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**UNIDROIT Working Group on Bank  
Insolvency**

***Fifth session (hybrid)***  
**Rome, 17 - 19 October 2023**

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**SUMMARY REPORT**  
**OF THE FIFTH SESSION**  
**(17 - 19 October 2023)**

**TABLE OF CONTENTS**

<b>Item 1:</b>	<b>Opening of the session and welcome</b>	3
<b>Item 2:</b>	<b>Adoption of the agenda and organisation of the session</b>	3
<b>Item 3:</b>	<b>Adoption of the Summary Report of the fourth session</b>	3
<b>Item 4:</b>	<b>Update on intersessional work and developments since the fourth Working Group session</b>	3
<b>Item 5:</b>	<b>Consideration of work in progress</b>	3
	a) Master Copy of the Draft Guide	4
	b) Other matters identified by the Secretariat	22
<b>Item 6:</b>	<b>Organisation of future work</b>	22
<b>Items 7 and 8:</b>	<b>Any other business. Closing of the session</b>	22
<b>Annexe I</b>	<b>List of participants</b>	23
<b>Annexe II</b>	<b>Draft agenda</b>	29

1. The fifth session of the Working Group on Bank Insolvency (“the Working Group”) took place on 17, 18 and 19 October 2023 at the premises of UNIDROIT in Rome. Online participation was possible for those who were unable to attend the session in person.

2. The session was attended by nine members and 38 observers, including representatives from international and regional organisations and bodies, central banks, resolution authorities and deposit insurance agencies, as well as staff of the FSI and the UNIDROIT Secretariat (the list of participants is available in [Annexe I](#)).

#### **Item 1: Opening of the session and welcome**

3. *The Chair* opened the session and welcomed all participants to the meeting. She invited the Secretary-General of UNIDROIT to take the floor.

4. *The Secretary-General* expressed his gratitude to the Working Group for the enormous amount of that had been done since the fourth Working Group session in March 2023. He was pleased to note that the Drafting Committee had further developed the future Legislative Guide and that the project was now reaching its final stage.

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

5. *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. 5 – Doc. 1](#), available in [Annexe II](#)) and agreed with the proposed organisation of the session.

#### **Item 3: Adoption of the Summary Report of the fourth session**

6. *The Chair* noted that the Secretariat had shared the Summary Report of the fourth Working Group session with all participants. *The Working Group confirmed the adoption of the Summary Report* (UNIDROIT 2023 – Study LXXXIV – W.G. 4 – Doc. 5).

#### **Item 4: Update on intersessional work and developments since the fourth Working Group session**

7. Upon invitation by the Chair, *a member of the UNIDROIT Secretariat* extended a warm welcome to the Monetary Authority of Singapore as a new institutional Observer to the Working Group. She added that the China Deposit Insurance Corporation and the Chinese National Administration of Financial Regulation would also observe the Working Group for the first time.

8. She recalled that the Working Group had discussed a first draft of the Legislative Guide during its fourth session. The Drafting Committee had updated and further developed the Chapters during the intersessional period and had met twice (virtually). Following review within the Drafting Committee, the Chapters had been sent to the three Subgroups for comments. She thanked the participants in the Subgroups for their feedback, which had led to a further revision of the Chapters by the drafters in cooperation with the UNIDROIT Secretariat and the FSI. This had ultimately resulted in the Master Copy (Study LXXXIV – W.G. 5 – Doc. 3, confidential), which would be the main object of discussion during the fifth Working Group session.

#### **Item 5: Consideration of work in progress**

9. *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. Chapter 1: Introduction**

10. *A member of the Secretariat* introduced draft Chapter 1. She explained the main changes that had been made to this Chapter since the fourth Working Group session as described in paragraphs 95 to 102 of the Secretariat's Report.

11. She invited the Working Group to express its views on the draft definition of "winding-up" and the use of that concept in the definition of "bank liquidation proceedings". Furthermore, the Working Group was invited to discuss (i) whether to add definitions of "piecemeal liquidation" and/or "failure"; (ii) whether to retain Box 2, fully or partially; and (iii) the new guidance regarding the balancing of liquidation objectives in the legal framework.

*(a) Background and purpose of the Legislative Guide (Part A)*

12. *The participants* discussed the scope of the Legislative Guide and its relationship with existing international standards such as the *Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions* ("FSB Key Attributes"). It was suggested to add the word "liquidation" in the second sentence of paragraph 5 and to replace the reference to "banks in financial distress" by "non-viable banks". Alternatively or in addition, it was suggested to refer in paragraph 5 to *FSB Key Attribute 1.1* on the scope of bank resolution regimes.

13. Some discussion took place on how detailed the explanations on the scope of the Guide should be. *Some participants* suggested to simply indicate in paragraph 5 that the Guide focused on the liquidation of non-viable banks that did not fall within the scope of special resolution regimes implementing the *FSB Key Attributes*. *Other participants* preferred to specify the scenarios that the Guide intended to cover. The first scenario concerned the liquidation of non-viable banks that fell outside the scope of special resolution regimes because they were not systemic in failure. The second scenario concerned the liquidation of a non-viable bank or parts thereof in the context of, or after, a resolution process.

14. It was agreed to develop additional guidance on the specificities that might need to be introduced in the legal framework to effectively liquidate a residual entity. For instance, special provisions might be needed to enable the liquidator to continue to provide services to transferred parts of the bank's business if needed.

15. *One participant* suggested to add in paragraph 5 that the Legislative Guide focused on the closure of non-viable banks while resolution frameworks also envisaged "open bank" solutions. *Another participant* suggested to indicate that some aspects of the Guide (e.g., concerning the creditor hierarchy) were also relevant for the resolution of systemic banks.

16. *The Drafting Committee* was asked to revise the text in Part A – especially paragraph 5 – regarding the scope of the Legislative Guide and its relationship with the *FSB Key Attributes*. *The Working Group* provided the Drafting Committee with a mandate to develop specific guidance on the liquidation of a residual entity ("rump bank").

*(b) Glossary (Part C)*

17. *The Working Group* discussed the draft definition of "bank liquidation proceedings". *Several participants* suggested deleting the phrase "for the purpose of winding up its affairs and operations" in this definition. Alternatively, reference could be made to the "termination" of the bank's activities. It was also suggested to replace the phrase "ending with the dissolution of the legal entity" by "ending with the exit of the bank from the market" or similar wording given that there might be exceptional situations in which the legal entity could continue to exist.

18. *The Working Group* agreed to delete the definition of “winding up” and to add a definition of “piecemeal liquidation”. For the development of the latter definition, regard could be had to the explanations of this concept in the Chapters.

19. It was agreed to delete the definition of “contractual subordination”. In the definition of “subordination agreement”, it was agreed to delete the phrase “*with which they would otherwise rank pari passu*”.

20. In the definition of “*pari passu* principle”, it was agreed to replace the word “equally” by “proportionally”.

21. *Some participants* suggested that it might be useful to develop definitions of the terms “single-track regime” and “dual-track regime”. However, *other participants* noted that the terms were not frequently used in the Guide and preferred keeping the explanations of these terms in the main text.

22. It was agreed to amend the definition of “resolution” by referring to “a process” instead of a “set of measures” and by adding a reference to “non-viable” banks (or similar).

23. Furthermore, it was proposed to develop new definitions of “licence” and “interbank deposit”. The Drafting Committee would reflect on the definitions of “(group) home jurisdiction” and “host jurisdiction” during the next intersessional period.

24. *The Working Group* agreed to (i) add definitions of “piecemeal liquidation”, “licence”, and “interbank deposit”; and (ii) delete the definitions of “contractual subordination” and “winding up”. In addition, the Drafting Committee was asked to update the definitions of “bank liquidation proceedings”, “*pari passu* principle”, “resolution”, and “subordination agreement” in line with the suggestions made during the session, and to further reflect on the definitions of “(group) home jurisdiction”, “host jurisdiction” and “affected jurisdiction”.

(c) *Preconditions for an effective bank liquidation framework (Part E)*

25. A suggestion was made to add an effective lender of last resort (LOLR) function as a precondition in Chapter 1. Since different views were expressed about this suggestion, *the Drafting Committee* was asked to reflect on whether to add such reference in the Guide.

