attributes*) should be followed as far as possible, which generally protected public authorities and their staff against liability for actions made while discharging their duties in good faith. A question was whether the same degree of protection was required or appropriate when actions were taken for the purposes of value maximisation and with less urgency.

47. *The Drafting Committee was asked to update the text and draft Recommendations on liability and legal protection, reflecting on the comments made during the session.*

3. Chapter 4: Preparation

48. *A member of the Drafting Committee* introduced the chapter, pointing out that, following guidance at previous sessions and suggestions within the Committee, the draft did not contemplate a regulatory requirement for planning or preparation. Rather, it proposed to distinguish between regular planning activities and contingency preparations in the context of an emerging intervention.

49. *Participants* largely responded positively to this approach. They endorsed the notion that resolution planning and preparatory work for liquidation should be kept distinct and that the Guide should not make recommendations, or establish requirements, as to the former, given that it was already covered in existing international standards. It was also noted that to the extent that planning or preparatory activities were part of internal administrative processes, the need for explicit legislative provisions may be limited. At the same time, advance planning was key to failure management and the Legislative Guide should not give the impression as though it was not needed.

50. The discussion then turned to information sharing among authorities as an element that enables preparatory action. *Participants* in principle supported the idea of legal gateways for such information sharing although these should fit in a jurisdiction's broader legal framework.

51. *Several* participants highlighted the need for information sharing between the competent liquidation authority and the deposit insurer, both for simple reimbursement procedures and in scenarios where the deposit insurer had a role in enabling a transfer strategy.

52. *Participants* broadly agreed that, to the extent that planning and preparation was needed, it should be considered a part of authorities' work, albeit with the ability to enlist banks' support. They also agreed that preparatory work should be proportional and should follow a risk-based approach. Moreover, the ability to share information should be seen as one key factor that should be considered by jurisdictions as they opt for a particular institutional design.

53. A suggestion was made to restructure the current draft, moving the parts on advance planning, cooperation and information sharing, and confidentiality elsewhere (for example, Chapter 2 or 3). Moreover, the preparatory actions needed to execute a transfer could be discussed following the discussion of grounds and tools.

54. The discussion then turned to Section D, whereby it was discussed that supervisory measures were outside the scope of this work. *Some participants* recommended eliminating Section D, while *others* were in favour of reducing the text but retaining specific elements, such as the role of a temporary administrator and the power to order a suspension of payments (moratorium).

55. Views on the role and functioning of a temporary administrator varied. *Some participants* considered it primarily a supervisory tool to be used to recover a bank, while *others* considered that a temporary administrator may also be useful in the context of preparing and conducting a liquidation (e.g., to reduce asset stripping risks). It was acknowledged that temporary administration can have destabilising effects and should thus be applied very judiciously. Some discussion also took place on the pros and cons of a suspension of payments or a moratorium.

56. *The Drafting Committee was asked to (i) consider moving several parts of Chapter 4 to other Chapters, and (ii) revisit Section D to minimise overlap with supervisory topics.*

4. Chapter 5: Grounds for opening bank liquidation proceedings

57. *A member of the Drafting Committee* introduced Chapter 5, noting that it contained a discussion of different grounds for opening bank liquidation proceedings (financial and nonfinancial grounds, regulatory grounds and forward-looking grounds). Feedback from the Working Group was particularly welcome on (i) the section on discretion, and (ii) the discussion of a situation in which a bank's license was withdrawn but the entity was viable (paragraph 152).

58. *Participants* generally appreciated that Chapter 5 referred to different grounds for initiating bank liquidation proceedings. The discussion on the concept of non-viability in the text was considered key. It was also argued that, following a non-viability assessment and resolution action, it should be possible to liquidate a residual entity on the same grounds.

59. It was proposed to streamline the text and to change the sequence of the subsections, discussing first the types of grounds (Section E), followed by the interaction with license revocation

(Section D), and then the matter of discretion and the relationship between the court and administrative authorities. It was also noted that the guidance could take different forms, from very specific to more generic recommendations, or discussing certain aspects only in the text without an accompanying recommendation.

60. Various views were expressed with respect to the section on discretion. It was raised that a margin of appreciation was inherent in administrative decision-making and that guidance may therefore not be needed. It was also argued that it may not be necessary to make a distinction between the level of discretion in two different preparatory phases, as the draft currently did, since some discretion may by warranted in both.

61. The discussion then turned to the question whether a court could or should defer to the expertise and technical assessment of a relevant administrative authority. *One of the drafters* indicated that, for court-led processes, it was suggested that the legislation could preclude an independent assessment of the bank's financial condition by the court, requiring it instead to defer to the petitioning authority's view. *Several participants* expressed support for such principle of deference, noting that there was a legitimate reason for limiting the court's role in these cases since diverging views between the administrative authority – which had the technical expertise to assess a bank's condition – and the court should be avoided. Guidance was considered helpful since not all jurisdictions may provide for a clear solution in case a court would not follow an administrative authority's technical assessment on a bank's viability. It was also noted that, in certain jurisdictions, a similar principle existed in cross-border cases under corporate insolvency law.

62. However, *several participants* pointed out that an assessment by the civil court could not be precluded, although it would likely defer to an administrative authority's assessment in practice. It was suggested to distinguish more clearly in the text between the standard for the ex-post judicial review of an administrative decision, on the one hand, and the court's decision to open bank liquidation proceedings based on the petition of an administrative authority, on the other. Some suggested providing guidance on the relevant standard to be applied by the court in the latter case, e.g., whether this would be a plausibility or a balance of probabilities test, while others suggested focusing on a general principle of deference without discussing further details in the Guide.

63. Ultimately, there was general agreement that the drafting on the principle of deference could be amended to clarify its meaning in primarily court-led processes.

64. Other suggestions made were to signal possible differences in liability risks depending on whether an administrative or primarily court-led process applied, and to cover *locus standi* in the Guide (e.g., for challenging decisions to withdraw a bank's license or to liquidate a bank).

