



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

---

**EN**

**UNIDROIT Working Group on Bank  
Insolvency**

***Sixth session (hybrid)***  
**Rome, 4 - 6 March 2024**

UNIDROIT 2024  
Study LXXXIV – W.G. 6 – Doc. 4  
Non-confidential version  
English only  
April 2024

**SUMMARY REPORT**  
**OF THE SIXTH SESSION**  
**(4 - 6 March 2024)**

**TABLE OF CONTENTS**

<b>Item 1:</b>	<b>Opening of the session and welcome</b>	<b>3</b>
<b>Item 2:</b>	<b>Adoption of the agenda and organisation of the session</b>	<b>3</b>
<b>Item 3:</b>	<b>Adoption of the Summary Report of the fifth session</b>	<b>3</b>
<b>Item 4:</b>	<b>Update on intersessional work and developments since the fifth Working Group session</b>	<b>3</b>
<b>Item 5:</b>	<b>Consideration of work in progress</b>	<b>3</b>
	a) Master Copy	3
	b) Other matters identified by the Secretariat	25
<b>Item 6:</b>	<b>Organisation of future work</b>	<b>25</b>
<b>Items 7 and 8:</b>	<b>Any other business. Closing of the session</b>	<b>26</b>
<b>Annexe I</b>	<b>List of participants</b>	<b>27</b>
<b>Annexe II</b>	<b>Draft agenda</b>	<b>33</b>

1. The sixth session of the Working Group on Bank Insolvency (“the Working Group”) took place on 4, 5, and 6 March 2024 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 ten members and 34 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.

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

4. *The Chair* introduced the draft agenda and invited a member of the UNIDROIT Secretariat to introduce the organisation of the session. It was proposed to discuss the draft chapters of the Legislative Guide in chronological order but starting with Chapter 4.

5. *The Working Group* adopted the draft agenda ([UNIDROIT 2024 – Study LXXXIV – W.G. 6 – Doc. 1](#), available in [Annexe II](#)) and agreed with the proposed organisation of the session.

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

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

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

7. Upon invitation by the Chair, a member of the UNIDROIT Secretariat updated the Working Group on the intersessional work since the fifth session. She explained that the Drafting Committee had revised the draft chapters of the Legislative Guide in line with the outcomes from the previous session. The Drafting Committee had had three virtual meetings, after which it had worked in teams on the draft chapters. The Secretariat had consolidated the draft chapters into an updated version of the Legislative Guide, which had been submitted to the Working Group for comments in February 2024. The comments received by the Secretariat were organised into a document (UNIDROIT 2024 – Study LXXXIV – W.G. 6 – Doc. 3 (confidential)) that had been distributed to the Working Group in an anonymised format for discussion during this session.

8. Some comments had already been addressed by the Secretariat prior to the sixth session (indicated by the light-grey shading)<sup>1</sup> whilst others were left to be discussed by the Working Group (indicated with no shading). It was agreed to discuss the “open” comments individually, by chapter and then paragraph number.

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

##### **a) Master Copy**

9. A member of the UNIDROIT Secretariat directed the group to the section marked “General Comments” in the overview of comments received during the Working Group consultation (UNIDROIT

---

<sup>1</sup> The redline version of the draft Legislative Guide (UNIDROIT 2024 – Study LXXXIV – W.G. 6 – Doc. 2 (confidential)) that had been distributed to the Working Group showed the changes that had been made by the Secretariat following the Working Group consultation.

2024 – Study LXXXIV – W.G. 6 – Doc. 3). Those comments were applicable to the draft Guide as a whole, not to any particular chapter specifically, and should thus be borne in mind throughout the session. *The Chair* proposed discussing the General Comments in more detail, if needed, at the end of the session. She invited the relevant members of the Drafting Committee to introduce the draft Chapters of the Legislative Guide.

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

10. In introducing Chapter 4, *a member of the Drafting Committee* noted that since the last Working Group session, several changes had been made. For instance, the difference between “liquidation plan” and “contingency plan” had been emphasised by inserting a new definition into the Glossary, and paragraph 174 had been updated to reflect the discussion during the previous session concerning prospective liquidators.

11. Reviewing the comments, he noted that there were two main points for discussion: (i) the references to “taking control over the bank” in the phase preceding liquidation, and (ii) the possibility to delay disclosure of information that a bank was approaching non-viability.

12. Noting these main points, the drafters were invited by *the Chair* to address each unshaded comment in *UNIDROIT 2024 – Study LXXXIV – W.G. 6 – Doc. 3* sequentially.

##### *Paragraph 168*

13. On this paragraph, a comment regarded the distinction between “liquidation plans” and “resolution plans”. *A member of the UNIDROIT Secretariat* added that some comments had also been received concerning the terms “contingency plan” and “liquidation plan” in the Glossary.

14. *The drafters* explained that “liquidation plans” were meant to refer to plans prepared on a regular basis, similar to “resolution plans” but with a different envisaged strategy, while a “contingency plan” referred to a plan developed to prepare and facilitate a bank’s liquidation in the run-up to its non-viability.

15. *The Working Group* agreed that the difference between the three types of plans was well-understood, but that a rewording of the main text would be beneficial for clarity. The Drafting Committee was also asked to reconsider the use of the term “liquidation plan” since it could be confused with liquidation plans under general insolvency law.

16. Separately, the point was raised that overlap with existing standards should be avoided. Therefore, the Guide should not express a position about whether the development of liquidation plans should be mandatory or optional.

##### *Paragraph 173*

17. In this paragraph, the terminology “*taking control of the bank*” was used. *The majority of the Working Group* agreed that this terminology should be changed.

18. It was agreed to refer in paragraph 173 to a legal mechanism that would allow a banking authority to cooperate with the bank in the preparatory phase and take measures if such cooperation did not run smoothly, referring as an example to the appointment of a temporary administrator that would cooperate with or replace the bank’s management. Furthermore, it was proposed to refer to the need to prevent asset stripping, as had been done in paragraph 178 for court-based models, and to add a reference to *Basel Core Principle 11*.

19. *The Working Group* expressed support for a proposal by *a member of the UNIDROIT Secretariat* to indicate more generally in Recommendation 38 that the legal framework should provide a mechanism that enabled a banking authority to take measures prior to bank liquidation proceedings

to facilitate preparation and preserve assets. The main text could then describe what those measures might entail.

*Paragraph 179*

20. *One of the drafters* suggested substituting the term “failing” with the term “non-viable” to be consistent with the terminology used in other parts of the Guide.

21. It was explained that the drafters in this paragraph contemplated the possibility of delaying the disclosure of information concerning the non-viability of banks that were issuers of securities listed or traded on regulated markets or multilateral trading facilities.

22. On this point, there were divergent opinions. *The drafters* suggested clarifying in the text that there were different procedural options: the issuer could request the securities regulator to authorise a delay in the disclosure of such information, or the liquidation authority could make such request if the issuer failed to do so. *Some participants* were in favour of an exemption from public disclosure *ex lege*. *Other participants* pointed suggested advising in the Guide that cooperation should take place between the bank, the banking authorities, and the securities regulator. Other suggestions made were to (i) clarify the type of information that would be subject to a delay in disclosure, and (ii) refer to possible disclosure requirements under other applicable laws.

23. *The Drafting Committee was invited to update the text of paragraph 179 considering the suggestions made by Working Group participants.*

24. Some discussion took place on whether the appointment of a person who could be involved in the preparation for liquidation, such as a prospective liquidator or temporary administrator, should be disclosed. It was discussed that it might be challenging to provide guidance on the possible public disclosure of such appointments, as well as the possible disclosure vis-à-vis contracting parties of the bank, since these aspects might be subject to existing rules in jurisdictions’ broader legal framework. *The Drafting Committee was provided with a mandate to reflect on whether any guidance should be added concerning (i) the possible disclosure of the appointment of a provisional liquidator or temporary administrator, and (ii) the interplay between the appointment of such person, on the one hand, and ipso facto clauses, on the other hand.*

25. A suggestion was made to distinguish between powers in the preparatory phase that would be expected to be available in an administrative model *versus* a court-based model.