(d) *Scope of a bank liquidation framework (Part F)*

26. *The Working Group* discussed whether Box 2 should be kept. *Several participants* proposed to remove the box in its entirety. *One participant* suggested to move some of the text on cooperative banks to the main text, without mentioning jurisdictions. *Some participants* suggested that a separate document could be drawn up with references to current laws and practices of jurisdictions.

27. *The Working Group* agreed to remove Box 2. *The Drafting Committee* was invited to consider whether to move part of the text on cooperative banks to the main text, without referring to jurisdictions.

(e) *Key objectives of an effective bank liquidation framework (Part G)*

28. *The Working Group* discussed the newly-developed guidance regarding the balancing of liquidation objectives in the legal framework.

29. *Some participants* expressed caution about prioritising financial stability and depositor protection over value maximisation, or trying to provide detailed guidance on how to balance the liquidation objectives. The concept “financial stability” was discussed, and how this related to bank failure management frameworks. *Other participants* expressed support for the new guidance and made specific suggestions to enhance the text (e.g., merging options (i) and (ii) in paragraph 63,

emphasising the complementary role of the liquidation objectives and recognising that the objectives might play a different role in different stages).

30. *Some participants* suggested to consider removing Box 3 or moving some of its contents to the main text or a footnote.

31. *The Drafting Committee was asked to (i) consider deleting Box 3, while keeping some elements in a footnote as appropriate; and (ii) revisit Point 6 on “Balancing the objectives of a bank liquidation framework” based on the discussions in the Working Group session.*

## **2. Chapter 2: Institutional Arrangements**

32. *A member of the Secretariat* introduced Chapter 2. She explained that the text had been streamlined and that most of the boxes with references to individual jurisdictions had been removed. In line with the outcome of the fourth Working Group session, Chapter 2 placed more emphasis on the advantages of an administrative model for bank liquidation proceedings, while retaining a discussion of court-based models with a role for administrative authorities and presenting Key Factors that might help jurisdictions in designing the appropriate institutional model. She explained the changes that had been made to the draft Key Considerations and Recommendations, as reported in paragraph 106 of the Secretariat’s Report.

33. The Working Group was invited to express its views on revised Chapter 2, especially the updated Key Considerations and Recommendations. A specific question was whether in Key Factor 8 (Adequate resources), a reference should be added to the need for adequate technical resources.

34. The ensuing discussion mainly revolved around two issues: the accountability of the liquidation authority and the role of deposit insurers in bank liquidation frameworks.

### *(a) Accountability (Key Factor 6)*

35. *The Working Group* agreed to elaborate on non-judicial accountability mechanisms for administrative authorities. It was agreed to move the paragraph on non-judicial accountability in draft Recommendation 2 to the “*Recommendations for jurisdictions with an administrative model*”.

36. *The Working Group* agreed to elaborate on the need for effective judicial protection in the main text and to develop an accompanying Recommendation that would apply irrespective of the chosen institutional model.

37. *The Working Group* agreed to elaborate on the *ex-post* judicial review of administrative actions, and in particular on the meaning of “limited review”. It was noted that paragraph 75 already contained wording on the importance of judicial review that could be useful for Key Factor 6. It was discussed that judicial review should be limited with respect to decisions that contained public interest considerations, while it could be broader for decisions that concerned the balancing of private rights. Other aspects discussed include the possible role of internal administrative review mechanisms and elements needed for courts to conduct judicial review.

38. *The Working Group* agreed to elaborate on (i) non-judicial accountability mechanisms for administrative authorities, (ii) the need for effective judicial protection, (iii) *ex-post* judicial review of administrative decisions, especially the concept of “limited review”. *The draft Recommendation on non-judicial accountability would be moved to the “Recommendations for jurisdictions with an administrative model”. The Drafting Committee was asked to develop a new Recommendation on effective judicial protection.*

### *(b) Deposit insurers*

39. *The Working Group* agreed that there would be merit in concentrating generic guidance the role of deposit insurers in bank liquidation proceedings in one section, which might fit best in Chapter

2. The new section on deposit insurers would cross-refer to the *IADI Core Principles for Effective Deposit Insurance Systems* (“IADI Core Principles”) as appropriate and would be without prejudice to the more specific guidance on the use of deposit insurance funding in Chapter 7.

40. The Working Group recognised that deposit insurers played an important role in bank liquidation proceedings. At the same time, it was agreed to explain in the Guide that the exact role of a deposit insurer might differ depending on its nature (“private” or “public” deposit insurer) and mandate – which depended on policy decisions made by jurisdictions. It was suggested that deposit insurers that were performing a public function and adhered to good governance practices might be given a stronger role in the liquidation process, provided this was in line with their mandate and subject to the requirements in the *IADI Core Principles*.

41. The Working Group discussed that the nature of the deposit insurer should also be taken into account for the guidance on preparation and cooperation between the deposit insurer and other authorities. For instance, the sharing of confidential information with “private” deposit insurers should be subject to constraints. It was also suggested to consider potential conflicts of interest in the new section on deposit insurers.

42. Different suggestions were made on how to amend draft Recommendation 8 and similarly worded Recommendations in Chapters 2 and 3. One suggestion was to find a terminological solution by reflecting on the definitions of “administrative authority” and “banking authority”. Another suggestion was to replace “the deposit insurer” with “the authority responsible for deposit insurance” or similar. A third suggestion was to delete the reference to the deposit insurer in these draft Recommendations and develop a separate Recommendation on the role of deposit insurers in the liquidation process. Support was expressed support for the third solution.

43. *The Working Group asked the Drafting Committee to develop a new section dedicated to the deposit insurer and to revisit the formulation of the draft Recommendations in which reference was made to the deposit insurer.*

(c) *Other suggestions concerning Chapter 2*

44. *One participant* pointed out that in Box 4, the reference to the Belgian resolution authority should be removed.

45. *Another participant* suggested to consider in Key Factor 2 (Preparation) that the shortcomings of court-based proceedings in terms of preparation might not be fully overcome. He also wondered whether the solutions for court-based models presented under this factor were feasible.

46. It was suggested to delete the reference to the possible establishment of specialised judicial bodies for financial matters in Key Factor 3 (Expertise, efficiency and access to information) and in draft Recommendation 9.

47. It was agreed to integrate Key Factor 8 (Adequate resources) into Key Factor 3, while adding a reference to the need for technical resources and the relevance of capacity-building.

48. It was suggested to elaborate in Key Factor 5 (Independence) on the concept of good governance.

49. It was agreed to clarify that draft Recommendation 8 contained various options for consideration by legislators (i.e., were not meant to be prescriptive and/or cumulative).

50. *The Working Group agreed to (i) remove the reference to the Belgian resolution authority in Box 4, (ii) further emphasise the shortcomings of court-based models in Key Factor 2, (iii) integrate Key Factor 8 into Key Factor 3 while adding a reference to technical resources and the relevance of capacity-building, (iv) delete the reference to the possible establishment of specialised judicial bodies*

in Key Factor 3 and draft Recommendation 9, and (v) elaborate on the concept of good governance in Key Factor 5.

### **3. Chapter 3: Procedural and Operational Aspects**

51. Upon invitation by the Chair, a member of the Drafting Committee explained that Chapter 3 had undergone significant changes. It now consisted of four Parts, in addition to the introduction: (i) duties of the bank's management in the period approaching liquidation, (ii) initiation of bank liquidation proceedings, (iii) the bank liquidator, and (iv) creditor involvement during the liquidation process. In addition, the Chapter contained 20 draft Recommendations.

#### *(a) Duties of the banks' management in the period approaching liquidation (Part B)*

52. The discussion focused on paragraph 115, which proposed that the management of a bank should notify the relevant administrative authorities in a timely manner of a bank's approaching non-viability, thereby adapting the general insolvency law duty for a business's management to file for insolvency in a timely manner. *The Working Group* generally expressed support for the proposed notification obligation. Some suggestions were made to slightly amend the text (e.g., referring to "the Board" instead of the "management"). It was discussed that either both the supervisor and the resolution authority could be notified, or the supervisor could inform the resolution authority.

53. *One participant* suggested to refer to the need for the legal framework to comply with existing standards (e.g., *Basel Core Principle 9*). *Another participant* suggested to reflect on possible additional requirements inspired by the business insolvency framework.