65. As a next point, the Working Group was invited to consider whether to keep paragraph 152, which addressed the situation in which a bank could no longer comply with technical requirements to conduct the banking business but was nonetheless a viable entity.

66. *Some participants* were in favour of deleting paragraph 152. They considered that the situation described there was rare and that it was not desirable to let the legal entity survive after the banking license was withdrawn, also pointing to the need to protect depositors and creditors.

67. However, *several other participants* suggesting keeping this paragraph. They noted that such situations had existed in practice and that, even if they were rare, they should not be ignored. Furthermore, recommending that the revocation of the banking license should automatically lead to the initiation of liquidation proceedings would limit the options for authorities to deal with specific cases. It was also noted that the draft already considered the position of depositors and creditors since it indicated that the former bank's deposit liabilities and other regulated activities should be transferred to another bank or liquidated on a voluntary basis.

68. *The Secretary-General* suggested specifically addressing the scenario in which shareholders of a bank decided to initiate voluntary liquidation proceedings in the Guide. In the absence of specific solutions in corporate law, he invited the Working Group to consider whether tailor-made guidance was needed for banks. *Several participants* agreed, highlighting that tailored guidance should be provided where there was a disconnect between general insolvency law, corporate law and bank liquidation law, to ensure suitable solutions were in place for banks specifically.

69. Finally, the Working Group discussed the relationship between license revocation and bank liquidation proceedings. It was recalled that license revocation can be a trigger for bank liquidation proceedings or the consequence of such proceedings. *Participants* were asked whether the Guide should recommend a specific approach.

70. *One participant* expressed the view that the preferred approach would be to initiate liquidation proceedings on the basis of license revocation. It was discussed that guidance may be needed to ensure that liquidation proceedings would start swiftly after license revocation, or to ensure interim solutions were in place. In the ensuing discussion, however, it was also raised that, given that there may be different reasons for revoking a bank's license, the automatic start of liquidation proceedings may not be appropriate in all cases.

71. Regarding the revocation of the license as a consequence of liquidation proceedings, flexibility was advocated for the timing of the license withdrawal. However, appropriate safeguards should be in place to prevent abuses.

72. *The Chair concluded that the Working Group was not yet in the position to propose concrete recommendations on grounds. She suggested that the Drafting Committee considers the points raised, streamlines and adapts the text where appropriate, and specifically reflects on which aspects would merit concrete recommendations.*

5. Chapter 6: Tools

73. *A member of the Drafting Committee* introduced the Chapter. Section A explained the need for transfer powers in bank liquidation frameworks. Section B described different types of transactions, including the transfer of assets and liabilities to a bridge bank or asset management company (AMC), which were further outlined in Section D. It also mentioned share deals, although those were unlikely to be particularly useful in bank liquidation. Moreover, Section B discussed the need for discretion for the liquidation authority when selecting the most suitable tool and deciding on the perimeter to be transferred. Section C discussed the steps that were needed to apply a transfer strategy and possible safeguards, while Section E focused on the treatment of financial contracts.

74. As a general comment, it was proposed to streamline and shorten Chapter 6, focusing on key aspects of legislative guidance and referring to existing standards where appropriate. Furthermore, *one of the drafters* suggested merging Sections C and E of Chapter 6 with parts of Chapter 4 on Preparation given the overlap between these sections.

(a) Tools other than P&A

75. *One expert* questioned whether guidance on tools other than P&A would be needed. For example, the text referred to share transfers, but recognised that these were likely to be of marginal importance in bank liquidation procedures. Similarly, there were references to mergers, demergers, spinoffs, and securitisation, which raised issues of corporate and securities law. Furthermore, doubts were expressed about bridge banks and AMCs as tools in liquidation, with the possible exception of the use of a pre-existing bridge bank or a transfer of assets to a private AMC.

76. *The drafters* of Chapter 6 agreed to focus on the P&A tool but advised against not mentioning other tools. Even if these were not regarded as core to a liquidation framework for all jurisdictions,

bridge banks, AMCs or share deals might be useful depending on the context. It was suggested that the Guide reflects these possibilities, even if it may not recommend that countries adopt them.

77. On the other hand, it was emphasised that the Guide should focus on providing legislative guidance. While the range of options that have been adopted by jurisdictions could be reflected, it was argued that specific legislative provisions may not be needed; general transfer powers in the legal framework would already provide the possibility to transfer assets and liabilities to an entity that had been established separately. The question of possible system-wide AMCs was beyond the scope of a liquidation framework, as had been recognised in the text.

78. *The drafters* agreed that references to securitisation could be omitted, but noted that it may be useful for the Guide to refer to the assignment of receivables and similar transactions. At a minimum, the Guide could indicate that transfers could be structured in different ways for the purposes of value maximisation, without going into detailed issues of securities law. It was noted that securitisation may also be helpful in piecemeal liquidations.

79. Finally, it was agreed to provide additional guidance in Chapter 6, including on piecemeal liquidation. It was suggested to include a statement in the Guide clarifying that it focussed on special tools and powers for bank liquidation proceedings, while it assumed that general insolvency powers were in place. New issues to be specifically addressed in Chapter 6 could include, for instance, the timeline for piecemeal bank liquidation proceedings, the situation in which a residual entity in liquidation needs to continue to provide services to a bank after resolution action, the preservation of assets, the general bankruptcy stay (distinguishing it from a possible temporary stay on financial contracts) and the impact thereof on secured creditors, avoidance of transactions, the treatment of related party claims, and the treatment of claims of the estate against third parties.

80. *The Working Group agreed to focus mainly on legislative guidance for the P&A tool in Chapter 6. It did not reach consensus on the extent to which other tools should be discussed in the Guide; the matter was referred to the Drafting Committee. In addition, Chapter 6 would provide specific guidance on the piecemeal liquidation of banks, while referring to existing standards where appropriate. The Drafting Committee was asked to reflect specifically on the suggestions made for additional aspects to be covered in Chapter 6.*

(b) Valuation

81. *One of the drafters* explained that the draft aimed to design the transfer process in a way that ensured that the price for a bank's assets and liabilities was fair. An independent valuation may not always be needed but some jurisdictions may nevertheless wish to introduce it.