*Paragraph 188*

26. It was agreed to accept the drafting suggestion for this paragraph, namely to add the phrase “*or request the supervisory authority to gather relevant information*” to the last sentence. The accompanying Recommendation would need to be updated accordingly.

*Paragraph 190*

27. It was agreed to accept the suggestion for this paragraph, namely to indicate that the legal framework should not constrain the ability of the liquidator to retain the staff of the bank that is deemed necessary for the conduct of the liquidation process.

*Key Consideration 1*

28. There was a proposal to add the phrase “*and the successful implementation of the liquidation strategy*”. It was agreed not to take up this drafting suggestion since reference was already made to the “*effective implementation of a transfer strategy*” in the next sentence. Furthermore, it was agreed to slightly alter the wording of Key Consideration 1 to avoid duplication with Recommendation 37.

29. *One of the participants* questioned the value of the Key Considerations in general, but this concern was not shared by *the Working Group*. *The UNIDROIT Secretary-General* explained that it was

standard methodology to include Key Considerations to summarise the discussions in the main text in support of the subsequent Recommendations and to allow the boxes with Key Considerations and Recommendations to be read as standalone guidance.

*Recommendation 37*

30. It was agreed to refer to the need for coordination with the resolution authority, which was relevant for jurisdictions with dual-track regimes.

*Recommendation 38*

31. It was agreed that the Recommendation would be rephrased in line with agreed revisions in the main text concerning the issue of “*taking control of the bank*”.

**Chapter 5: Grounds for Opening Bank Liquidation Proceedings**

32. *Two members of the Drafting Committee* introduced the chapter, which had been updated following the fifth Working Group session. Furthermore, most comments that had been received during the Working Group consultation had already been addressed.

33. In Chapter 5, *the drafters* advised an integrated approach with both financial and non-financial grounds for opening bank liquidation proceedings. The chapter contained a short discussion about the “negative” condition<sup>2</sup> and addressed the relationship between licence revocation and the opening of liquidation proceedings. A preference was expressed in the chapter for including the revocation of the banking licence as one of the grounds to open a liquidation proceeding, even though the other option – licence revocation as a direct consequence of the initiation of the liquidation procedure – was also discussed. *The drafters* had rephrased the part on possible exceptional cases in which the revocation of a bank’s licence should not necessarily lead to the initiation of liquidation, in paragraph 212 and footnote 118. Finally, for dual-track regimes the chapter recommended aligning the triggers for resolution and liquidation.

34. Turning to a general comment about Chapter 5 as a whole, *one of the drafters* acknowledged that this chapter was particularly relevant for dual-track regimes because for single-track regimes the *Financial Stability Board’s Key Attributes of Effective Resolution Regimes for Financial Institutions* (“FSB Key Attributes”) would inform the grounds for the initiation of failure management proceedings. It was agreed to clarify this at the beginning of the Chapter.

*Paragraph 197*

35. Different views were expressed within the Working Group about the reference in this paragraph to the possible access by banks to central bank liquidity. It was agreed to make the following changes to the text: (i) indicating that banks “may” have access to central bank liquidity “subject to the conditions required by the applicable framework” and on a “discretionary basis”, and (ii) deleting the wording “if everything else fails”.

36. In the sentence beginning with “*Conversely, when the bank’s failure [...]*”, it was agreed to replace “*can be foreseen with high degree of probability*” with “*is likely*”.

*Paragraph 198*

37. *One participant* suggested referring not only to the book value but also to the market value in this paragraph. However, *others* considered that the notion of book value in the first sentence was correct since it referred to criteria for the traditional insolvency ground of balance-sheet insolvency.

---

<sup>2</sup> In order to commence failure management proceedings, not only should a bank be no longer viable or likely to be no longer viable, it should also have “*no reasonable prospect of becoming viable*”.

*Paragraph 205*

38. There was a discussion on the final two sentences of this paragraph, which discussed challenges in proving that the “negative” condition was met. It was noted that the legal risks referred to here were relevant irrespective of whether the negative condition was explicitly or implicitly included in the legal framework. *The Drafting Committee was asked to revise the text accordingly.*

*Paragraph 212*

39. It was noted by *the drafters* that this paragraph and footnote 118 concerned an exceptional case where the banking licence may have been revoked but the entity was not liquidated. *Several participants* expressed support for the current text. *One participant* suggested making it clearer that these were exceptional circumstances and that the entity would continue not as a bank, but as another type of company. *It was left to the Drafting Committee to consider editing the wording of this paragraph and/or the footnote.*

40. *One participant* proposed that it might be made clearer that the relevant authority should be empowered to open a bank liquidation proceeding in case a bank’s licence was withdrawn due to serious wrongdoing. *The Chair deemed this to be sufficiently clear but left it to the Drafting Committee to consider whether amendments to the text and/or any Recommendation were needed.*

*Paragraphs 214-216*

41. Different views were expressed about licence withdrawal as trigger for liquidation proceedings. It was noted that paragraphs 214 and 216 should be read in their context; they were part of a subsection that specifically dealt with situations in which licence revocation and liquidation proceedings were not articulated as consecutive steps, but as parallel proceedings by different authorities. In such cases, it was advisable to include licence revocation as a ground for opening liquidation proceedings to avoid inconsistent assessments that would lead to “limbo” situations.

42. It was also discussed that, if the grounds for licence revocation and for opening bank liquidation proceedings were aligned, the actual revocation of the licence could follow later. However, the risk of inconsistent assessments by different authorities should be avoided. *The Drafting Committee was asked to revise the text of paragraph 214 on this basis.*

43. Separately, it was suggested to add in the text and in Recommendation 42 that the revocation of the licence might need to be postponed until a transfer strategy had been completed, as had been recognised in Chapter 6. *The drafters agreed to add a reference to the possible postponement of the effects of the revocation decision to facilitate a transfer strategy.*

*Paragraph 219*

44. It was agreed not to take up the proposal to modify the text, since it would fall outside the scope of this Guide. The current drafting of this paragraph was supported by *the Working Group*.

*Key Consideration 3*

45. *The Working Group* discussed whether to keep this Key Consideration, modify it, or delete it. *One of the drafters* proposed being more neutral about the preferred solution, by referring to licence revocation both as a ground for, or as a necessary consequence of, bank liquidation proceedings. Another suggestion was to reformulate the Key Consideration to clarify that it focused on scenarios in which licence revocation and the opening of bank liquidation proceedings were parallel procedures, and that the risk of conflicting assessments should be avoided.

46. *The Working Group agreed to keep Key Consideration 3 and left it to the Drafting Committee to revisit the wording.*

*Recommendation 42*

47. It was agreed to align the wording of Recommendation 42 with the wording in paragraph 214, which indicated that the grounds for opening bank liquidation proceedings should be aligned with the existing triggers for licence revocation.

*Recommendations 42-43*

48. Since avoiding “limbo” situations was mentioned in Key Consideration 2 as a rationale for the Recommendations, *it was agreed not to refer to “limbo” situations in the Recommendations.*

**Chapter 6: Liquidation Tools**

49. *A member of the Drafting Committee* recalled that Chapter 6 dealt with a range of issues. *The drafters* had tried to integrate all the comments that had found consensus in the Working Group. Since the previous Working Group session, the chapter had been streamlined. *The drafters* had also updated the sequence of the Recommendations in Part C, as had been agreed in the previous session. In Part D, the text had been revised with respect to the perimeter of the transfer; more cautious language had been used in relation to non-bank acquirers; and amendments had been made to the text on due diligence, valuation, and creditor safeguards. The Part on bridge banks and asset management companies had been kept but the general message was cautionary rather than promoting these tools. Substantive additions had also been made in Parts F and G, concerning piecemeal liquidation and the preservation of the liquidation estate.

*General comments*

50. A general comment asking to explain how the distinction between single-track and dual-track regimes affected the analysis in this chapter was acknowledged by *the drafters*. They agreed to develop new text explaining this to the reader.