54. *The participants* generally agreed that it was helpful to recommend in the Guide that the triggers for the Board's notification obligation should be clearly spelled out in the legal framework. It was suggested to reflect on whether the concept of "knowledge" might be relevant. Another suggestion was to consider the possible need for an exemption from disclosure requirements.<sup>1</sup>

55. *The Working Group* agreed to retain paragraph 116 on a sanctioning regime for non-compliance with the notification duty.<sup>2</sup> It was recognised that the type of sanction would be highly dependent on the existing framework in a jurisdiction and should not be prescribed in the Guide. It was agreed to describe different options (e.g., civil or administrative sanctions) and to add to draft Recommendation 11 that the legal framework should contain a sanction for non-compliance. The consequences for non-compliance of the business insolvency law duty of filing for insolvency in a timely manner would be the same as under the business insolvency framework. It was proposed to consider in the intersessional period whether compliance with the duty to notify the supervisor in a timely manner should waive the Board's liability.

56. *The Drafting Committee* was asked to revise paragraphs 114 to 116 and draft Recommendation 11 in line with the suggestions made during the Working Group Session.

#### *(b) Initiation of bank liquidation proceedings (Part C)*

57. It was suggested to align draft Recommendation 12 with the main text (paragraph 119) to clarify that, if a petition to file for the opening of bank liquidation proceedings was made by a person other than the administrative authority, the latter should either approve the initiation of bank liquidation proceedings or be heard before the proceedings were opened. This should also be clarified in Part B (paragraph 114). It was suggested to link Part C with Part B on duties for the bank's management. Furthermore, some discussion took place on whether petitions to open bank liquidation proceedings by "other persons" than the administrative authority should be kept confidential.

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<sup>1</sup> Reference is made to the discussion of Chapter 4, see [paragraph 96](#) of this Report.

<sup>2</sup> See the question in the Secretariat's Report (paragraph 109, second bullet point).



58. *The Drafting Committee was asked to (i) add to draft Recommendation 12 the option of hearing the administrative authority before opening bank liquidation proceedings, (ii) add a reference to the bank’s management in Part C, linking it to Part B.*

(c) *The bank liquidator (Part D)*

#### Desirable qualities (D.1)

59. *The Working Group expressed support for the section on the desirable qualities of the liquidator and the accompanying draft Recommendation 13. For the sake of clarity, the Working Group agreed to add a reference to the need for the liquidator to have expertise in insolvency law.*

#### Selection and appointment procedure (D.2)

60. It was suggested to consider that a specific provision might need to be introduced in the legal framework to allow a court to appoint a liquidator on the proposal of an administrative authority or from a pre-established list of eligible liquidators established in cooperation with such authority.

61. *The Working Group supported the proposal to cover in the Legislative Guide the possible notification/publication of the appointment of a liquidator.<sup>3</sup>*

62. *The Working Group asked the Drafting Committee to update paragraph 125 and draft Recommendation 15, and to develop new guidance on the notification/publication of the appointment of a liquidator.*

#### Powers of the liquidator<sup>4</sup>

63. It was suggested to indicate in the Guide that the powers of the liquidator might be inspired by general insolvency law, but specificities were needed in the context of bank liquidation (e.g., for the transfer of assets and liabilities and the treatment of contracts). *The Working Group agreed to cover a liquidator’s general powers and possible deviations or additions to business insolvency law in Chapter 6.*

#### Remuneration (D.3)

64. It was suggested to merge the first sentence of draft Recommendation 16 with draft Recommendation 19. It was recognised that “liquidation expenses” and “remuneration” were different concepts and should not be used interchangeably, although it was agreed that the Guide should not delve into the details of what the liquidator might recover from the estate and what was instead embedded in its remuneration.

65. It was agreed to remove the second sentence of Recommendation 16 since that would fall outside the scope of the Guide.

66. It was suggested to clarify whether draft Recommendation 17 meant to cover liquidators appointed by an administrative authority, like draft Recommendation 16, or whether it concerned court-appointed liquidators. It was agreed to remove any overlap. It was suggested that there would be no need to provide guidance on the remuneration of a private firm hired by a liquidator that was an administrative authority.

67. It was proposed to replace draft Recommendations 17 and 18 by a general Recommendation that the authorities should be able to determine the remuneration of a liquidator in a manner that encouraged the timely and efficient conduct of the liquidation, also drawing on models from business insolvency law.

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<sup>3</sup> See the question in the Secretariat’s Report (paragraph 113, first bullet point).

<sup>4</sup> See the question in the Secretariat’s Report (paragraph 113, second bullet point).

68. *The Working Group asked the Drafting Committee to (i) consider merging the first sentence of draft Recommendation 16 with draft Recommendation 19, (ii) delete the second sentence of draft Recommendation 16, (iii) clarify the third sentence of draft Recommendation 16 and draft Recommendation 17 and remove any overlap, and (iv) consider replacing draft Recommendations 17 and 18 by a high-level principle that the liquidation authority should be able to determine the remuneration of a liquidator in a manner that encouraged the timely and efficient conduct of the liquidation.*

#### Transparency, oversight and accountability (D.4)

69. It was suggested to change the title to “Oversight, transparency and accountability”.

70. It was agreed to amend draft Recommendation 20 and the last sentences of paragraph 129 to clarify that reports or selected pieces of information “may” be published and “should” be made available to all creditors. It was discussed that the appointing liquidation authority should obtain a detailed report. In a court-based model, reporting should not only take place vis-à-vis the appointing court but also towards the relevant administrative authorities.

71. *The Working Group did not consider it necessary to specify the extent to which a liquidator might be able to deviate from directions of an administrative liquidation authority nor to indicate that the liquidator would be accountable directly to creditors.*<sup>5</sup>

72. *One participant suggested to use in draft Recommendation 22 the same formulation as in the first sentence of paragraph 131.*

73. *The Working Group asked the Drafting Committee to update the title of this section and to revise draft Recommendation 20 and the accompanying text on reporting.*

#### Personal liability and legal protection (D.5)

74. Regarding draft Recommendation 25, it was suggested to recommend that jurisdictions assess to what extent the applicable legal protection to the administrative authority might apply to the liquidator in his/her capacity as agent of the authority. If this would not apply, it was suggested to recommend that jurisdictions provide appropriate protection to the appointed liquidator in line with existing international guidance applicable to administrative authorities. It was discussed that the level of protection would also depend on the nature of the activities performed by the liquidator.

75. It was suggested to use the term “legal protection” rather than “immunity” in draft Recommendation 25 and the accompanying text. Furthermore, it was suggested to clarify that guidance was provided only on civil liability.

76. In paragraph 140, it was suggested to consider recommending that valuers should enjoy the same level of protection as liquidators appointed by an administrative authority.

77. *The Working Group asked the Drafting Committee to reflect on these suggestions and to update draft Recommendation 25 and section 5 accordingly.*

#### *(d) Creditor involvement during the liquidation process (Part E)*

78. It was suggested to consider in Part E that differences compared to ordinary insolvency proceedings were the number of creditors in bank liquidation proceedings and the role of the deposit insurer as subrogated creditor.

79. The discussion then focused on paragraph 144 and the accompanying draft Recommendation 28. *One participant* argued that the involvement of creditors in bank liquidation proceedings should be more limited than in ordinary insolvency proceedings, irrespective of the tool that was applied.

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<sup>5</sup> See the questions in the Secretariat's Report (paragraph 115).

*Another participant* suggested to replace Part E and draft Recommendation 28 by a general explanation that the principles of business insolvency law should apply to the piecemeal liquidation of a bank, while bank-specific rules were required for the transfer of a bank's assets and liabilities to another entity.

80. *Several participants* expressed support for the current formulation of paragraph 144, which made a distinction between the application of the transfer tool, on the one hand, and the piecemeal liquidation of a residual entity, on the other hand. Some suggestions were made to enhance the text, e.g., by clarifying that creditors would benefit from appropriate safeguards if the transfer tool were applied and by explaining what the involvement of creditors in a piecemeal liquidation entailed in practice. It was also suggested to distinguish between court-based and administrative models, and to elaborate on the piecemeal liquidation of banks without a prior transfer of assets and liabilities.