82. *Some experts* considered that a valuation would facilitate fair pricing and would be appropriate given that a transfer would take place without creditor approval. However, support was also expressed for flexibility.

(c) No creditor worse off (NCWO) safeguard

83. *The participants* discussed whether a NCWO safeguard should be applicable in bank liquidation proceedings, as had been suggested in draft Recommendation 11. Different views were expressed regarding the need for such safeguard (discussing differences and similarities with resolution proceedings, e.g., on the timing for actions and the need to deviate from the *pari passu* treatment of creditors in the same class), the appropriate counterfactual against which to assess the liquidation strategy, the role of the objective of value maximisation in bank liquidation, and possible sources of compensation in case of noncompliance with a NCWO safeguard. Overall, many participants were sceptical about recommending a resolution-like NCWO safeguard in bank liquidation proceedings.

84. However, there was broad agreement that there should be some safeguard for creditors in bank liquidation proceedings, especially those whose claims were left behind in a residual entity.

Those who had expressed views against the NCWO safeguard proposed considering the existing safeguards in general insolvency law for this purpose (e.g., the liquidator's duty to act in good faith, the principle of value maximisation, and the *par condicio creditorum* principle).

85. Ultimately, it was suggested that the Drafting Committee would clarify (i) what the purpose of a creditor safeguard would be (e.g., guiding the actions of a liquidator, introducing a constraint or establishing a compensation mechanism), and (ii) what the proposed consequences would be (e.g., whether noncompliance would result in an enforceable right and, if so, for whom).

86. *The Working Group agreed that guidance on a creditor safeguard would be helpful, especially for creditors whose claims were left behind in a residual entity. Given the reservations expressed about the proposed NCWO safeguard in this context, the Drafting Committee was asked to reconsider the matter and clarify the purpose and consequences of a possible creditor safeguard.*

(d) Licence withdrawal

87. *The participants* discussed whether there would be a need to retain the banking license for a short period of time to conduct a transfer. On the one hand, it was suggested that general insolvency law principles may already enable this, although it may depend on the mandate of the liquidator.

88. On the other hand, several arguments were brought forward that might justify keeping the banking licence for some time. Reference was made to the ability to dispose of the bank as a going concern, the management of deposits and the continuity of payment services, since a licence may be needed for access to the payment system. Moreover, a licensed status allowed supervisory oversight and powers. The view was expressed that licence withdrawal should be a discretionary decision of the supervisor in consultation with the liquidator.

89. *It was suggested to update the text on the possible need to retain the banking license for a limited period of time following the opening of bank liquidation proceedings, referring to the discretion of the banking supervisor in this context.*

(e) Financial contracts

90. *A member of the Drafting Committee* introduced the topic, recalling that the traditional exemption of financial contracts from the bankruptcy stay – i.e., allowing early termination and netting – was reconsidered after the great financial crisis since close-out netting may interfere with the orderly management of a bank's failure. Based on previous Working Group sessions, the draft advocated aligning the treatment of financial contracts in bank failure management proceedings as much as possible. In line with the *Key Attributes*, draft Recommendation 16 proposed that the competent liquidation authority should have the power to temporarily stay early termination rights and close-out netting, provided that the substantive obligations under the contract continued to be performed. Draft Recommendations 17 and 18 specified, *inter alia*, that the stay should only be imposed if necessary to facilitate a transfer and that the duration of the stay should be limited.

91. *One participant* wondered whether this section would fit better in Chapter 8. However, *most participants* were in favour of keeping it in Chapter 6, given that the stay could be seen as an ancillary measure to ensure the effective functioning of the transfer tool. It was suggested to change the title to better capture the contents of this section.

92. *Some participants* expressed caution about recommendations with respect to the treatment of financial contracts in bank liquidation proceedings. It was noted that it had been a policy decision to protect the exercise of close-out netting in insolvency. A change of approach should be carefully considered given the impact it may have on the market and the prudential treatment of these contracts. It was advised to consult relevant stakeholders on draft recommendations in this area.

93. It was discussed that not all the *Key Attributes*' provisions on close-out netting should be imported in the Guide. The *Key Attributes* provided, *inter alia*, that the entry into resolution should

not be a default event and included the option of an automatic stay. Such provisions were contingent on the expected outcome of resolution, which was a continuity of the bank's business. In the context of bank liquidation, a discretionary power to impose a stay may be helpful if a transfer tool was applied, but there should not be an automatic stay. It was also noted that the ISDA documents were linked to provisions in special resolution frameworks.

94. With this caveat, *several participants* expressed support for the text, commending the drafting and noting that the proposed recommendations were balanced and in line with existing standards. It was discussed that it may be helpful to analyse how jurisdictions with significant experience in applying transfer tools treated financial contracts.

95. With regard to draft Recommendation 14, it was noted that the wording "*any stay on contract enforcement*" suggested a broader scope of application than the stay on close-out netting in financial contracts. It was agreed to either narrow the scope or to move it to another section of the Guide.

96. Regarding draft Recommendation 15, it was agreed to delete the last part of the sentence ("*limited to those where the undue delay of enforcement would pose a risk to financial market stability*") to avoid confusion with existing instruments at international and regional level.

97. In draft Recommendation 16, it was agreed to delete "*the bank's*" to clarify that the substantive obligations under the contract may continue to be performed by a party other than the failing bank.

98. *Some participants* suggested that a discretionary stay in bank liquidation proceedings may need to be longer than a stay pursuant to the *Key Attributes*. On the other hand, it was considered beneficial to specify the length of the possible stay and the reference to two business days seemed to be the outer limit in practice.