51. Another general suggestion was to elaborate more on civil and commercial law matters that might arise in the context of transfers. It was suggested to analyse how such aspects were dealt with in existing Purchase and Assumption Agreements.

52. *The drafters* agreed that guidance could be added on the legal form of the transfer, i.e., indicating that the transfer could be effected by means of an administrative decision or a court order, often accompanied by a contract. They noted that more reflection might be needed regarding the other suggestions. *The UNIDROIT Secretary-General* supported the proposal to provide additional guidance on private law aspects of the transfer since these were not covered by existing standards and private law was UNIDROIT’s area of strength. *The drafters* agreed that this could be done in the next intersessional period or after benefiting from input during the envisaged consultation.

*Paragraph 221*

53. On this paragraph there was a comment on the need to clarify that a “sale as a going concern” in bank liquidation was different as compared to business insolvency. *This was agreed to be clarified in the drafting.*

*Paragraph 227*

54. In reference to the comment made on this paragraph, *several participants* expressed support for the current text. *A drafter* explained that the sentence on a bank’s deposit base often being valued at a premium by acquirers merely intended to be descriptive, not prescriptive.

*Paragraph 234*



55. A suggestion was made to insert a footnote referring to a particular jurisdiction's practice in this paragraph. *One of the drafters* cautioned against adding such a footnote since it could be confused as advocating this solution for every jurisdiction. *The Chair* concurred.

*Paragraph 235*

56. On this paragraph there were several drafting suggestions. It was agreed not to take up the suggestion to replace the term "bank failure management regimes" with "bank liquidation regimes", but to consider the remainder of the drafting suggestions.

*Paragraph 236*

57. It was agreed to revise the text for readability, along the lines that share deals preserved the legal entity while a transfer of assets and liabilities preserved only certain operations.

*Paragraphs 238 to 241*

58. These paragraphs explained why a transfer tool should be part of the liquidation framework, even if already present in a jurisdiction's bank resolution framework. Several comments were made about the reference to some of the liquidation and resolution objectives in paragraph 238. *Several participants* suggested removing paragraphs 238 to 241 completely, or heavily streamlining them.

59. With regard to the comment on paragraph 241 to specify to what extent the guidance in Chapter 6 was relevant for single-track and dual-track regimes, *the drafters* agreed to update the text. Specifically, it would be recognised that transfer powers were already part of single-track regimes pursuant to the *FSB Key Attributes*; however, guidance might still be useful for aspects not covered by said *Key Attributes*.

60. *A member of the UNIDROIT Secretariat* added that there was also a suggestion to have a general paragraph in Chapter 1 to explain the extent to which the guidance in various chapters was relevant for single-track and dual-track regimes.

61. *The drafters agreed to streamline paragraphs 238 to 241, deleting aspects relating to the objectives of liquidation and elaborating instead on the relevance of the guidance on tools for jurisdictions with single-track and dual-track regimes.*

*Recommendation 46*

62. Following the comment made on this Recommendation, it was suggested to refer to "ensuring access to deposits" since this was one of the driving reasons for implementing a transfer quickly (because of the time pressure of deposit insurance payout). *The drafters agreed to refer to uninterrupted access to deposits in this Recommendation.*

*Part D (paragraph 248 et seq.)*

63. The first comment received on this Part, regarding the legal form and mechanisms of the transfer, had already been discussed as part of the general comments received on Chapter 6 (see above). *The drafters agreed that they could elaborate on this.*

*Paragraph 250*

64. *One of the drafters* explained that the main message contained in this paragraph was that there should be coordination between the liquidation authority and/or the liquidator and the banking supervisor, so that the process by which the licence may be withdrawn would not unduly hinder the transfer. He indicated that a reference to possible other authorisations could be added.

65. *It was agreed to refer generally to the possible need for other authorisations and the need for cooperation in such case.*

*Paragraph 254*

66. *One participant* suggested to provide guidance on the treatment of contingent liabilities, identifying possible tensions between different laws and litigation risks.

67. Two suggestions were subsequently made: (i) to add that jurisdictions should consider whether, based on their broader legal framework, contingent liabilities should be explicitly excluded in the transfer act, or whether these could be considered not transferred if not mentioned in the perimeter to be transferred; and (ii) to clarify the concept of “contingent liabilities”. *The Drafting Committee was asked to reflect on these suggestions.*

*Paragraph 256*

68. This paragraph had been deleted following a comment during the Working Group consultation. However, *one of the drafters* suggested retaining a reference that guarantees, risk-sharing and loss-sharing agreements might be concluded – adding a cross-reference to Chapter 7 – since this was related to the determination of the perimeter of assets and liabilities to be transferred.

*Paragraph 259*

69. Changes to this paragraph had been made in line with the comments received prior to the sixth Working Group session. *One of the drafters* asked for confirmation that the second and third sentences should be kept. *The Chair* expressed the view that they should be kept, and no objections were made.

70. Separately, *a participant* suggested to consider whether guidance should be added on acquirers in case assets were sold in the context of a piecemeal liquidation, rather than a sale as a going concern. *One of the drafters* indicated that this could be added in the part on piecemeal liquidation, which already cross-referenced the part on the transfer tool. He welcomed concrete drafting suggestions.

*Paragraphs 260-263*

71. Following the comment made on this subsection, it was agreed that a sentence could be included at the beginning of paragraph 260 along the lines that the liquidation authority or liquidator should be able to market the bank before or after the initiation of the liquidation proceeding, and that this may require, or should include, the possibility of disclosing a bank’s information, with a cross-reference to Chapter 4.

*Paragraphs 264-267*

72. Two comments had been made on the subsection on valuation. It was agreed to accept the first suggestion, which was to replace “legal requirement” with “practice” in paragraph 265 for consistency reasons.

73. The second comment suggested that additional text should be added in paragraph 267 on the relevance of a valuation. *One of the drafters* agreed with the suggestion in principle, but proposed to add such language in paragraph 265 since the latter already discussed advantages of a valuation.

74. Ultimately, it was agreed to accept the second comment but to replace the proposed language on a “minimum bid” with more generic language, e.g., “to inform the internal process of the authority for price-setting purposes” or something similar. It was also agreed to connect the subsection on valuation with the next subsection on creditor safeguards by means of a cross-reference.

75. *A participant* suggested adding in a footnote that the liquidation authority should be able to consider the price offered for the assets and liabilities of the failing bank, but also other factors for the effective achievement of the liquidation objectives. *The Chair* considered that this already

followed from the text. *One of the drafters* suggested that, if need be, text could be added to paragraph 263, which discussed the selection of the winning bid.

*Paragraphs 268-271*

76. Regarding the suggestion to clarify that the counterfactual of the safeguard discussed in this subsection was piecemeal liquidation, *one of the drafters* noted that this already clearly followed from the text.

77. *The Working Group* agreed to add a reference to depositor protection in paragraph 270, e.g., by adding in the final sentence, “*is conducive to depositor protection or value maximisation*”.

78. It was noted by *a participant* that under the *FSB Key Attributes*, there were two grounds for possible deviations from the *pari passu* treatment of creditors: one was value maximisation, and the other was financial stability. These grounds would be part of the failure management framework in single-track regimes. It was agreed to limit the text here to value maximisation and depositor protection.

*Paragraphs 273-279*

79. Regarding the comment on footnote 136, which referred to a specific jurisdiction, *one of the drafters* suggested to add context on that jurisdiction’s broader framework.

80. *The Working Group* expressed divergent views on the section on bridge banks and asset management companies (e.g., whether to further streamline the text). *The Drafting Committee* was asked to consider the various views that had been expressed when reviewing the text.

*Recommendation 49(a)*

81. In response to the comment made on this Recommendation, *one of the drafters* suggested adding an explicit reference to licence revocation. This was not opposed.