81. *Some participants* suggested to delete the second sentence of draft Recommendation 28 or to reformulate it positively.

82. It was suggested to delete the reference in draft Recommendation 29 to the deposit insurer as a creditor by subrogation since that was covered in the *IADI Core Principles*.

83. *The Working Group asked the Drafting Committee to reflect on these suggestions and to update Part E and draft Recommendations 28 and 29 accordingly.*

(e) *Termination of bank liquidation proceedings*

84. *The Working Group* expressed support for new draft Recommendation 30 and agreed to add guidance on the termination of bank liquidation proceedings in the main text.

85. Several suggestions were made to slightly amend the text of Recommendation 30. For instance, it was suggested to add a reference to the submission of the final accounts in point (a) and to add that there might be a need to notify the termination of the liquidation proceedings to the business registrar if the liquidation proceedings led to the disappearance of the legal entity. It was also proposed to clarify whether points (a) to (c) were meant to be an exhaustive list.

86. A suggestion was made to move point (c) of draft Recommendation 30 to the section on accountability. The Working Group agreed to add that the liquidator should remain accountable and have standing in possible litigation procedures following the closure of the liquidation process<sup>6</sup>.

87. It was observed that draft Recommendation 30 focused on administrative systems. It was suggested to provide guidance also for jurisdictions with court-based models, e.g., recommending that the liquidator submits a final report and final accounts to the court and in parallel to the administrative authority.

88. It was discussed that the submission and recognition of claims was covered in Chapter 6. It could be clarified there that insured depositors should be exempt from the requirement to declare claims in relation to any amounts covered by deposit insurance schemes.<sup>7</sup>

89. *The Working Group asked the Drafting Committee to update draft Recommendation 30 based on the discussions during the session and to develop accompanying guidance for the main text.*

#### **4. Chapter 4: Preparation and Cooperation**

90. Upon invitation by the Chair, a *member of the Drafting Committee* explained that Chapter 4 had been streamlined and that it now consisted of three main parts: (i) the need for preparation for bank liquidation proceedings (Part B), (ii) enabling provisions in the legal framework and the timing

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<sup>6</sup> See the question in the Secretariat's Report (paragraph 118).

<sup>7</sup> See the question in the Secretariat's Report (paragraph 118).

for preparatory actions (part C), and (iii) cooperation between all actors in the period approaching liquidation (Part D). He anticipated that a closer look might need to be had to the terminology used in this Chapter (e.g., “liquidation planning”, “contingency planning” and “contingency preparation”). The Working Group was invited express its views on the scope of Chapter 4 and whether additional guidance should be provided on the timing for preparatory actions.

91. *The Working Group* expressed support for the revised, streamlined version of Chapter 4. *One participant* suggested to emphasise more in Part B that a significant amount of preparation was needed to effectively conduct a transfer of assets and liabilities.

92. The discussion then revolved around the possible involvement of a “prospective liquidator” in the preparation for a potential bank liquidation. It was discussed that a prospective liquidator should be distinguished from a provisional liquidator, who generally had a limited mandate focused on the protection of assets. It was suggested to consider clarifying the meaning of these terms in the Glossary or revisiting the definition of “liquidator”. It was also raised that there might be merit in moving parts of Chapter 6 (e.g., on the protection of the liquidation estate) to Chapter 4.

93. Different views were expressed about whether a prospective liquidator could facilitate preparation for bank liquidation proceedings. It was discussed that, for banks, the appointment of a prospective liquidator might not be needed or could create confusion since the supervisory authority could take measures in the phase prior to the commencement of failure management proceedings (e.g., appointing a temporary administrator). On the other hand, *some participants* considered that the appointment of a prospective liquidator might be helpful, especially for court-based models. It was agreed to leave it to jurisdictions to decide whether a provisional and/or prospective liquidator would fit in their legal system.

94. *The participants* generally agreed that the Guide should discuss legal mechanisms that would enable authorities to take control of the bank if it was not cooperating properly with relevant authorities in the preparatory phase (this could be added e.g., in paragraph 156). It was proposed to recommend that jurisdictions assess whether their frameworks provide for a power to take control of the bank to enable preparation. If not, the liquidation framework should complement the existing framework by providing for such power.

95. Regarding planning, it was suggested to explain more clearly how contingency planning differed from recovery and resolution planning (which could also be useful for the liquidator) and to consider defining it in the Glossary.

96. Finally, it was suggested to consider the need for possible exemptions from disclosure requirements for listed banks in the preparatory phase. It was agreed to examine the existing guidance on this subject matter and to consult securities regulators on possible guidance in this area.

97. The discussion then turned to the box with draft Key Considerations and Recommendations. The following suggestions were made.

- To add a reference to “timely access to adequate information” in the second Key Consideration.
- To consider adding a reference to the deposit insurer in draft Recommendation 31, depending on the new section on deposit insurers (see Chapter 2) and any revisions in the main text (Chapter 4) concerning cooperation with the deposit insurer.
- To update the first sentence in draft Recommendation 32 in line with the discussions on the prospective liquidator and ensuring that banking authorities would be duly involved in the preparatory phase.
- To expand the scope of draft Recommendation 32, point (a) to cover three different aspects: (i) the power of the relevant authority to request information; (ii) the possibility to exchange

information among authorities, adding a reference to the liquidator; and (iii) access to information by deposit insurers, in line with *IADI Core Principle 16* and subject to confidentiality requirements. In points (i) and (ii), it was suggested to add the phrase “unless already provided by the legal framework”, given that administrative authorities might already have such powers under existing legislation.

98. *The Drafting Committee was asked to revise the main text of Chapter 4 and the draft Key Considerations and Recommendations in line with the discussions during the Working Group session.*

## **5. Chapter 5: Grounds for opening bank liquidation proceedings**

99. *A member of the Drafting Committee* introduced Chapter 5, noting that after the fourth Working Group session, the text had been streamlined, and the sequence of the Parts had been updated as follows: (i) introduction and general considerations (Part A), (ii) types of grounds (Part B), (iii) interaction with licence revocation (Part C), and (iv) interaction with triggers for resolution (Part D).

100. Part B indicated that the grounds for opening bank liquidation proceedings should include traditional insolvency grounds but should be broader and include forward looking grounds. The concept of “non-viability” was recommended as a guiding principle for formulating grounds to open bank liquidation proceedings. Furthermore, the part on the “negative condition” contained a discussion of pros and cons of including such criterion in the statutory framework. Part C distinguished between three situations: (i) licence revocation as grounds for opening liquidation proceedings, which had clear benefits; (ii) parallel licence revocation and liquidation proceedings, which was not advisable; and (iii) impact of a liquidation proceeding on the bank’s licence. Part D *inter alia* contained guidance on transitioning from resolution to liquidation.

101. The Working Group was invited to express its views on (i) the newly-developed draft Recommendations 33-36, (ii) the concept of non-viability as starting point for the design of the grounds for opening bank liquidation proceedings, (iii) the guidance on transitioning from resolution to liquidation, and (iv) whether Chapter 5 should cover voluntary liquidation proceedings.

### *(a) Types of grounds (Part B)*

102. *The Working Group* generally agreed that the concept of “non-viability” should inform the grounds for the opening of bank liquidation proceedings.<sup>8</sup> It was noted that the viability of a bank should be assessed by a banking authority and that it was important to clarify the relationship with the court in hybrid of court-based models. It was also noted that the relationship with the objective of minimising the use of public funding had been covered in the text.

103. Some discussion took place on whether reference should be made to how the concept of non-viability had been implemented at the regional level. It was suggested not to do so in footnote 82, which focused on international guidance concerning the concept of non-viability.

104. It was suggested to slightly amend the section on the “negative” condition, along the lines that it was part of the existing international framework and that there were different ways to implement it (i.e., by including it explicitly in the statute or not). It was suggested to delete footnote 84.

105. *The Drafting Committee was asked to update section 3 (‘negative’ condition) in line with these suggestions.*

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<sup>8</sup> See [paragraph 117](#) of this Report for one dissenting view.

(b) *Interaction with licence revocation (Part C)*

106. It was suggested to explain in footnote 86 that jurisdictions might use terms other than “licence”, and to add a definition of “licence” in the Glossary. Different views were expressed on whether to explain that licence revocation was multidimensional (e.g., a sanction or a trigger for the commencement of bank failure management proceedings).