99. *The Working Group agreed to (i) keep Section E in Chapter 6, while changing the title to better reflect its contents, (ii) allow the Drafting Committee to reflect on draft Recommendation 14, to either narrow its scope or move it elsewhere, (iii) end draft Recommendation 15 after "should be clearly defined", (iv) delete the word "bank's" in draft Recommendation 16, and (v) exchange views with relevant stakeholders on the proposed recommendations.*

6. Chapter 7: Funding

100. Upon invitation of the Chair, *a member of the Drafting Committee* introduced Chapter 7, which contained: (i) an introduction referring to relevant international standards on the provision of funding in the context of bank failure management, (ii) a section on the need for external funding, (iii) a section on the relevance of DIS for bank failure management and relevant safeguards, (iv) a section on the design of DIS financing, (v) a section on burden-sharing, and (vi) a section on public funding, which use should be minimised in the context of bank failure management. The Working Group was invited to identify possible recommendations (considering the suggestions in the Secretariat's report) and to decide whether guidance should encompass forms of liquidity support.

101. In the ensuing discussion, support was expressed for the possible recommendations suggested in the Secretariat's report about allowing the use of DIS funding beyond payout in the context of bank liquidation and recognising the subrogation rights of the deposit insurer in such cases.

102. It was suggested to distinguish in the Guide between systems in which deposit insurance and failure management functions were combined in the same authority, and systems in which those functions were performed by different entities – having due regard to the safeguards in the IADI *Core Principles for Effective Deposit Insurance Systems*. It was confirmed that the reference to "resolution" in IADI *Core Principle* 9 should be understood broadly to encompass a range of failure management options.

103. Several remarks were made about the possible sources of funding in bank liquidation proceedings. For instance, it was raised that the source of funding may depend on the type of funding

gap that may arise when transfer tools were applied (e.g., whether the transfer was limited to insured deposits or broader) and that the role of institutional protection schemes could be considered as well.

104. *Several participants* considered that the focus should not so much be on the source of funding but rather on the methods and applicable constraints or safeguards.

105. *The participants* discussed whether liquidity support should be explicitly addressed in the Guide. On the one hand, it was argued that liquidity support may not be needed since an acquiring bank would have access to liquidity through ordinary market facilities. On the other hand, participants discussed the close relationship between illiquidity and insolvency, and argued that the solutions for systemic and non-systemic banks should be similar. While liquidity issues may be less acute in case of a sound purchaser, it was considered preferable not to unduly restrict the possible support measures of the DIS or other sources. *Several participants* considered the provision of liquidity a cost-effective way of enhancing the feasibility of the transfer tool since it would be temporary and fully recoverable. Furthermore, it could contribute to maximising returns for creditors and ensuring the protection of depositors. The possibility to provide liquidity support, irrespective of the source thereof, would also be in line with the guidance in Chapter 6.

106. *Several participants* suggested not to make an explicit distinction in the Guide between solvency and liquidity support. Instead, the Guide could refer to financial support which could take different forms within the boundaries of safeguards (e.g., a least cost requirement). A flexible approach was favoured that would not establish restrictions as to the type of interventions, nor overly focus on the source(s) of funding, given the different schemes in place across jurisdictions.

107. *The participants* agreed that it was important to acknowledge, as was done in the draft Guide, that support may take different forms, from providing cash to more complex arrangements (e.g., a guarantee or loss-sharing agreement). It was suggested to specify that the latter forms of support may raise difficult questions that would need to be duly considered. A suggestion was also made to develop general principles to guide the provision of funding, which would need to be in line with the IADI *Core Principles*.

108. Some discussion took place on the extent to which a 'systemic risk exception' may be relevant also for non-systemic banks to which transfer strategies would be applied. While different views were expressed, the group generally considered that this exception would not be relevant in the context of idiosyncratic failures of non-systemic banks.

109. Finally, support was expressed for the draft text on *ex-post* industry assessments. The provision for *ex-post* assessments could help minimise moral hazard and was considered a best practice. It was suggested to add in the text that *ex-post* industry assessments were also beneficial to enhancing market discipline in the banking sector.

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

7. Chapter 8: Creditor Hierarchy

111. *A member of the Drafting Committee* introduced the sections of draft Chapter 8. Section A provided an introduction to the topic. Section B contained general recommendations (e.g., on how to introduce rules on creditor ranking in the legal framework). Section C discussed the ranking of depositors' claims, with a focus on the interplay between depositor ranking, the availability of DIS funding and the *pari passu* principle in the context of transfer strategies. Section D contained a preliminary text on the treatment of temporary settlement accounts, e-money and runnable liabilities

in liquidation, mostly based on the results of the survey. Section E on secured creditors underlined the need to protect such creditors in liquidation proceedings, in line with existing standards. Section F contained draft Recommendations on contractual subordination and related party subordination.

112. The Working Group was invited to discuss specifically (i) whether the options on depositor ranking in the boxes in Section C should be kept in their current form, (ii) whether Section D should be kept or not, and (iii) whether Section E should be further developed.

(a) Bank deposits

113. *Most participants* were in favour of keeping the boxes with explanations concerning the different options for depositor ranking. The discussion then centred around two main points: (i) the focus in the boxes on the implications of different types of depositor ranking for the application of transfer tools: it was suggested to emphasise more that the choice on depositor ranking was informed also by other policy considerations, as had been explained in detail in other international publications, and (ii) whether the box on 'no depositor preference' should be kept. On the one hand, it was argued that the box should be removed since existing international publications recommended general depositor preference or tiered or insured depositor preference. On the other hand, the *Secretary-General* and various other experts suggested retaining the box, given that a Legislative Guide was meant to contain a discursive discussion of different options and their advantages and disadvantages. Such approach would not preclude the Working Group from recommending depositor preference.

114. The discussion then moved to the types of depositor preference. *Several participants* were in favour of general depositor preference, emphasising that it would facilitate transfer strategies while protecting the DIS vis-à-vis senior unsecured creditors. *Some* suggested explicitly recommending general depositor preference in the Guide. *Others* advised against recommending a specific type of depositor preference, given that the preferred system was impacted by a range of factors which may lead to different outcomes across jurisdictions. It was suggested that the advantages of general depositor preference could be made more explicit in the text.