*Recommendation 49(e)*

82. *The Working Group* agreed to keep the Recommendation while elaborating on the complexities of loss-sharing agreements and similar in the main text (paragraph 256). *The Drafting Committee* was asked to update the texts in line with the comment.

*Part F (paragraph 280 et seq.)*

83. A general suggestion for this Part was to add guidance on the legal consequences of the initiation of liquidation on a bank’s corporate bodies. *One of the drafters* indicated that such guidance could be added but that it seemed more appropriate to do so in another chapter. *The decision* was left with the *Drafting Committee*.

*Paragraph 280*

84. *The Working Group* agreed to delete the first sentence of this paragraph.

*Paragraphs 282–283*

85. *The Working Group* agreed to retain these paragraphs as they described what the general powers of the liquidator should be in connection with the preservation of assets. The sentence on liquidation expenses being borne by the estate would be deleted since it was covered elsewhere.

86. It was agreed to keep the language “*as soon as possible*” in paragraph 283.

*Paragraph 284*

87. *A drafter proposed that a sentence could be included along the lines that jurisdictions should consider whether the legal framework should provide rules to protect creditors and the liquidator from unrecorded side agreements or agreements that did not fulfil certain formality requirements. The spirit of the comment on this paragraph was accepted and the drafters would update the text.*

*Paragraph 285*

88. *It was suggested to eliminate the reference to “jurisdictions without a DIS” since advance payments to uninsured depositors could be relevant also in jurisdictions with a DIS. It was left to the Drafting Committee to update the text.*

*Recommendation 52*

89. *The comment that this Recommendation should explicitly refer to piecemeal liquidation was noted but not considered a major point since Recommendations 52-54 were all about piecemeal liquidation.*

*Recommendation 54*

90. *It was agreed to update this Recommendation in line with the revisions in paragraph 285, i.e., it should not only refer to jurisdictions without a DIS.*

*Paragraph 286*

91. *A comment was made that the phrase “bank liquidation rules should draw from general insolvency rules that seek to preserve the estate” seemed to apply only to jurisdictions with a *lex specialis* on bank liquidation. It was agreed that the text could be revised to clarify that the “incorporation” of principles of general insolvency law could be done in different ways, depending on the type of bank liquidation framework.*

*Paragraph 289 and Recommendation 56(a)*

92. *Different views were expressed on this paragraph and the accompanying Recommendation, which concerned contract termination. Suggestions included not to recommend an automatic continuity of *all* contracts, and to make a clear distinction between the treatment of contracts in a piecemeal liquidation *versus* in a transfer (recommending the unenforceability of *ipso facto* clauses in the latter case).*

93. *In the ensuing discussion, it was emphasised that different approaches were followed across jurisdictions with respect to *ipso facto* clauses, so there was no generally applicable standard under business insolvency law that could be followed. It was discussed that, in any case, clarity for the counterparty was important. Some discussion also took place about contracts concerning deposit accounts.*

94. *Regarding the suggestion to provide guidance on damages in case of repudiation of contracts, the UNIDROIT Secretary-General proposed to follow best practices which suggested that, when a liquidator used its power to disclaim a contract, the counterclaim for damages for the early termination of the contract would be an ordinary unsecured claim.*

95. *One of the drafters concluded that the suggestions would be taken to the Drafting Committee, noting that several points had already been addressed in the text but could be clarified.*

*Paragraph 293*

96. *One of the drafters recalled that a suggestion had been made in an earlier Working Group session to add a reference to the need to exempt central bank financing from avoidance rules. However, as the comment had suggested, such financing may not be within the scope of avoidance in any case. Ultimately, it was suggested to keep a sentence saying that central bank financing was*

*not expected to be subject to avoidance rules but that jurisdictions with strict avoidance rules may consider including a safe harbour in their legal framework.*

*Part H (paragraphs 298-307)*

97. *One of the drafters* recalled the rationale for this Part of the Guide, on financial contracts. Some discussion took place on the recommended duration of the possible stay on early termination rights and close-out netting, “*e.g., not exceeding two business days*”. Ultimately, it was suggested to recognise in the text that the feasibility of such short stay depended on the efficiency of jurisdictions’ institutional and procedural arrangements – with greater challenges in a court-based system.

98. Furthermore, a suggestion was made to be less prescriptive on the power to impose a temporary stay. Finally, a concern was raised on the cross-border dimension and how the provisions that would be based on the Legislative Guide could be included in new ISDA protocols.

*Recommendation 62*

99. *A participant* commented on Recommendation 62, suggesting to provide for the possibility of a temporary stay only where it was considered necessary to facilitate the execution of a sale as a going concern. *A member of the UNIDROIT Secretariat* explained that Recommendation 62 should be read in conjunction with Recommendation 64; the power to impose a stay was therefore limited to a transfer scenario only. *It was agreed to clarify this in the text.*

**Chapter 10: Cross-Border Aspects**

100. *A member of the Drafting Committee* explained the main changes that had been made to this chapter since the previous Working Group session. It had been emphasised more that the guidance was aligned with international standards, and that concrete suggestions were provided to jurisdictions to implement an effective cross-border framework for cooperation and coordination in bank liquidation. Furthermore, the text had been streamlined where possible, and the discussion on the liquidation of cross-border groups had been moved to a separate Part at the end of the Chapter.

*Paragraph 419*

101. In response to the comments on paragraph 419, *the drafters* explained that reference was made to the need for jurisdictions to align their legal framework for cross-border cooperation with the *FSB Key Attributes* and *FSB Principles for Cross-Border Effectiveness of Resolution Actions* (“*FSB Principles*”), to ensure consistency with such standards although the chapter provided more detailed guidance on certain aspects. Furthermore, they explained that the chapter already provided guidance for jurisdictions with administrative models and court-based models.

102. *One participant* suggested considering that jurisdictions might have implemented the *FSB Key Attributes* in different ways procedurally (i.e., jurisdictions with court-based models might have different procedures in place than those with administrative models). *The drafters* welcomed input on this in order to consider this in the next round of drafting.

*Paragraph 430*

103. In response to the first comment on paragraph 430, *one of the drafters* explained that the intended meaning of the first sentence was that in jurisdictions with court-based systems, administrative authorities should be allowed to cooperate in advance since courts were generally unable to take preparatory steps prior to the opening of a liquidation proceeding. This paragraph did not discuss cooperation between courts and administrative authorities. If the Working Group agreed with the intent, the language could be amended to clarify this.

104. Separately, *one of the drafters* suggested referring to a court-based system or court-based process instead of the court as liquidation authority in the fourth sentence.

*Paragraph 431*

105. *The drafters* agreed to accept the suggestion made on this paragraph, which was to recognise that it may be more challenging to effectively coordinate between administrative authorities and courts. At the same time, the paragraph's message would remain that cooperation should be the general guiding principle, irrespective of the institutional model.

*Paragraphs 434-435*

106. Regarding the comment that suggested clarifying whether paragraph 435 applied to jurisdictions with administrative and/or court-based models, *the drafters* explained that the term "liquidation authority" covered both administrative liquidation authorities and courts. The guidance provided in this subsection therefore applied to jurisdictions irrespective of their institutional model.

107. *One of the drafters* explained that paragraph 434 was descriptive. She suggested slightly changing the first sentence of paragraph 435; instead of saying "*the same should apply*" which might create confusion, it could say that "*recognition of and support for foreign proceedings should be enabled in bank liquidation proceedings as well*".

108. *A participant* recalled three general points that had been raised earlier in the context of other chapters, namely to (i) clarify the applicability of the guidance to single-track/dual-track regimes, (ii) distinguish between jurisdictions with court-based and administrative models, and (iii) consider whether there were any other civil and commercial issues that ought to be discussed. He mentioned several aspects that the Working Group might wish to consider going forward.

109. *One of the drafters* explained that the aspect concerning recognition had already been addressed in paragraphs 436 to 438. *Another drafter* noted that additional elements could be added but it depended on the level of detail the Working Group wished to provide. In the ensuing discussion, it was agreed that (i) additional guidance could be provided on aspects of private international law, while taking into account existing guidance in this area and ongoing work by UNCITRAL, (ii) input could be sought from the Working Group and during the consultation on specific issues of civil and commercial law that should be addressed in this chapter.