107. Some discussion took place on possible different types of licence revocation. It was agreed to make a clearer distinction between licence revocation and consensual surrender of the licence.

108. *The Drafting Committee was asked to (i) update footnote 86, (ii) reflect on the multidimensional nature of licence revocation, and (iii) clearly distinguish between licence revocation and the surrender of the banking licence.*

Licence revocation as grounds for opening liquidation proceedings (C.1)

109. Support was expressed for the distinction that was made in the text between the exit of a bank from the market and the disappearance of the legal entity. It was suggested to check whether this distinction was made consistently in the Guide.

110. *The participants* discussed which situations should be covered in paragraph 191. The drafters explained that the intention had been to capture different situations, including the surrender of the licence by a bank that decided to change its business activities. It was agreed to more clearly spell out the various situations.

111. *The Working Group asked the Drafting Committee to (i) ensure that the Guide consistently distinguished between a bank’s exit from the market, on the one hand, and the disappearance of the bank as legal entity, on the other; and (ii) clarify the situations covered in paragraph 191.*

Parallel licence revocation and liquidation proceedings (C.2)

112. It was agreed to consider moving parts of paragraphs 195 through 197 that related to judicial review to Chapter 2.

113. It was suggested to clarify in paragraph 197 that the preferred solution would be to include licence revocation as a self-standing ground to initiate liquidation proceedings. The alternative would be a procedural safeguard that the court should defer to the technical assessment of the administrative authority on a bank’s viability. It was suggested to identify possible solutions in case the court would depart from the administrative authority’s technical assessment. Furthermore, it was suggested to add guidance on the scenario in which licence revocation and the opening of liquidation proceedings were dealt with by different courts.

114. It was suggested to reconsider the use of the term “public policy” since it had a specific meaning in the cross-border context.

115. *The Drafting Committee was asked to (i) consider moving (parts of) paragraphs 195 through 197, (ii) update paragraph 197, and (iii) cross-check the use of the terms “public policy” and “public interest” in the Guide to ensure a consistent approach was followed.*

Impact of opening liquidation proceedings on the bank’s licence (C.3)

116. *The participants* discussed to what extent (period of time) it should be possible to retain the banking licence during the liquidation proceeding. It was acknowledged that this might be needed in some situations for the efficient conduct of the liquidation proceedings.

(c) *Interaction with triggers for resolution (Part D)*

117. *One participant* did not agree with the concept of “non-viability” as guiding principle for the opening of bank liquidation proceedings and the proposed alignment of the grounds for liquidation with the triggers for resolution. It was noted that this would blur the distinction between the different regimes and that it might cause constitutional issues in certain jurisdictions. In case a bank met the triggers for resolution but not the grounds for liquidation, it was proposed to introduce a referral to the supervisory authority, which would then withdraw the licence.

118. However, *other participants* supported the proposed alignment and the inclusion of forward-looking grounds given the special nature of banks and the need to avoid limbo situations. They suggested to keep the text as it was.

119. It was suggested to move the guidance in footnote 92, on how to achieve alignment of the grounds for liquidation with the resolution triggers, to the main text.

120. *The participants* discussed the fluidity between different types of bank failures and the possibility to move from one failure management proceeding to another, especially in jurisdictions with a dual-track regime.

121. *One participant* expressed caution about recommending that the legal framework should allow the initiation of liquidation proceedings for a residual part of a bank based on an existing non-viability assessment of the bank under the resolution framework. She explained that there might be complex scenarios in which a residual part should not automatically be liquidated following a transfer and based on an existing non-viability assessment. It was also noted that some jurisdictions had a special procedure for managing the residual entity.

122. *Several participants* suggested to remove the second part of paragraph 201.<sup>9</sup>

123. *The Drafting Committee* was asked to reflect on these suggestions and to update Part D accordingly.

(d) *Key Considerations and Recommendations*

124. *The Working Group* agreed to merge and streamline draft Recommendations 35 and 36 to avoid overlap.

(e) *Voluntary liquidation*<sup>10</sup>

125. *The Working Group* recognised that specificities were needed compared to business insolvency law but agreed not to provide detailed guidance on voluntary liquidation proceedings since the focus of the Guide was on compulsory liquidation and the approach differed across jurisdictions.

## **6. Chapter 6: Liquidation Tools**

126. *Members of the Drafting Committee* introduced Chapter 6, noting that considerable changes had been made since the last Working Group session. They elaborated on the aspects on which guidance of the Working Group was sought, in line with paragraph 125 of the Secretariat’s Report.

127. First, the Working Group was invited to express its views on several terminological aspects (e.g., “sale as a going concern”, the transfer of “assets and liabilities”, a “moratorium”).

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<sup>9</sup> See the question in the Secretariat’s Report (paragraph 123, third bullet point).

<sup>10</sup> See the question in the Secretariat’s Report (paragraph 123, fourth bullet point).

128. Second, guidance was sought as to whether the Guide should maintain references to transactions such as share deals, de-mergers, and the use of bridge banks and asset management companies (“AMCs”).

129. Third, the Working Group was asked whether more guidance should be provided on the criteria to select an acquirer (C.4). *The drafters* explained that the text on valuation (C.5) had been updated in line with previous discussions, the section on safeguards (C.6) no longer referred to the “no creditor worse off” (“NCWO”) principle, and a new section covered transfers to related parties (C.7).

130. Finally, two new Parts had been developed in line with the suggestions made during the fourth Working Group session, on piecemeal liquidation (Part E) and on the protection of the liquidation estate (Part F). The Working Group was invited to express its views on the aspects for which bank-specific guidance would be needed.

(a) *General remarks*

131. *The Working Group* expressed support for the proposal to streamline the text in Chapter 6.<sup>11</sup> It was suggested to add an introductory paragraph that would explain the contents of the Chapter.

132. *The drafters of Chapter 6* suggested keeping “sale as a going concern” as terminology for a transfer of assets and liabilities to a private acquirer, possibly defining it in the Glossary.<sup>12</sup> Other options considered were to use the term “transfer tool” for the sale of assets and liabilities or to use “transfer-based tool” as an umbrella term. Ultimately, *the participants* generally favoured the current wording “sale as a going concern”.

133. *The Working Group* expressed support for the suggestion to clarify in the Glossary that the reference to a transfer of “assets and liabilities” meant to cover also any rights and obligations.<sup>13</sup>

134. Regarding the question in the Secretariat's Report whether some aspects of Chapter 6 should be moved to other Chapters, a suggestion was made to move Parts F and G to Chapter 3 or to a separate Chapter. *One participant* suggested to place Part E on piecemeal liquidation before the discussion of transfer tools.

135. Different views were expressed on whether Chapter 6 should provide specific guidance on the liquidation of credit cooperatives and credit unions. A suggestion was made to move the guidance on cooperatives in Chapter 9 to Chapter 6. *Other participants* did not consider necessary to provide specific guidance on cooperatives. It was agreed to consider this in more detail during the intersessional period. It was recognised that special expertise on cooperatives and credit unions was needed if specific guidance were to be developed.

136. *The Working Group* agreed to (i) streamline the text in Chapter 6, (ii) retain the term “sale as a going concern” and consider defining it in the Glossary, and (iii) clarify the concept “assets and liabilities” in the Glossary. *The Drafting Committee* was asked to consider moving Parts F and G to Chapter 3 and to reflect on possible specific guidance on the liquidation of cooperative banks.

(b) *The need for transfer-based tools (Part A)*

137. With regard to paragraph 205, it was suggested to consider that the deposit base of a bank might not necessarily be stable in some cases.

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<sup>11</sup> See the question in the Secretariat's Report (paragraph 125, first bullet point).

<sup>12</sup> See the question in the Secretariat's Report (paragraph 125, second bullet point).

<sup>13</sup> See the question in the Secretariat's Report (paragraph 125, third bullet point).



138. Different views were expressed on whether the discussion on pre- and post-insolvency liabilities in paragraph 206 should be kept.<sup>14</sup>

139. With regard to paragraph 210, it was suggested to clarify that the transfer might also include non-performing assets.

140. It was agreed to move the contents of footnote 100, on different legal forms and mechanisms to give effect to a transfer, to the main text.