115. *Two participants* suggested deleting draft Recommendation 5 on insured or tiered depositor preference, arguing that it could be perceived as advocating such type of depositor preference.

116. Furthermore, it was suggested that the Guide could more explicitly describe the impact of the type of depositor preference on the role of the DIS.

117. Finally, it was agreed to delete Table 1 in Section C given that its contents may be subject to change over time and it may not be sufficiently representative of jurisdictions' choices.

118. *The Working Group agreed to retain a discussion on all the options for depositor ranking in the text, while favouring depositor preference - with a specific emphasis on general depositor preference – and recognising that the choice for a specific type of depositor preference was influenced by a number of policy considerations.*

(b) Temporary settlement accounts

119. It was discussed that some jurisdictions provide for a special treatment of accounts where money in transfer was temporarily placed after being withdrawn from the payer's account and before it was credited to the recipient's account, to ensure the completion of the payment process in case the originating bank would enter into liquidation proceedings. It followed from the survey that jurisdictions had different practices to protect these accounts, including through segregation, treating the funds as deposits or allowing the use of DIS funds to ensure the completion of the transaction.

120. *Some participants* noted that this may be rather an issue of definitions, i.e., whether these types of claims legally qualified as deposits or not. *Others* considered that this issue was related to the structure and functioning of payment systems. *Again others* were of the view that the topic was

related to the scope of the liquidation estate. These different perspectives led to various suggestions regarding the appropriate place for discussing this topic in the Guide.

121. Overall, *a majority of the participants* who expressed a view on this topic was in favour of keeping this section, to raise awareness about the situations that may arise if funds were in transit at the moment bank liquidation proceedings were opened. Guidance on different possibilities to protect funds in transit and the timing thereof were considered useful.

122. *The Working Group agreed to retain guidance on the treatment of temporary settlement accounts. Such guidance would take into account differences across jurisdictions in the definition of deposits and the functioning of payment systems. The Guide could recommend that the legislative framework should protect money in transit, without prescribing a specific means of protection considering that different options seemed valid. While several participants were in favour of keeping the guidance in Chapter 8, the Drafting Committee was granted flexibility to reflect on this.*

(c) E-money and runnable liabilities

123. *The Working Group agreed to remove this section given the different approaches across jurisdictions and the ongoing policy discussions. This would not preclude the Working Group from reflecting on these matters.*

(d) Asset side of a bank

124. A suggestion was made to address the composition of the liquidation estate in the Guide, and specifically the treatment of assets held by a bank in trust or for the benefit of a client. Several suggestions were made as to where such guidance could be included in the Guide.

125. On the other hand, it was noted that the composition of the bank's liquidation estate was not expected to raise particularities and that there may not be a need for guidance on issues concerning custodians and client assets given that jurisdictions may already have legal provisions that provide sufficient clarity on such matters.

126. *The Working Group agreed to focus in Chapter 8, for the moment, on the liability side of the bank. The Drafting Committee was provided with a mandate to consider whether there was a need to develop guidance on the asset side of a non-viable bank.*

(e) Secured creditors

127. *A member of the Drafting Committee* recalled that the draft guidance on the treatment of secured creditors followed existing standards. In line with the discussions in the third Working Group session, the text underlined the relevance of secured financing for banks and the need to protect covered bond holders and central banks.

128. *The Secretary-General* suggested to discuss whether there was any difference between banks and other companies that would justify developing bank-specific recommendations on the treatment of secured creditors in liquidation (e.g., recommending absolute priority).

129. *Several participants* considered there was no need to depart from the general principles on the treatment of secured creditors under business insolvency laws. They generally agreed with the draft guidance and considered it to be sufficient.

130. Two suggestions were made with regard to the draft Recommendations in this section: (i) to make a clearer distinction in Recommendations 8 and 9 between the situation in which the non-viable bank was a secured creditor and the situation in which a third party was the secured creditor, and (ii) to move the second part of draft Recommendation 9 to Chapter 6.

131. Other suggestions made were to add appropriation as an option for protecting secured creditors, and to introduce – possibly in Chapter 6 – substantive rules on the preservation of assets,

including the role of a general bankruptcy stay and the impact thereof on secured creditors. With regard to covered bonds, it was suggest to add guidance on their treatment under a transfer strategy.

132. Finally, the participants discussed the order of topics within Chapter 8. A suggestion was made to revise the order as follows: (i) ranking of deposit claims, (ii) subordination, (iii) other, which could include secured creditors, possibly financial contracts, and temporary settlement accounts.

133. *The Working Group agreed to move the section on secured creditors to the end of Chapter 8. It was agreed that there was no need to develop further guidance on this topic, while the Drafting Committee was invited to reflect on the specific suggestions made during the discussion.*

(f) Subordinated claims

134. *A member of the Drafting Committee* introduced the last section of Chapter 8, noting that related party claims were subject to special rules in the supervisory framework. The question was whether the Guide should recommend reinforcing this special treatment in the bank liquidation framework.

135. *The participants* were generally in favour of introducing specific guidance on related party claims in bank liquidation proceedings. It was noted that related party transactions can be the source of internal funding and that the subordination of related party claims may facilitate transfers. The importance of intra-group subordination for resolution was highlighted, and the need to have consistent rules for all banks, irrespective of their size.

136. It was suggested to clearly distinguish between subordination following fraudulent (or similar) actions, on the one hand, and the subordination of related party claims, on the other, given that different thresholds and rationales applied.

137. It was noted that Chapter 9 proposed an exception to the subordination of intra-group financing in the twilight zone. Alternatively, it was suggested to grant certain types of financing in the twilight zone a preferred ranking.

138. With regard to related party transactions, it was suggested to address several aspects in the Guide: (i) the ranking of related party claims and the link with depositor protection, (ii) the transfer of related party claims to an acquiring entity, (iii) the sale of a non-viable bank's assets to a related party, and (iv) avoidance rules and related party transactions. While point (i) related to Chapter 8, the other aspects would fit better in Chapter 6.