110. Regarding branches, *one of the drafters* explained that they had taken into account that these might be dealt with differently depending on the applicable general insolvency framework, but there might be merit in adding additional explanations in this chapter.

*Recommendations 100–103*

111. A comment stated that Recommendations for court-based models were missing. *The drafters* explained that the Recommendations did not omit court-based systems or judicial authorities.

*Recommendation 100*

112. *It was agreed to delete the reference to "characteristics under this Legislative Guide" in Recommendation 100 and the accompanying main text.*

*Recommendation 101*

113. *It was agreed to add that supervisory powers could be used as long as the prudential conditions for their use were met.*

*Recommendation 102*

114. On this Recommendation, *it was agreed to move up the measure under letter (d).*

*Paragraphs 440-441*

115. A concern was raised that the initial sentence of paragraph 440 seemed an attempt to define public policy. *The drafters* explained that this had not been the intention.

116. In the ensuing discussion, *one of the drafters* proposed (i) deleting the first sentence of paragraph 440 and saying instead that the public policy safeguard should not be applied as a matter of course but only in clearly defined circumstances, followed by examples in which a refusal of recognition or support on the basis of the public policy safeguard might be justified; (ii) deleting the example about the release of a local board member in paragraph 440; and (iii) deleting the last sentence of paragraph 441.

117. Other suggestions made were to move the sentence on the survey in paragraph 441 to paragraph 440, to refer separately to issues related to financial stability and fiscal implications in paragraph 440, and to add that jurisdictions should be transparent about what they meant by public policy.

118. *The Drafting Committee would revise the text accordingly and consider merging paragraphs 440 and 441.*

*Recommendation 105(a)*

119. *It was agreed to replace "foreign creditors are not discriminated against" by wording along the lines of "creditors are not discriminated against based on their nationality, residence, or the location of their claims".*

*Part E (paragraphs 443-447)*

120. *One of the drafters* proposed to further align Recommendation 109 with Chapter 9 by (i) adding the word "procedural" in letter (c), and (ii) removing letter (e). Furthermore, a reference could be added to granting administrative authorities the right to be heard and legal standing. *It was agreed that the Drafting Committee would update the text, which would be kept for the consultation.*

**Chapter 7: Funding**

121. *Two members of the Drafting Committee* introduced Chapter 7 and the main changes that had been made since the last Working Group session. *One drafter* explained that the three main messages were that (i) the bank's own resources should be the first line of defence, (ii) beyond that, external sources of funding may be needed to facilitate a transfer strategy, and (iii) deposit insurers can play an important role in this context.

122. *One participant* considered that the chapter touched too much on policy and operational issues. He suggested streamlining the chapter, emphasising that public funding should not be available in the liquidation of a non-systemic bank, and indicating that, where a deposit insurer had a mandate broader than "paybox" based on a policy choice, the legal framework should not prevent it from extending financing in a transfer transaction.

123. *A member of the UNIDROIT Secretariat* agreed that text could be added on not using public funding, but cautioned against deleting guidance on the use of DIF resources for a transfer. *Several participants* expressed support for this chapter and the language on the possible role of the deposit insurer, which was considered sufficiently balanced and in line with the *IADI Core Principles for Effective Deposit Insurance Systems* ("IADI Core Principles").

124. In the ensuing discussion, several specific suggestions were made (e.g., to clarify the term "external funding" and recognise the diversity in institutional arrangements across jurisdictions).

*Paragraphs 329-333*

125. It was suggested that Part E could be streamlined and clarified. It was suggested to change the title, which was “public funding”, into “*backstop funding and recovery mechanisms*” or similar.

126. In response to a comment on the use of the term “industry assessments”, *one of the drafters* explained that this referred to contributions by the banking sector to fill the DIF or replenish it.

127. It was suggested to delete the first sentence of paragraph 329, and shorten the discussion about public funding for systemic cases or move it to the introduction.

*Paragraph 333*

128. *The Working Group* discussed whether to keep this paragraph. *Several participants* considered it useful to provide guidance on the possible switch from non-systemic to systemic failures, while *others* maintained that it was not appropriate for the Guide to provide guidance on criteria to determine whether a failure was systemic, or to address the systemic risk exception.

129. *Ultimately, it was left with the Drafting Committee to update Chapter 7 in line with the suggestions made.*

**Chapter 9: Group Dimension**

*Paragraph 404*

130. It was suggested to recognise in the main text and Recommendation 88 that intra-group support might not only be provided by a parent to its subsidiaries but also by other group entities or within an institutional protection scheme. *The drafters agreed to consider this during re-drafting.*

131. Furthermore, it was agreed to redraft the text and Recommendation 88 along the lines that “*In case intra-group support or related party claims are subject to subordination, any exception to these rules should be subject to strict safeguards*”.

*Paragraph 406*

132. It was agreed to clarify that the provision of post-liquidation financing by other entities of the same group might be subject to different types of approval mechanisms depending on the institutional model. Furthermore, it was agreed that the paragraph could be trimmed.

*Paragraph 415 and Recommendation 94*

133. It was agreed to integrate the comment regarding cross-guarantees between group entities and entities affiliated with the same institutional protection schemes.

*Recommendation 91*

134. It was agreed to accept the suggestions related to this Recommendation, namely to add a reference to (i) group entities that were “material” for the bank’s liquidation, and (ii) coordination with the resolution authority.

**Chapter 8: Creditor Hierarchy**

*Paragraph 344*

135. It was agreed that a reference to depositor protection would be added, in line with the discussions on Chapter 6. Furthermore, it could be acknowledged in the text that, in jurisdictions with single-track regimes, there were additional grounds for deviating from the *pari passu* treatment of creditors.



*Paragraph 345*

136. *One participant* suggested to consider what should be protected by depositor preference (depositors, deposits, banking and settlement system, etc.).

*Illustration 2*

137. It was agreed to integrate the suggestion of using the terms “claims” and “DI’s claim” instead of “creditors” and “DIS”.

*Paragraph 348*

138. There were comments from *two participants* advocating for neutrality, i.e., by removing the terms “compelling” and “potential” in this paragraph. As an alternative, it was suggested to add at the beginning of the first sentence something along the lines of “*Based on past experiences [...]*”. *Another participant* suggested leaving the text as it was, since it was sufficiently balanced.

139. *This was left to the Drafting Committee.*

*Paragraph 349*

140. *One of the drafters* indicated that linguistic suggestions, namely to add a reference to “*moral hazard*” and to jurisdictions’ “*legal and judicial framework and financial system structure*”, could be accepted.

*Paragraphs 351-354*

141. *One participant* considered that Chapter 8 suggested removing the discussion on policy implications of different types of depositor ranking for funding a transfer strategy in liquidation.

142. *One of the drafters* recalled that the paragraphs had been discussed extensively in earlier meetings and the Working Group had expressed a preference for keeping them. *The Chair agreed and proposed keeping these paragraphs.*

*Recommendation 70*

143. *One of the drafters* explained that Key Consideration 1 and Recommendation 70 reflected the agreement of the group in favour of suggesting some form of depositor preference.

144. *Two participants* suggested qualifying Recommendation 70 by adding “*should advantages of such arrangements outweigh their disadvantages*”. *Another participant* preferred keeping Recommendation 70 as it was, or linking it to Key Consideration 1.

145. *It was agreed to link Recommendation 70 to the Key Considerations, referring to the implications of different forms of depositor preference for a transfer.*

*Paragraph 365*

146. *It was agreed to delete the reference to non-preferred debt.*

*Paragraph 378*

147. *It was agreed to revise the text on the subordination of related party claims in line with the comment made on this paragraph.*

*Paragraph 380*

148. *The drafters* agreed to amend the language on intra-group support in line with the outcome of the discussions on Chapter 9, putting emphasis on the need for strict safeguards and conditions in

case jurisdictions provided any special rules or exceptions to subordination rules for intra-group financing provided prior to liquidation.