141. *The Drafting Committee was asked to update Part A in line with these suggestions.*

(c) *Transfer-based tools: nature and applicability (Part B)*

142. *The Working Group* agreed to retain references to share deals for the time being, but it was suggested to reduce the text (paragraphs 217–219).

143. It was suggested to elaborate on the “short moratorium” mentioned in paragraph 233. *One of the drafters* suggested making a cross-reference to that Part F, where it was explained that the moratorium had a narrow scope.

144. It was agreed to place draft Recommendation 40, on the discretion of the liquidation authority to select an appropriate tool, either just before or directly after draft Recommendation 37.

145. *One participant* suggested to clarify that the liquidator would exercise the transfer power under the oversight of the liquidation authority. *One of the drafters* suggested to consider developing a single term for the liquidation authority and the liquidator to simplify the text.

146. It was noted that draft Recommendation 42 seemed to overlap with draft Recommendations 37 and 38 and could be merged.

147. Regarding the question whether Recommendation 39 should be kept in light of similar Recommendation 4 in Chapter 2,<sup>15</sup> *the participants* agreed that it was important to ensure the irreversibility of the outcomes of a transfer but overlap between the Chapters should be avoided.

148. *The Working Group agreed to (i) retain limited text on share deals; (ii) cross-refer to Part F in paragraph 233; (iii) place draft Recommendation 40 directly before or directly after draft Recommendation 27; (iv) streamline Recommendations 37, 38, and 42 and remove any overlap. The Drafting Committee was asked to determine which of the draft Recommendations on the irreversibility of the transfer should be kept and in which Chapter.*

(d) *Sale as a going concern: process and safeguards (Part C)*

Perimeter of the transfer, licensing and succession (C.2)

149. It was suggested to refer in paragraph 242 to the possibility of transferring only insured deposits to another entity. Different views were expressed about whether references to de-mergers and spin-offs should be kept.

Non-bank acquirers (C.3)

150. *The participants* agreed with expressing caution in the Guide about including non-bank entities in the bidding process as potential acquirers of (parts of) a non-viable bank. A distinction was made in the text between the transfer of deposits and the transfer of assets that were subject to specific licensing requirements. *Some participants* suggested to advise more strongly against non-bank acquirers, especially if deposits were to be transferred. On the other hand, it was raised that it might be unavoidable to admit non-bank entities to the bidding process in certain circumstances. It

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<sup>14</sup> See the question in the Secretariat’s Report (paragraph 125, fourth bullet point).

<sup>15</sup> See the question in the Secretariat’s Report (paragraph 125, fifth bullet point).

was also suggested to distinguish between non-bank financial institutions and non-financial corporations.

151. For the scenario in which assets would be transferred that were subject to specific licensing requirements (paragraph 248), it was suggested to emphasise the preferred solution, which would be to transfer the assets to an entity that had the required licence at the time of the bidding process.

152. It was raised that inviting non-licensed entities to the bidding process might also create competition issues. It was suggested to reflect on this during the intersessional period.

#### Disclosure of information to potential acquirers and bidding process (C.4)

153. It was discussed that time constraints might prevent the authority from conducting a due diligence process as described in paragraph 250. It was suggested to refer to possible alternative solutions that could be considered in such case.

154. Regarding criteria for the selection of the winning bid,<sup>16</sup> it was suggested to recommend that jurisdictions and/or authorities develop such criteria in secondary instruments and policy documents.

#### Valuation (C.5)

155. It was suggested to refer to an external valuation as default scenario. If that would not be possible due to the urgent circumstances, the legal framework should provide safeguards. It was suggested to emphasise that the valuation would often have to be conducted under time constraints.

156. It was agreed that a reference could be added in Chapter 6 to the least cost test that was relevant for some deposit insurers in choosing the failure management strategy, but not in the section on valuation .

#### Safeguards: creditor treatment (C.6)

157. It was suggested to clarify that, for the liquidation of non-systemic banks, possible deviations from the *pari passu* treatment of creditors should be conducive to value maximisation without harming other creditors.

158. It was suggested to add the word “unjustifiably” in accompanying draft Recommendation 47.

159. *The Drafting Committee was asked to update Part C in line with the suggestions made during the session.*

(e) *Other transfer-based tools: bridge bank and asset management company (Part D)*<sup>17</sup>

160. *The participants generally agreed with indicating in the Guide that bridge banks and AMCs were not recommended for the liquidation of non-systemic banks (while it was recognised that they could be considered for systemic scenarios). It was agreed to further emphasise the challenges of these tools. One participant suggested that the challenges might be easier overcome for bridge banks than for AMCs. Another participant noted that the power to establish bridge banks and AMCs might not be a matter of general law. One of the drafters explained that the text made a distinction between bridge banks and AMCs given that their ownership might be different.*

161. *The Working Group agreed to retain the section on bridge banks and AMCs but the Drafting Committee was asked to more clearly reflect the legal and operational challenges for the establishment and management of these entities in the text.*

<sup>16</sup> See the question in the Secretariat’s Report (paragraph 125, seventh bullet point).

<sup>17</sup> See the question in the Secretariat’s Report (paragraph 125, sixth bullet point).

(f) *Piecemeal liquidation (Part E) and Protection of the liquidation estate (Part F)*

162. The discussion focused on the question in the Secretariat's Report about the extent to which business insolvency principles could be followed in case of a piecemeal liquidation, and for which aspects bank-specific rules would instead be needed. *The Working Group* agreed that it would be important to provide guidance on this. It was suggested that the guidance should also address incompatible and inefficient aspects in business insolvency law.

163. *Several participants* mentioned examples of aspects for which bank-specific rules might be needed. For instance, a moratorium might not be applied in the same manner to banks as to other companies given the need to preserve continuity and avoid disruption. Furthermore, bank-specific guidance might be needed to allow certain contracts (e.g., service level agreements) to stay in force. Guidance on the avoidance of transactions was also considered helpful, although reservations were expressed about the proposed treatment of intra-group support agreements approved by the supervisory authority. Discretion for the liquidator in exercising avoidance powers was considered important to ensure that such power would only capture transactions that were not conducted in the ordinary course of business. *One of the drafters* added that guidance on set-off and on the final stage of the bank liquidation proceedings might also be useful.

164. *The participants* agreed that the liquidator of a bank should be able to rely on the bank's records. It was suggested to make explicit that insured depositors should be exempt from the requirement to declare claims in relation to amounts covered by deposit insurance.<sup>18</sup> It was suggested to reflect on whether the claim of the deposit insurer would be registered as a single claim or as multiple claims.

165. *The Working Group* agreed to provide bank-specific guidance on the following aspects: moratorium, avoidance, treatment of contracts, set-off, the submission and recognition of claims, and the final stage of the bank liquidation proceedings.

(g) *Limited stay on the enforcement of certain financial contracts to enable their transfer and orderly liquidation (Part G)*

166. *The Working Group* agreed to replace "individual contracts" with "individual rights and obligations" in draft Recommendation 59(d).

## **7. Chapter 7: Funding**

167. Upon invitation by the Chair, a member of the Drafting Committee introduced Chapter 7. He explained that the text had been streamlined and referred to existing international standards. Furthermore, explanations had been added regarding safeguards to the use of deposit insurance fund (DIF) resources. The Working Group was invited to express its views on (i) whether guidance should be added on the methodology for calculating the limit on the use of DIF resources, and (ii) the way in which a deposit insurer could contribute funding to a transfer of assets and liabilities.

168. Regarding question (i), *the Working Group* appreciated the text in paragraph 306 and agreed not to provide additional guidance on the calculation methodology, since the approaches differed across jurisdictions and this was a policy matter outside the scope of this project.

169. Regarding question (ii), *some participants* considered preferable for the DIF resources to be transferred directly to the acquiring bank.

170. *One participant* suggested to add in section C.3 that jurisdictions without a DIS should have funding solutions in place *ex ante*.

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<sup>18</sup> Reference is made to the discussion of Chapter 3, see [paragraph 88](#) of this Report.

171. In Part D it was suggested to add a reference to “liquidity” and to reflect on the interaction with draft Recommendations 76 and 77 on related party claims.