139. Some discussion took place about draft Recommendation 14, which recommended that the possibility of subordinating the claims of related parties should be recognised in specific statutory provisions when the possibility of subordinating such claims under the general law was uncertain and/or remote. Views were exchanged on whether the Guide should recommend a mechanisms for subordinating related party claims, either through statutory subordination or by introducing a possibility to subordinate related party claims *ex-post*. It was suggested that the participants further reflect on this during the intersessional period, taking into account aspects of policy.

140. *The Working Group agreed (i) to let the Drafting Committee reflect on whether to separate the section on the subordination of fraudulent (or similar) claims and the section on the subordination of related party claims, (ii) to cover in the Guide, in addition to the ranking of related party claims, also other aspects relating to such claims (in Chapter 6 on Tools), and (iii) to reflect on a possible recommendation concerning the subordination of related party claims.*

(g) Suggestions to cover additional elements

141. *Several participants* made suggestions to expand the scope of the guidance on creditor hierarchy. It was proposed to consider: (i) the ranking of shareholders, (ii) the ranking of post-

liquidation financing, (iii) the ranking of inter-bank deposits, and (iv) the position of the deposit insurer, and its ability to file a claim in the liquidation estate after subrogation.

142. On the suggestion of *the Secretary-General,* the Working Group considered whether there was a need to introduce special guidance on avoidance.

143. *Several participants* agreed that the Guide should cover avoidance. It was discussed that avoidance rules should not become an impediment for banks to seek external financing in the run up to liquidation.

144. It was suggested to include substantive rules on matters such as the preservation of assets, avoidance and the bankruptcy stay in a new Chapter or in Chapter 6. It was agreed to identify the aspects for which bank-specific guidance was needed. For other aspects, reference could be made to existing standards on general insolvency law.

145. In order to ensure that it would be clear to the reader that the Legislative Guide focused on the specificities for banks only, it was suggested to include a statement in Chapter 1 indicating that the Guide only aimed at filling gaps and that aspects not covered by it should be understood as to be dealt with under existing guidance.

146. *The Working Group agreed to provide a mandate to the Drafting Committee to consider developing guidance on the suggested additional topics. The Working Group agreed to specifically address avoidance in the Guide, possibly in Chapter 6. More generally, it was agreed to verify whether there were any other aspects of business insolvency law for which bank-specific guidance was needed. Furthermore, it was agreed to clarify in the Guide that it only aimed to fill gaps in the existing legal architecture and that aspects not covered by the Guide should be understood as to be dealt with under existing guidance.*

8. Chapter 9: Group Dimension

147. *A member of the Drafting Committee* introduced the Chapter, which had been amended following the comments received during the third session and considering the results of the survey. Section A contained an introduction. Section B encouraged *ex-ante* liquidation planning without making this a requirement. It had been clarified that liquidation plans could be drawn up well ahead of any financial distress of the bank, incorporated in resolution planning where appropriate, or in the 'twilight zone'. *Ex-post* liquidation solutions, on the other hand, would allow the liquidators of different group entities to proceed in a coordinated manner after the opening of liquidation proceedings.

148. Section C on 'enhanced procedural coordination' recommended that the legislation facilitates the opening of a single liquidation proceeding for a group or other appropriate tools to facilitate coordination. It indicated that procedural consolidation should respect the separate legal entity principle, while substantive consolidation should be permitted only in exceptional circumstances. Section D proposed allowing banking groups to take measures that would maximise the estate value by moving funds within a group, subject to prior approval. Section E addressed how the corporate form could be retained in case of liquidation solutions concerning cooperative groups. Section F proposed exceptions to anti-avoidance rules, claw-back, and subordination provisions for certain intra-group transactions and subject to specific conditions.

149. *The participants* discussed that Chapters 9 and 10 together were important for cross-border banking groups. It was noted that planning would enhance authorities' knowledge of the legal framework in different jurisdictions and that cooperation and information sharing arrangements should be in place between authorities to facilitate coordinated actions. *The relevant members of the Drafting Committee* explained that they had worked together to ensure consistency between Chapters 9 and 10. *The Chair* added that aspects of cooperation were covered in Chapters 4 and 10.

150. A suggestion was made to focus in Chapter 9 on aspects such as procedural coordination, from the perspective of individual bank failures, while leaving out complex and unresolved matters concerning intragroup financing (covered in Sections D, E, and F).

151. *One participant* noted that share deals may be a useful way to transfer solvent parts of a group to an interested purchaser.

152. *Several participants* expressed the view that advance planning was key. It was mentioned that more detailed guidance on planning would be helpful to make it operational, although it was acknowledged that the Guide should not prescribe disproportionate processes to prepare for the failure of non-systemic banking groups. One way to solve this was to identify and refer to existing instruments which already contained guidance on operational aspects.

153. It was generally considered beneficial if existing planning efforts were extended to as many banks as possible, without introducing a parallel liquidation planning requirement. *A member of the Drafting Committee* explained that the draft already underlined the need for proportionality and recognised that planning for liquidation may be incorporated in existing resolution planning efforts.

154. It was discussed that recovery plans drawn up by banks may only be useful to some extent for liquidation proceedings, since they have a different aim and given that banks may lack knowledge on certain matters that were relevant for devising a transfer strategy.

155. Some discussion took place on whether it would be useful to involve the court in preparatory steps. It was generally agreed that the court should not have a role in approving plans, given their dynamic, non-binding nature and to avoid overly complicating the process.

156. It was suggested that the Drafting Committee reflects on the guidance to be provided on planning, both for single entities and groups. It was noted that concrete recommendations may not be needed, or could focus on what was needed to allow effective planning, such as information gathering and cooperation with relevant authorities and the bank.

157. *The participants* generally expressed support for section C on procedural coordination.