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

149. *A member of the Drafting Committee* introduced Chapter 3, noting that all the major comments made during the last session had been duly taken into consideration and that references had been added to relevant international standards (mainly the *Basel Core Principles* and the *IADI Core Principles*).

#### *Paragraphs 122 and 124*

150. Regarding the comments on these paragraphs, a consensus was reached on the substance: *most participants* agreed that there were trade-offs between confidentiality and public disclosure, which should be clarified in Chapter 4 (paragraph 179). The Guide could then advise jurisdictions to consider the effects of the disclosure of information that a bank was approaching non-viability for the successful implementation of the liquidation strategy. *It was agreed not to elaborate on these issues here but rather cross-refer to Chapter 4.*

151. Furthermore, it was agreed that possible inconsistencies between paragraphs 122 and 124 would be ironed out by the Drafting Committee.

#### *Paragraph 125*

152. A comment questioned why the failure of a bank to notify the relevant authorities of its approaching non-viability in a timely manner was only considered from an administrative law perspective.

153. *One of the drafters* proposed to either: (i) delete everything after the first or second sentence of paragraph 125, or (ii) add text on criminal and civil law sanctions.

154. Another proposal was to retain only the first two sentences but to modify the wording. It was also proposed to replace the term “sanction” by “legal consequence” or similar.

155. *It was ultimately left to the Drafting Committee to revise the text.*

#### *Paragraph 137*

156. *It was agreed to delete the second sentence about the remuneration of employees of an administrative authority.*

#### *Paragraphs 140-142*

157. It was agreed to delete the last sentence of the paragraph, and to split footnote 77; the reference to notice, reporting, or other duties vis-à-vis the court or creditors would be put at the end of paragraph 140, while the remaining part of the footnote would be moved to Chapter 2.

#### *Paragraph 151*

158. It was agreed to clarify the term “private sector liquidator”, for instance by referring to a “*liquidator who was not a public official*” or similar, and align the text with paragraph 138.

#### *Paragraph 152*

159. In response to the comment on whether private sector liquidators should benefit from a high bar for liability, it was suggested that acts concerning matters of public interest and mere acts of execution might justify a safe harbour, but that conduct outside of this might not deserve special

protection. It was noted that persons from the private sector appointed by an administrative authority might already benefit from special legal protection as agent of the authority.

160. *One participant* noted that it might be practically challenging to distinguish between autonomous acts of the liquidator and acts based on instructions of the liquidation authority.

161. *The Drafting Committee was asked to revise the text.*

*Paragraph 153*

162. It was proposed not to address the liability of valuers in the Guide. Different views were expressed on this and the issue was left to the Drafting Committee.

*Paragraph 157*

163. *The Working Group* agreed to keep the text on public policy concerns and add that efficiency considerations also justified a different degree of creditor involvement.

*Paragraph 158*

164. It was agreed that the text could be updated by the Drafting Committee to address the first part of the comment, regarding doctrinal justifications for a creditor to be the liquidation authority or liquidator.

165. The second part of the comment was clarified; the proposal was to add a reference to the existence and the form of the depositor preference because this may also inform whether there was a significant risk of a conflict of interest or not. This would be addressed by the Drafting Committee.

166. It was also agreed to accept the third part of the comment, by deleting the reference to a deposit insurer that acted as a liquidation authority or liquidator reporting to another liquidation authority, and replacing it with the drafting suggestion referring simply to an “*appropriate transparency and accountability framework*”.

167. It was agreed to keep the sentence starting with “*To the extent that there is [...]*”.

*Paragraph 160*

168. *It was agreed to implement the drafting suggestion regarding hearing the administrative authority or receiving its consent (or non-objection).*

*Paragraph 161*

169. It was proposed to delete the last sentence and re-draft the second sentence as “*the legal framework should clarify whether the liquidation authority and any appointed liquidator are subsequently relieved of any further liability*”, so that the need for legal clarity would be emphasised instead of taking a specific position considering the different practices across jurisdictions.

*Recommendations (general)*

170. *The drafters* took note of the suggestion to streamline the Recommendations and avoid overlap.

*Recommendation 16*

171. It was agreed to keep the Recommendation, which meant to ensure coordination took place between the banking supervisor, the resolution authority, and the liquidation authority.

*Recommendation 18*

172. It was agreed to refer to expertise in “*insolvency cases*” (or similar) rather than “*insolvency law*” in this Recommendation and the main text, to avoid giving the impression that the liquidator should necessarily be a lawyer.

*Recommendation 21*

173. It was proposed to add to this Recommendation and in the main text that, in jurisdictions with court-based models, the relevant banking authority should be involved in the determination of the remuneration of the liquidator.

174. It was agreed to amend the definition of “liquidator” in the Glossary, so that it would be clear that a liquidator may be a natural or legal person.

*Recommendation 22*

175. It was agreed to remove (i) the square brackets in the first sentence, and (ii) the elements in square brackets in the second and third paragraph of this Recommendation.

*Recommendation 23*

176. It was agreed that the Drafting Committee would reflect on this Recommendation and a similar Recommendation in Chapter 2 to ensure that there was consistency and to avoid overlap.

*Recommendations 27-29*

177. These Recommendations would be updated in line with the agreed revisions in the main text concerning personal liability and legal protection.

*Recommendation 31*

178. In the second sentence, it was agreed to add the term “more” before “limited” and to clarify that creditor involvement could be similar as under general business insolvency law subject to the efficiency of the general insolvency framework.

*Recommendation 32*

179. It was proposed to distinguish between the role of the deposit insurer as creditor *versus* as possible liquidation authority or liquidator, and its role in a payout scenario *versus* in a transfer of assets and liabilities.

180. *A member of the Secretariat* indicated that Chapter 2 contained a separate Recommendation on the possible involvement of the deposit insurer as liquidation authority or liquidator. *One of the drafters* suggested that the formulation of Recommendation 32 could be amended to make it broader and avoid overlap.

*Recommendation 35*

181. It was agreed to keep this Recommendation, and to add in the main text that – following the termination of bank liquidation proceedings – the bank must not only be stricken from the business register but also from other public registers as applicable.

**Chapter 2: Institutional Arrangements**

182. Chapter 2 was introduced by *a member of the Drafting Committee*. He noted that the two major changes were that a new section on deposit insurers had been added (Part E) and that more considerations had been added on accountability and judicial review.

*Paragraph 71*

183. The first comment on Chapter 2 related to a general comment about the approach in the Guide towards administrative models and court-based models.

184. *One of the drafters and a member of the Secretariat* explained that the current drafting was based on the consensus that had been reached in previous Working Group sessions that an administrative model was generally preferable, while it was also recognised that not all jurisdictions might be able to introduce such model. It was acknowledged in Chapter 2 that the efficiency of any model depended on jurisdiction-specific factors, and guidance was provided for both models. In sum, the chapter reflected the general Working Group view that an administrative system was preferable in a nuanced way.

185. Several suggestions were made to change the first sentence in paragraph 71. *Ultimately, support was expressed for a proposal of one of the drafters to replicate in paragraph 71 the wording of Key Consideration 1, i.e., saying that "an administrative model can have clear benefits, which may make it the preferred option for jurisdictions"*.

*Paragraphs 80-82*

186. It was agreed to keep these paragraphs because they were descriptive, although it was left to the Drafting Committee to consider moving parts to the general description of institutional models.

*Part C (paragraphs 85-112)*

187. The drafters agreed with the comment that jurisdictions with a single-track regime would necessarily have an administrative model. It was proposed to add this in the new subsection on single-track/dual-track regimes that would be added to Chapter 1.

*Paragraph 87*

188. *The drafters* agreed with the suggestion to include a similar statement to Chapter 1.

*Paragraph 88*

189. In the sentence about involving a prospective liquidator, it was agreed to add "*if legally available*" or "*where feasible*" in line with Recommendation 11.