172. *The Working Group* generally agreed that a reference could be made in Part E to the systemic risk exception but it should not be elaborated on since it fell outside the scope of the Guide. *Some participants* suggested to delete paragraph 315. Other aspects raised included the need for adequate accountability mechanisms.

173. The discussion then turned to the box with draft Key Considerations and Recommendations. The following suggestions were made.

- To consider merging and streamlining draft Recommendations 60 and 61.
- To consider moving draft Recommendation 62 to another Chapter.
- To consider rephrasing or deleting the reference to the DIS’s subrogation rights in draft Recommendation 63 and focusing on the legislative elements needed to conduct a transfer of assets and liabilities.

174. As a general remark, *the Secretary-General* emphasised that the Legislative Guide should read as a stand-alone instrument. He explained that it was possible – and might also be useful for the reader – to cross-refer or recall related guidance in existing international instruments.

175. *The Drafting Committee* was asked to update the main text and the draft Recommendations in line with the suggestions made during the session.

## **8. Chapter 8: Creditor Hierarchy**

176. *A member of the Drafting Committee* introduced the Chapter and the main changes to Part C (Ranking of depositors) since the fourth Working Group Session. The Working Group was invited to discuss whether the boxes in paragraph 331 should be kept. Furthermore, he explained that views were welcome on the new guidance regarding (i) the position of the deposit insurer (paragraph 335), (ii) the ranking of related party deposits (paragraph 336), and (iii) the treatment of interbank deposits (paragraph 337).

177. Some discussion took place on the reference to “piecemeal” liquidation in the first sentence of paragraph 316. *One participant* appreciated the explanation in that paragraph that distribution rules in insolvency function as a yardstick for the allocation of losses during bank failure management proceedings. It was suggested to add similar wording in Chapter 1 (paragraph 5).

178. The discussion then turned to Part C on the ranking of depositors. *One participant* noted that banks’ liability structure might have an impact on the choice for depositor ranking. It was suggested to indicate that jurisdictions should make their own choice considering the liability structure of their banking sector.

179. It was agreed to delete the reference to “existing international guidance” in paragraph 329 and draft Recommendation 68.

180. It was suggested to delete the boxes in paragraph 331 while moving their contents to the main text. A suggestion was made to proceed the same way with Box 7.

181. *The Working Group* expressed support for the new guidance in paragraph 335 on the position of the deposit insurer. It was suggested to refer to the gross or net “contribution” by the deposit insurer. *One participant* suggested to explain the differences between these approaches for the calculation of the amount of funding in the payout counterfactual.

182. The Working Group generally appreciated the wording in paragraph 337 on the treatment of interbank deposits. Aspects of terminology were discussed (e.g., “interbank lending” and “interbank

deposits”) and it was suggested to examine possible economic analysis concerning the treatment of interbank deposits.

183. The discussion then turned to the box with draft Key Considerations and Recommendations. The following suggestions were made.

- To slightly amend draft Recommendation 67 by referring to the need to “clearly specify” the relative depositor ranking.
- To delete the phrase “in line with existing international guidance” in draft Recommendation 68. Different views were expressed about whether the term “should” or “may” should be used in this recommendation.
- To move the second sentence of draft Recommendation 68 to the Key Considerations.
- To remove the part on interbank deposits from draft Recommendation 69.

184. *Some participants* made suggestions to cover additional topics in Chapter 8, including the ranking of resolution financing arrangements, possible cash withdrawals following the declaration of insolvency and the possible accrual of interest during the bank liquidation proceeding.

185. *The Drafting Committee was asked to update the main text and the draft Recommendations in line with the suggestions made during the session.*

## **9. Chapter 9: Group Dimension**

186. Due to time constraints, the Working Group did not discuss draft Chapter 9.

## **10. Chapter 10: Cross-Border Aspects**

187. *A member of the Drafting Committee* explained that significant changes had been made to draft Chapter 10. The text had been streamlined and the number of Recommendations had been reduced. The Chapter covered cross-border aspects in different types of institutional models and made reference to existing guidance in the *FSB Key Attributes* and the *FSB Principles for the Cross-border Effectiveness of Resolution Actions*. The Working Group was invited to discuss, among other things, the concepts of “(group) home jurisdiction”, “host jurisdiction” and “affected jurisdiction”.<sup>19</sup>

188. *Another member of the Drafting Committee* added that the word “however” would need to be added in paragraph 391, second sentence, and that paragraph 393, which explained the structure and contents of Chapter 10, would need to be updated. She also noted that the boxes in Chapter 10 only contained draft Recommendations. Depending on the approach taken in other Chapters, the sections “Key Considerations” and “Purpose of legislative provisions” might need to be added.

189. *The Working Group* agreed with the proposal to include a general recommendation in Chapter 10 that jurisdictions should have a cross-border cooperation framework in place in line with the FSB framework and to focus on specificities in the context of bank liquidation.<sup>20</sup>

190. *The Working Group* agreed that Chapter 10 should provide guidance on how the legal framework could enable the authorities to effectively cooperate across borders considering that jurisdictions might have different institutional models. Support was also expressed for covering in Chapter 10 the cooperation between and with deposit insurers of different jurisdictions. Such guidance should be aligned with and build upon the *IADI Core Principles*.

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<sup>19</sup> See the question in the Secretariat’s Report (paragraph 136, second bullet point).

<sup>20</sup> See the question in the Secretariat’s Report (paragraph 136, first bullet point).

191. It was suggested to add a reference to institution-specific cooperation agreements and memoranda of understanding between authorities in section B.6.

192. It was agreed to verify whether the terms “(group) home jurisdiction” and “host jurisdiction” had been used in a consistent manner in Chapter 10 and considering the definitions in the Glossary. *One of the drafters* explained that “host jurisdiction” could either be given a broad or a narrow meaning. In the latter case, the term “affected jurisdiction” would need to be used in addition. *Several participants* expressed preference for distinguishing between “host jurisdiction” and “affected jurisdiction”. *One participant* suggested using “foreign jurisdiction”.

193. A suggestion was made to delete paragraph 421 and draft Recommendation 108(b). *One of the drafters* proposed keeping these parts, explaining that they focused on procedural consolidation.

194. *The Working Group invited the Drafting Committee to reflect on these suggestions and update Chapter 10 accordingly.*

#### **b) Other matters identified by the Secretariat**

195. *The Chair* indicated that the Working Group was invited to express its views on the title of the Legislative Guide, which could be the “UNIDROIT Legislative Guide on Bank Liquidation” or the “UNIDROIT Legislative Guide on Effective Bank Liquidation Regimes”. She proposed discussing this during the next Working Group session.

196. *The Secretary-General* added that the Working Group could propose a title for the future instrument, but that this would ultimately be determined by UNIDROIT’s Governing Council.

#### **Item 6: Organisation of future work**

197. *A member of the Secretariat* indicated that a sixth Working Group session would be organised in the first quarter of 2024. *The Secretariat* subsequently confirmed that the sixth session would be held at the premises of UNIDROIT in Rome between 4 and 6 March (inclusive) 2024.

198. As a next step, the draft Legislative Guide would be shared with the UNIDROIT Governing Council for its 103<sup>rd</sup> session in May 2024, with the proposal to commence a targeted consultation. It was anticipated that the Working Group would meet for a final session after the consultation period lapsed, to address the feedback received during the consultation as appropriate. The final draft Legislative Guide would then be submitted to UNIDROIT’s Governing Council for approval in 2025.