158. *Several participants* expressed concerns about draft Recommendation 8 in section D. They considered the recommendation too prescriptive, noting that the proposed right to provide intra-group financial support was complex and not accompanied by a framework to allow such mechanism to work properly. If this section were to be kept, *one participant* advised considering the issue from the perspective of substantive consolidation, including commonly applicable safeguards in that context.

159. *One of the drafters* explained that draft Recommendation 8 aimed at making group asset and liability management implementable and providing legal certainty, by addressing impediments arising from entity-centric insolvency and company laws. It was acknowledged that this was an innovative idea and that the section could be removed if deemed too complex.

160. With regard to section F, *several participants* suggested to further reflect on draft Recommendation 11 on exceptions from company law and insolvency law provisions to facilitate intra-group transactions. Concerns were raised about creditor safeguards. *The drafters* explained that the draft Recommendations contained safeguards, including the prior review by the banking supervisor.

161. *One participant* proposed discussing Recommendation 11 together with Recommendation 14 in Chapter 8 (on the possibility to subordinate related parties' claims), ensuring alignment. It was also suggested that Recommendations 217-218 of the UNCITRAL Legislative Guide on Insolvency Law (Part Three) may be relevant for this section.

162. *Several participants* considered that group-level restructuring as proposed in section G was beyond the scope of this project.

163. *It was agreed to focus in Chapter 9 on (i) group liquidation plans (Section B), coordinating this with Chapter 4 on Preparation, and (ii) procedural consolidation (Section C). It was suggested to discuss Sections D, E, and F within Subgroup 3 before presenting, possibly, a revised proposal to the Working Group. It was agreed to remove Section G.*

9. Chapter 10: Cross-Border Aspects

164. The Chapter was introduced by *a member of the Drafting Committee*, who noted that the revised text accommodated feedback received during the third session and within the Drafting Committee. It also incorporated results from the survey which, among other things, confirmed the prevalence of cross-border aspects across banks of different sizes and structures. The draft Recommendations aimed at providing a comprehensive regime covering cooperation, powers related to cooperation and recognition of foreign actions and measures, and duties and safeguards. They drew on and were in line with other international instruments but also tried to fill gaps in those instruments. The Chapter sought to accommodate the range of banks with international elements, including branches and subsidiaries, and tried to enable both centralisation of processes and parallel proceedings, as best fit the circumstances of the individual case. Finally, *the drafters* highlighted the importance of robust safeguards in a cross-border bank liquidation. Chapter 10 *inter alia* referred to a cross-border concept of the NCWO safeguard which compared recoveries in a centralised process with those of creditors in a local process.

165. *The drafters* referred to two issues that could merit discussion. The first were the definitions of home and host jurisdiction, which were in Chapter 1 but relevant for the cross-border chapter. The second was the alignment of Chapter 10 with other chapters, in particular Chapters 6 and 9.

166. With regard to the suggestions made for the definitions of 'home' and 'host jurisdiction', reference is made to paragraphs 17-18 above.

167. It was discussed that cross-border recognition was a complex issue, given the interplay with jurisdictions' domestic interests and possible reciprocity requirements. Therefore, *some participants* suggested not to be too ambitious or prescriptive in this area. It was suggested that host authorities should not be prevented from taking unilateral action if they were not comfortable with the action or inaction of the home authorities or if they considered local action would better serve national interests. Furthermore, for home State decisions to be recognised in host States, the home proceedings must provide for fair treatment and due process. It was noted that, in some jurisdictions, the basis for recognition was not set out in statute, but rather through the courts' jurisdiction and precedent. It was also raised that the concept of modified universalism was not accepted among all jurisdictions and that it may be challenging to advocate single proceedings for a cross-border banking group. It was suggested to focus in Chapter 10 on cross-border cooperation, as a natural follow-up to existing arrangements such as supervisory colleges.

168. Moreover, *participants* discussed that the process of administrative recognition tended to be cumbersome and was currently not regulated in some jurisdictions. The Guide could emphasise that prior planning and communication among relevant authorities were key to facilitate that process. It was suggested to specify in the Guide that recognition procedures should be swift and allow for quick action.

169. It was discussed that the Guide should clearly distinguish between subsidiaries and branches when considering any cross-border aspect. A suggestion was made to focus on a cross-border scenario of a bank with a branch abroad and to consider the implications of deposit-taking operations in two jurisdictions – including for the different deposit insurers (in Chapter 10 or in Chapter 7).

170. *Several participants* questioned the feasibility of a proposed presumption that a group liquidation plan would be legally enforceable in the host jurisdiction, noting, among others, that there was no equivalent presumption for resolution plans. It was also noted that the proposed presumption would need to be accompanied by safeguards, including that the competent authority may determine otherwise and a right for affected stakeholders to challenge this in court.

171. More generally, it was observed that the Chapter did not address the remedies of affected persons, including depositors. In this regard, it was discussed that several options could be considered with regard to the jurisdiction to challenge plans. This could be considered by the Drafting Committee in the intersessional period for discussion at the next meeting.

172. *Several participants* questioned the number and level of detail of draft Recommendations in Chapter 10. It was noted that jurisdictions had different interpretations of certain concepts (e.g., 'equitable treatment'), and that several aspects covered in Chapter 10 were issues of policy. It was suggested to align the guidance with the *Key Attributes* and recommend that the legislation should not impede cooperative solutions by the authorities.

173. It was also suggested to clearly distinguish between administrative processes and court-based processes since they gave rise to different issues. For court-based processes, it was suggested to consider the existing guidance in the area of business insolvency law and to consider to what extent modifications were needed to facilitate court-to-court cooperation in bank liquidation proceedings.

174. *The drafters* recalled that there was a gap in existing international instruments and that the Working Group had agreed in previous meetings that the Guide should provide concrete guidance to legislators. While acknowledging the concern about the number of draft Recommendations, they suggested caution in reducing them. They explained that the Recommendations aimed to account for different possibilities and scenarios (e.g., centralised and parallel proceedings, single entities with branches and groups) and cutting them could distort the careful balance. Furthermore, the text acknowledged the UNICTRAL framework, the possibility of court-based and administrative procedures, and cooperative solutions. They considered that many of the points raised by the participants had already been addressed in the text.