190. It was agreed to keep the sentence about the shortcomings of a court-based model as it was.

*Paragraph 91*

191. There was some discussion on whether it would be easier to manage confidential information if an administrative liquidation authority acted as liquidator itself, or whether it would be the same in a model whereby a liquidator was appointed by the liquidation authority.

192. *Ultimately, it was agreed to delete the last sentence of paragraph 91.*

*Paragraph 92*

193. It was proposed to delete the comparison with courts in the first sentence but merge it with the second sentence, or to keep the phrase "*[...] administrative authorities have an information advantage compared to courts*" as it was.

194. It was agreed to delete the last sentence about concentrating a number of functions in a single administrative authority.

*Paragraph 93*

195. It was agreed to add an introductory sentence saying that "*The efficiency of courts and the business insolvency system will be another aspect to consider in defining the model*".

196. There was some discussion on whether to change the wording regarding the lack of speed in court-based models. Ultimately, it was agreed to keep the language as it was.

*Paragraph 97*

197. The comment concerning coordination with the resolution authority was considered a drafting issue that was left to the Drafting Committee.

*Paragraph 101*

198. It was agreed to keep the first sentence of this paragraph, since it was considered a helpful introduction to the discussion.

*Paragraph 106*

199. It was left to the Drafting Committee to examine whether the expression “judicial review” was appropriate or whether terminology such as “judicial actions” or “judicial scrutiny” would be more suitable.

200. With regard to the standard of judicial scrutiny, it was proposed to make a distinction between administrative decisions and acts of the liquidator (on the basis of instructions of the liquidation authority) concerning matters of public interest, on the one hand, and decisions that were of a civil or commercial law nature (e.g., concerning the recognition of claims), on the other. With regard to the former, the Guide could recommend that the scope of judicial scrutiny should be limited.

201. Some caution was expressed on being too detailed about the type of decisions that might be taken during the liquidation process; it was considered more important to clarify that the system of judicial scrutiny should properly safeguard the objectives of liquidation. At the same time, it was emphasised that the decision to execute a transfer should in any case be subject to limited judicial review.

*Paragraph 107*

202. It was agreed not to add “*and duly proved fumus boni iuris*” since reference was already made to “*prima facie illegality*”.

*Paragraph 108*

203. It was agreed to strengthen the wording regarding the limitation of remedies in the last sentence, in line with Recommendation 5.

*Paragraph 113*

204. The suggestion to refer in the last sentence to “*the structure and development level of the banking system*” was accepted.

*Paragraph 114*

205. It was agreed to add “more” after “*public policy concerns may be [...]*” and to add “*albeit not entirely ruled out*” after “limited”, as had been suggested in the comment.

*Paragraph 116*

206. It was agreed to keep this paragraph on the description of different types of deposit insurer mandates since it was considered helpful for the reader.

*Paragraph 117*

207. *The Working Group* considered the proposal to delete the last two or three sentences of this paragraph, concerning “private” deposit insurers. It was discussed that instead of deleting these

sentences, it might be preferable to rephrase them so that it would be clearer for the reader that the Guide warned against assigning “private” deposit insurers a role as liquidation authority or liquidator.

*Paragraph 119*

208. It was agreed to delete the second half of the footnote in this paragraph referring to the sharing of confidential information with “private” deposit insurers.

*Key Considerations*

209. It was agreed to keep the wording of the Key Considerations as it was.

210. It was agreed not to define the term “liquidation objectives” in the Glossary since they were extensively discussed in Chapter 1.

*Recommendation 5*

211. It was suggested to review the recommendations to confirm whether they related to jurisdictions with an administrative or court-based model, or both. *It was agreed that the Drafting Committee would check that the recommendations were included in the correct category.*

212. There was a suggestion that Recommendation 5 could be moved to the “*Recommendations for jurisdictions with an administrative model*”, but a member of the Secretariat explained that this recommendation was relevant for both models since it would in either case be undesirable that a transfer transaction could be reversed.

213. It was also agreed to keep the last sentence, but to replace “could” with “should”.

*Recommendation 8*

214. There were comments on this recommendation and relevant drafting suggestions, which the Working Group agreed would be considered by the Drafting Committee after revising the main text on judicial scrutiny.

*Recommendation 10(c)*

215. It was agreed to move this recommendation to the section with “*Recommendations irrespective of the institutional model*” since it was of general application.

*Recommendation 11*

216. The Working Group discussed whether any changes should be made to this recommendation, which advised that the legal framework should provide for arrangements that adequate preparation can take place in court-based models, for instance by involving a prospective liquidator.

217. *It was ultimately agreed that the current language was appropriate and sufficiently nuanced, since it referred to a “provisional liquidator” that could be involved in the preparation of a liquidation “where feasible”.*

*Recommendation 12(b)*

218. It was proposed not to use the term “expert to the court” for an administrative authority. *It was left to the Drafting Committee to come up with alternative terminology.*

*Recommendation 14*

219. A question was raised as to whether the word “appeal” was correct in this context. *This was noted as another terminological issue and was left to the Drafting Committee.*

*Recommendation 15*

220. It was agreed to keep the wording in Recommendation 15 as it was, since it was sufficiently clear that the deposit insurer would normally be a creditor. If needed, additional text could be added on this in paragraph 119.

*Proposed New Recommendation*

221. A new Recommendation was proposed, which advised that issues relating to financial stability should be primarily assessed by a banking authority.

222. This proposal was generally endorsed. It was clarified that the recommendation entailed that the administrative authority should be able to instruct a liquidator either directly or indirectly, by asking the court to do so, without curbing in any way the court's role in overseeing the liquidation process.

**Chapter 1: Introduction**

*Paragraph 42*

223. It was proposed to keep the explanations about how the liquidation objectives could play a role in bank liquidation proceedings (i.e., as a design principle, as part of an administrative authority's mandate, or as an explicit statutory objective).

224. It was proposed to accept the drafting suggestion that had been made for the sentence starting with "*Where such an authority [...]*". However, it was agreed not to add the suggested text in parentheses since it led to confusion. Furthermore, a *participant* raised the point that the last part of the proposed text "*unless specifically stated otherwise by the liquidation framework*" was unclear. The proponent of the drafting suggestion indicated that the proposed text was meant for clarification only. *It was left to the Drafting Committee to consider it.*

*Paragraph 43*

225. It was agreed to add to Chapter 1 a new section that would explain the relevance of the guidance in the various Chapters for single-track/dual-track regimes.

226. It was agreed to add the additional text that had been proposed: "*Importantly, it is also recognised that different stages of the liquidation process can be informed by a different objective*".

*Paragraphs 44-46*

227. There was a comment suggesting to clarify the meaning of value maximisation in light of the explanatory notes of the *FSB Key Attributes Assessment Methodology for the Banking Sector*, in connection with Key Attribute 5.1.

228. A member of the *UNIDROIT Secretariat* noted that this was relevant for Chapter 6 and had been explained there. If needed, a cross-reference could be made.

*Paragraphs 47-51*

229. A member of the *UNIDROIT Secretariat* proposed to accept the suggestion to strengthen the wording on not exposing taxpayers to loss, and asked the Working Group whether this should be done in the description regarding the objective of financial stability or within the separate objective of minimising costs for taxpayers.

230. Several participants expressed a preference for keeping separate the objective of minimising costs to taxpayers. Furthermore, a suggestion was made to change the title of subsection 5 into "*avoiding the use of public funds*". It was discussed that, in exceptional circumstances, the deposit insurer might be able to borrow funding from the government, but this was a separate proceeding



under a separate framework. *One participant* explained that the objective of financial stability in this context should not be understood as being permissive on the use of public funds.

231. *The Working Group* then turned to the objective of financial stability. *Some participants* highlighted that the notion of financial stability had evolved over time, and advocated keeping it as a liquidation objective arguing, *inter alia*, that financial stability was linked to banks' special nature and that the main objective of any financial safety net participant was to protect financial stability.