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

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

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

**ANNEXE I****LIST OF PARTICIPANTS****MEMBERS**

Ms Stefania BARIATTI <i>Chair</i>	Professor University of Milan
Ms Anna GELPERN	Professor Georgetown Law
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 Warwick
Ms Janis SARRA	Professor University of British Columbia
Mr Reto SCHILTKNECHT <i>(excused)</i>	Doctor of Laws (LL.D.), Attorney-at-Law and Research Associate (Switzerland)

**INSTITUTIONAL OBSERVERS**

AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (APRA)	Mr Zachary LOW Senior Analyst - Resolution
	Ms Kate FARRELL
BANCA D'ITALIA	Ms Alessandra DE ALDISIO Director, Regulatory and Macro-prudential Analysis Directorate
	Mr Romualdo CANINI Expert, Banking and Financial Supervision

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	Mr Cristiano MARTINEZ Lawyer, Legal Service
BANCO DE ESPAÑA	Ms Lucia PIAZZA Head of Unit, Legal Department
BANK OF ENGLAND	Ms Clare MERRIFILED Senior Legal Counsel, Financial Stability Division, Legal Directorate
	Mr Jak YOGESWARAN
BANQUE DE FRANCE / ACPR	Ms Elodie BATAILLE Senior Resolution Expert, Resolution Directorate
	Ms Rania KAHLOUL
BANK OF GHANA	Ms Elsie ADDO AWADZI Second Deputy Governor
BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGS-AUFSICHT (BaFin)	Ms Anne SCHWALL Lawyer
	Ms Nicole STEPHAN Lawyer
CENTRAL BANK OF ARGENTINA	Ms Rosalina DIAZ Principal Manager of Specialised Supervision
	Ms Valeria FORMATTO Principal Analyst, Legal Research Department
	Mr Cristian Eduardo PUJOL Legal Advisory Manager Operations, Regulations and Supervision
	Ms Cecilia DACAL Deputy Manager Legal Advice in Regulation
	Ms Maria Eva COVINO Deputy Manager Legal Advice in Operations
CENTRAL BANK OF BRAZIL	Ms Vivian GRASSI SAMPAIO Deputy-Head, Department of Resolution and Sanctioning Action
CENTRAL BANK OF PARAGUAY (BCP)	Ms Irene Cristina ESCRIBÁ SAKODA Head of the Legal Department
CHINA DEPOSIT INSURANCE CORPORATION	Ms ZHANG Shaohua Vice President



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	Ms GAO Qianqian Deputy Director, Legal Affairs Department
	Mr HUANG Jiansheng Manager, Legal Affairs Department
DEPOSIT INSURANCE CORPORATION OF JAPAN (DICJ)	Mr Hidenori MITSUI Governor
	Mr Ryuichi SHOGAN Deputy Governor
	Mr Hidemitsu OTSUKA Deputy Governor
DE NEDERLANDSCHE BANK	Ms Yael DIAMANT Senior Legal Counsel, Legal Services
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (EBRD)	Ms Catherine BRIDGE ZOLLER Senior Counsel
EUROPEAN BANKING INSTITUTE (EBI)	Mr Christos GORTSOS President of the Academic Board
	Ms Juana PULGAR EZQUERRA Professor Universidad Complutense Madrid Justinian
EUROPEAN CENTRAL BANK (ECB)	Mr Asen LEFTEROV Senior Legal Counsel, Legal Services
EUROPEAN UNIVERSITY INSTITUTE	Mr Nicola COSTA Florence School of Banking and Finance
FINANCIAL SERVICES AGENCY OF JAPAN (J-FSA)	Mr Tomoaki HAYASHI Deputy Division Chief, Recovery and Resolution Planning (RRP) Office
	Mr Takuma HISANAGA Director, Deposit Insurance and Resolution Framework Policy Office
	Mr Masakazu KUMAKURA Deputy Director, RRP office
	Mr Yunosuke NAKAGO Deputy Director, RRP office
	Mr Yoshito ATSUMI Deputy Director, RRP office
	Mr Ikuo KUMAGAI Deputy Director, RRP office

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FINMA (SWITZERLAND)	Ms Katharina BUTT Crisis Management and Legal Expertise Recovery and Resolution Division
FONDO DE GARANTÍA DE DEPÓSITOS EN ENTIDADES DE CRÉDITO (FGD) SPAIN	Mr José María FERNÁNDEZ REAL Director, International Affairs and Policy  Ms Ana LILLO CERVANTES Director, Legal Unit  Ms María Luisa MARCILLA ALCONERO Senior Expert, Regulatory International Cooperation
FONDO DE GARANTÍAS DE INSTITUCIONES FINANCIERAS (Fogafín) COLOMBIA	Ms María DEL PILAR GALINDO VERGARA Deputy Director, Resolution Mechanisms  Ms Amanda GARCÍA Head of Resolution and Liquidation Department  Ms Carolina ROJAS Head of Legal Department
HONG KONG MONETARY AUTHORITY	Ms Olivia CHENG Senior Manager, Banking Review and Development Unit  Ms Amelia KHOO
INTERNATIONAL ASSOCIATION OF DEPOSIT INSURERS (IADI)	Mr Bert VAN ROOSEBEKE Senior Policy and Research Advisor
INTERNATIONAL INSOLVENCY INSTITUTE ( <i>excused</i> )	Mr Stephan MADAUS Professor Martin Luther University
INTERNATIONAL MONETARY FUND (IMF)	Mr Alessandro GULLO Assistant General Counsel Legal Department  Mr Ender EMRE Senior Counsel Legal Department
ISTITUTO PER LA VIGILANZA SULLE ASSICURAZIONI (IVASS)	Mr Simone CASTROVINCI ZENNA Lawyer
MONETARY AUTHORITY OF SINGAPORE (MAS)	Ms Amanda GOH Assistant General Counsel  Ms Priscilla SHEN Senior Legal Counsel

NATIONAL BANK OF BELGIUM (NBB) / BANQUE NATIONALE DE BELGIQUE	Mr Thomas HÜRNER Legal Advisor Legal Department
NATIONAL ADMINISTRATION OF FINANCIAL REGULATION (NAFR) CHINA	Ms PANG Luming Director, Legal Department
NIGERIA DEPOSIT INSURANCE CORPORATION (NDIC)	Mr Mohammed M. LAWAL Assistant Director Insurance & Surveillance Department
PEOPLE'S BANK OF CHINA	Ms JING Wei Director, Legal Department  Ms CHENG Junxiu Section Chief, Legal Department
RESERVE BANK OF INDIA (RBI)	Mr Deepak GOGIA Deputy General Manager
SINGLE RESOLUTION BOARD (SRB)	Mr Karl-Philipp WOJCIK General Counsel  Ms Ilinca FILIPESCU Senior Policy Expert  Mr Joan RIUS Legal Expert
SUPERINTENDENCIA FINANCIERA DE COLOMBIA (SFC)	Mr Santiago DÍAZ PATIÑO Coordinator, Group of resolution mechanisms and plans
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)	Ms Samira MUSAYEVA Legal Officer Secretary, Working Group V (Insolvency Law) International Trade Law Division  Ms Maria-Angeliki GIANNAKOU Associate Legal Officer, International Trade Law Division
WORLD BANK GROUP ( <i>excused</i> )	Mr Danilo PALERMO Senior Financial Sector Specialist

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**INDIVIDUAL OBSERVERS**

Mr Sumant BATRA	President Insolvency Law Academy (India)
-----------------	---

Mr Hideki KANDA	Professor, Gakushuin University Member UNIDROIT Governing Council
Mr Hossein NABILOU	Assistant Professor University of Amsterdam
Ms Kateryna YASHCHENKO	Ph.D. candidate, National University of Kyiv- Mohyla Acamdy; Associate Counsel, EBRD

\* \* \* \*

### **BIS FINANCIAL STABILITY INSTITUTE (FSI)**

Mr Rastko VRBASKI	Senior Advisor
Ms Ruth WALTERS	Senior Advisor

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### **UNIDROIT SECRETARIAT**

Mr Ignacio TIRADO	Secretary-General
Ms Anna VENEZIANO	Deputy Secretary-General
Ms Myrte THIJSEN	Legal Officer
Mr David RAMOS MUÑOZ	Associate Professor, University Carlos III of Madrid, <i>Advisor to the UNIDROIT Secretariat</i>
Mr Marco BODELLINI	Associate Lecturer, Queen Mary University of London, <i>Advisor to the UNIDROIT Secretariat</i>
Mr Iacopo DONATI	UNIDROIT – Bank of Italy Chair Holder
Mr Shuai GUO	Assistant Professor, China University of Political Science and Law, <i>Consultant to the Secretariat</i>
Ms Xin ZHANG	<i>Intern</i>

**ANNEXE 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 fourth session (Study LXXXIV – W.G. 4 - Doc. 5)
4. Update on intersessional work and developments since the fourth Working Group session
5. Consideration of work in progress
  - (a) Master Copy of the Draft Guide
  - (b) Other matters identified by the Secretariat
6. Organisation of future work
7. Any other business
8. Closing of the session