175. *The Secretary-General* expressed the view that Chapter 10 arguably represented the biggest service to the international community because cross-border cooperation was the area in which bank liquidation frameworks trial most behind corporate insolvency. The Chapter aimed at adapting existing business insolvency standards to banks. If it were decided to be less ambitious and reduce the number of Recommendations, he suggested retaining the discursive analysis because it provided valuable guidance to legislators.

176. In response to the concerns expressed about modified universalism, *the drafters* acknowledged the challenges but noted that there had been significant progress. They also emphasised that the focus of Chapter 10 was procedural and that it was not advocating substantive consolidation generally; it should apply only in very exceptional circumstances.

177. Furthermore, *the drafters* acknowledged that in many countries, cooperation and comity had been possible without explicit legislation. They explained that the Recommendations did not necessarily require new legislative provisions, pointing to the broad definition of "the Law" in the Guide.

178. *The drafters* concluded that a number of comments could be accommodated, including a more explicit reference to communication and clarity that recognition should be swift but would require advance preparation. The term '*affected jurisdiction'* could be adopted to capture the range of jurisdictions that may be relevant for cross-border effectiveness, and a reference to deposit insurers could be added, including their status as significant creditors. Regarding the proposed presumption that a liquidation plan would be enforced in host jurisdictions, they observed that it followed logically from liquidation planning if that was done in cooperation between home and host authorities.

179. *The Drafting Committee was asked to update Chapter 10 in accordance with the discussion.*

b) Other matters identified by the Secretariat

180. *The Chair* invited the Secretariat to introduce any remaining items in the Secretariat's Report (Study LXXXIV – W.G. 4 - Doc. 2).

181. *A member of the Secretariat* noted that a general question was to what extent the Legislative Guide in its final form should include references to jurisdictions' laws and practices.

182. *The Working Group* decided to include country references in the Guide only where this was considered helpful to illustrate solutions advocated in the Guide. This approach would significantly reduce the number of boxes. The Working Group could consider further which of the remaining examples should be retained in the next iteration. Furthermore, where appropriate, footnotes could be used rather than boxes.

183. *A participant* suggested to consider the extent to which some aspects set out in the Guide should be addressed in primary legislation and which aspects can or should be delegated to secondary instruments. General guidance on this was considered helpful. Another point was that the Guide could cover different ways of law reform (e.g., administrative liquidation frameworks may require a special law whereas court-based regimes may be modified by a limited set of amendments, although some jurisdictions have a *lex specialis* for a court-based bank liquidation framework).

184. *Participants* also discussed the format of the Guide, specifically, how Recommendations should be presented and whether they should be supplemented by 'Key Considerations'. There was support for including Key Considerations, either as a consistent approach throughout the instrument or where appropriate to the subject matter, provided that the considerations accurately reflected the full discussion set out in the relevant chapter and supported the Recommendations. In the next iteration, it was suggested to include the Recommendations at the beginning of each Chapter or at the beginning of the Guide as an executive summary.

185. *It was agreed to (i) keep country references only where this would be helpful to illustrate specific solutions advocated in the Guide, (ii) ask the Drafting Committee to consider developing guidance on general matters of legislative design, (iii) keep (and where appropriate add) 'Key Considerations' in the boxes with Recommendations.*

Item 6: Organisation of future work

186. *The Chair and the Secretariat* summarised that the Working Group had agreed the following regarding the next intersessional period: (i) the Drafting Committee would update the Master Copy in line with the outcome of the discussions, (ii) Subgroup meetings would be organised as appropriate, (iii) a consultation for written feedback on the draft Guide would be postponed until after the Drafting Committee had revised the text.

187. It was announced that the next Working Group session would be held at the premises of UNIDROIT in Rome between 17 and 19 October (included) 2023.

Items 7 and 8: Any other business. Closing of the session

188. In the absence of any other business, *the Chair* and *the Secretary-General* thanked all the participants for their input.

189. *The participants* expressed their gratitude to the FSI for the hospitality and the excellent organisation of the session.

ANNEX I

LIST OF PARTICIPANTS

MEMBERS

Ms Stefania BARIATTI *Chair*	Professor University of Milan
Ms Anna GELPERN	Professor Georgetown University
Mr Christos HADJIEMMANUIL	Professor University of Piraeus
Mr Matthias HAENTJENS	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 Nottingham
Ms Janis SARRA	Professor University of British Columbia
Mr Reto SCHILTKNECHT	Doctor of Laws (LL.D.), Attorney-at-Law and Research Associate (Switzerland)

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BANCA D'ITALIA	Ms Alessandra DE ALDISIO Director, Regulatory and Macro-prudential Analysis Directorate
	Mr Michele COSSA Senior Lawyer, Legal Service
	Mr Romualdo CANINI Expert, Banking and Financial Supervision
BANCO DE ESPAÑA	Ms Lucia PIAZZA Head of Unit, Legal Department

BANK OF ENGLAND	Ms Clare MERRIFIELD Senior Legal Counsel, Financial Stability Division, Legal Directorate
	Mr Thomas Douglas COATES Lawyer, Financial Stability Division, Legal Directorate
BANK OF GHANA	Ms Elsie ADDO AWADZI Second Deputy Governor
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ANNEX II

AGENDA

1. Opening of the session and welcome

2. Adoption of the agenda and organisation of the session

3. Adoption of the Summary Report of the third session (Study LXXXIV – W.G. 3 - Doc. 6)

4. Update on intersessional work and developments since the third Working Group session (Study LXXXIV – W.G. 4 - Doc. 2)

5. Consideration of work in progress

   (a) Master Copy of the Draft Guide (Study LXXXIV – W.G. 4 - Doc. 3)

   (b) Other matters identified by the Secretariat (Study LXXXIV – W.G. 4 – Doc. 2)

6. Organisation of future work

7. Any other business

8. Closing of the session