232. *Other participants* were more cautious about the extent to which financial stability issues were relevant in the liquidation of non-systemic banks. They suggested referring to financial stability only in the context of specific situations (e.g., when a residual entity in liquidation needed to continue to provide services to an entity that had acquired assets and liabilities as part of a resolution action) and referring more specifically to depositor protection and the public policy objectives of authorities. A suggestion was also made to trim the subsection on financial stability and minimise replication of the *FSB Key Attributes*.

233. *One of the drafters* concluded that there was agreement that the financial stability objective would be kept, and that enough input had been received for the drafters to revise the text.

#### *Precondition 4*

234. *The Working Group* then turned to the paragraph on “*an effective lender of last resort function*”.

235. *Some participants* were of the firm conviction that this paragraph ought to be maintained. They highlighted the relevance of a smooth continuum from supervision to failure management, and considered that an effective lender of last resort function was an essential part of the framework for safeguarding financial stability. They considered that emergency liquidity assistance (ELA) was intimately related to early actions, as liquidity tools could prevent a crisis from escalating. They also recognised the discretionary nature of ELA, which was aimed at illiquid but solvent institutions and could only be provided if there was sufficient adequate collateral.

236. *Other participants* considered that this discussion was not appropriate for the Guide, which was aimed at the liquidation of non-systemic banks, since ELA would rather be there to prevent banks from failing. It was also a policy choice whether ELA should be confined to certain types of banks. Furthermore, the point was made that the design of the liquidation framework would not be affected by the design of the lender of last resort framework. They shared the view that ELA was important but questioned whether it was a “precondition” for liquidation.

237. *Ultimately*, it was agreed to change the title of Part E so that it would not refer to “preconditions”.

238. Furthermore, different suggestions were made as to where in the Guide reference could be made to ELA. It was also suggested by *several participants* that the role of the lender of last resort be included as part of a broader financial safety net.

239. *The Drafting Committee* was asked to revise Part E and reconcile these disparate views.

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

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

240. *A member of the UNIDROIT Secretariat* indicated that it was proposed to provide the Drafting Committee and the UNIDROIT Secretariat and FSI with a mandate to finalise the draft Guide in line with the outcome of the discussions during this session. The revised draft Guide would be submitted to the Working Group for fatal flaw review.

241. As a next step, the draft Legislative Guide would be submitted to the UNIDROIT Governing Council for its 103<sup>rd</sup> session in May 2024, with the proposal to commence a targeted consultation. The Working Group would meet again after the consultation period lapsed, to address the feedback received during the consultation as appropriate. Following the session, the Secretariat informed the Working Group that the seventh Working Group session would take place between 18 and 20 November 2024, at the seat of UNIDROIT. The final draft Legislative Guide would be submitted to UNIDROIT's Governing Council for approval in 2025.

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

242. In the absence of any other business, *the Chair* thanked all the participants for their input and closed 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	Doctor of Laws (LL.D.), Attorney-at-Law, and Research Associate (Switzerland)

**INSTITUTIONAL OBSERVERS**

AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (APRA)	Ms Kate FARRELL Account Manager
BANCA D'ITALIA	Ms Alessandra DE ALDISIO Director, Regulatory and Macroeprudential Analysis Directorate
	Mr Romualdo CANINI Expert, Banking and Financial Supervision
	Mr Cristiano MARTINEZ Lawyer, Legal Service

---

BANCO DE ESPAÑA	Ms Lucia PIAZZA Head of Unit, Legal Department
BANK OF ENGLAND	Ms Clare MERRIFIELD Senior Legal Counsel & Manager Financial Stability Division, Legal Directorate
BANQUE DE FRANCE / ACPR	Ms Elodie BATAILLE Senior Resolution Expert, Resolution Directorate  Ms Katia DJEFFEL Legal Directorate  Ms Rania KAHLOUL  Ms Anissa LOUNICI  Ms Chiara LUNETTI
BANK OF GHANA	Ms Elsie ADDO AWADZI Second Deputy Governor
BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT (BaFin)	Ms Anne SCHWALL Lawyer  Ms Nicole STEPHAN Lawyer
CENTRAL BANK OF ARGENTINA	Ms Maria Eva COVINO Deputy Manager Legal Advice in Operations Legal Advisory Senior Management Office  Ms Valeria FORMATTO Principal Analyst, Legal Research Department  Mr Cristian Eduardo PUJOL Legal Advisory Manager Operations, Regulations and Supervision
CENTRAL BANK OF BRAZIL	Ms Vivian GRASSI SAMPAIO Deputy-Head, Department of Resolution and Sanctioning Action
CENTRAL BANK OF PARAGUAY (BCP)	Ms Irene Cristina ESCRIBÁ SAKODA Head of the Legal Department
CHINA DEPOSIT INSURANCE CORPORATION	Ms Shaohua ZHANG Vice President  Mr Jiansheng HUANG Team Leader, Legal Affairs Team Department of Research and Legal Affairs

---

	Mr Chen LING Deputy manager Department of Research and Legal Affairs
	Ms Ruohan SI Deputy Manager Department of Research and Legal Affairs
DEPOSIT INSURANCE CORPORATION OF JAPAN (DICJ)	Mr Hidenori MITSUI Governor
	Mr Ryuichi SHOGAN Deputy Governor
	Mr Hidemitsu OTSUKA Deputy Governor
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 COMMISSION	Ms Rossitza PETKOVA Policy Officer Directorate-General for Financial Stability, Financial Services and Capital Markets Union
	Mr Andreas TARDE Policy Officer Directorate-General for Financial Stability, Financial Services and Capital Markets Union
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
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	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
HONG KONG MONETARY AUTHORITY (HKMA)	Ms Olivia CHENG Senior Manager, Banking Review and Development Unit
	Ms Amelia KHOO Manager, Banking Review and Development Unit
INTERNATIONAL ASSOCIATION OF DEPOSIT INSURERS (IADI)	Mr Bert VAN ROOSEBEKE Senior Policy and Research Advisor
INTERNATIONAL INSOLVENCY INSTITUTE	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
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	Ms PANG Luming Director Legal Department

PEOPLE'S BANK OF CHINA	Ms CHENG Junxiu Section Chief, Legal Department
	Mr LIU Shichao Expert, Legal Department
PERBADANAN INSURANS DEPOSIT MALAYSIA (PIDM)	Ms Cheryl-Ann CHAN Head Reimbursement, Run-off and Liquidation Department
	Mr Pong Kai MUN
RESERVE BANK OF INDIA (RBI)	Mr Deepak GOGIA Deputy General Manager
SINGLE RESOLUTION BOARD (SRB)	Mr Samy HARRAZ Head of Strategy, International Relations and Communications
	Mr Karl-Philipp WOJCIK General Counsel
	Mr Joan RIUS Senior Legal Expert
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)	Ms Maria Angeliki GIANNAKOU Associate Legal Officer, International Trade Law Division
	Mr Benjamin HERISSET Legal Officer, International Trade Law Division

\* \* \* \*

**INDIVIDUAL OBSERVERS**

Mr Sumant BATRA <i>Excused</i>	President Insolvency Law Academy (India)
Ms Concetta BRESCIA MORRA	Professor University Roma Tre
Ms Kateryna YASHCHENKO	Ph.D. candidate, National University of Kyiv-Mohyla Academy; Associate Counsel, EBRD

\* \* \* \*

**BIS FINANCIAL STABILITY INSTITUTE (FSI)**

Mr Rastko VRBASKI	Senior Advisor
Ms Ruth WALTERS	Senior Advisor

\* \* \* \*

### **UNIDROIT SECRETARIAT**

Mr Ignacio TIRADO	Secretary-General
Ms Myrte THIJSEN	Legal Officer
Ms Yuan HE	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
Mr Shuai GUO	Assistant Professor, China University of Political Science and Law, <i>Consultant to the Secretariat</i>
Mr Alexander SIOURTHAS	Intern



**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 fifth session (Study LXXXIV – W.G. 5 - Doc. 4)
4. Update on intersessional work and developments since the fifth 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