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DRAFT LEGISLATIVE GUIDE ON BANK LIQUIDATION
CONSULTATION FEEDBACK

(prepared by the UNIDROIT Secretariat)

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I. INTRODUCTION

1. This document contains an overview of the comments submitted to the UNIDROIT Secretariat during the online consultation on the draft Legislative Guide on Bank Liquidation that was launched on 5 June 2024. The consultation was open for 18 weeks, until 11 October 2024.

2. The purpose of the consultation was to:

- Raise awareness about the instrument.
- Ensure that the instrument is well-suited to application in different contexts, including both civil and common law jurisdictions, as well as developing economies, emerging markets, and developed economies.
- Seek feedback on whether the instrument sufficiently addresses the private law issues that arise in bank liquidation proceedings.

3. Views were welcome from all interested parties. For the more technical aspects, feedback was welcome in particular from persons and entities representing:

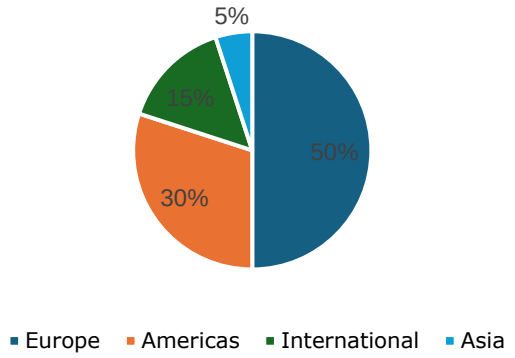
- National and supranational authorities (e.g., banking supervisors, resolution authorities, deposit insurers, securities regulators, and international organisations);
- Insolvency practitioners and law firms;
- Banks and banking associations;
- Academics and think-tanks.

4. Respondents were allowed to provide feedback on any part of the draft Legislative Guide. Comments could be provided in English or French and had to be submitted to the UNIDROIT Secretariat at LGBLconsultation@unidroit.org. Respondents were asked to submit their comments in a Word document, specifying for each comment to which Chapter and paragraph number of the Draft Legislative Guide it pertained. The consultation webpage indicated that comments received during this consultation process would be made public, and that the name of respondents would be made public unless expressly requested otherwise.

5. In total, the consultation received 22 responses. Responses received were from a variety of stakeholders representing national and supranational authorities and organisations (30%), insolvency practitioners and law firms (30%), academics and think-tanks (25%), and banks and banking associations (15%). Most respondents are stakeholders from Europe (50%), followed by respondents from the Americas (30%), international respondents (15%), and one respondent from Asia (5%).

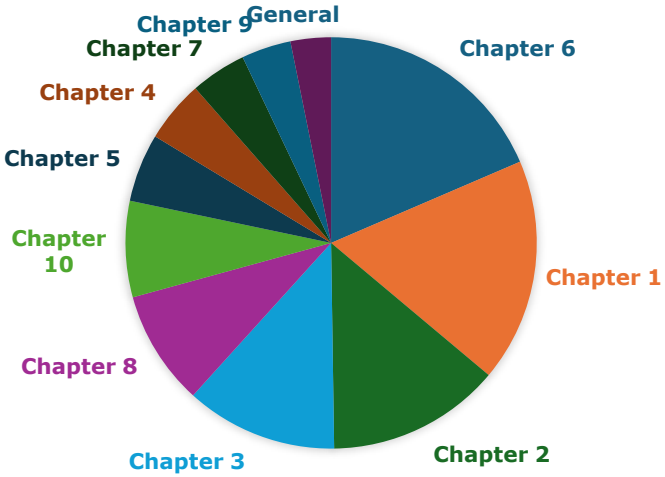
Categories of respondents

Geographical origin repondents



6. In numerical terms, most comments were received in relation to Chapter 6 – Liquidation tools (18,5%), followed by Chapter 1 – Introduction (17,48%), Chapter 2 – Institutional arrangements (13,59%) and Chapter 3 – Procedural and operational aspects (11,89%).

Feedback per Chapter



7. The summary table of submissions below sets out the 22 submissions received. The comments included in all submissions are then categorised by Chapter and paragraph number in the remainder of this document. The comments have been included in this document verbatim. Comments or remarks of a general nature have been included in the Part 'General Comments'.

II. SUMMARY TABLE OF SUBMISSIONS

#	Name	Affiliation	Country	No. of pages	Submission date
1	Oleksandr Biryukov	Professor, UNIDROIT Correspondent	Ukraine	1	01/10/2024
2	Hernany Veytia	Professor, UNIDROIT Correspondent	Mexico	3	03/10/2024
3	Thomas Ziesenitz	German Banking Industry Committee	Germany	11	08/10/2024
4	Isabelle Ruf	National Association of German Cooperative Banks and the German Savings Banks Finance Group	Germany	3	09/10/2024
5	Konrad Richter	Oesterreichische National Bank (**OeNB**)	Austria	2	10/10/2024
6	Luis Fernando Lopez Roca[1]	Director of the Department of Financial and Securities Law, Universidad Externado de Colombia	Colombia	5	10/10/2024
7	FROB	Spanish Executive Resolution Authority (**FROB**)	Spain	9	11/10/2024
8	Dominik Skauradszun	Professor, Hochschule Fulda University of Applied Sciences; Judge of Appeal, Higher Regional Court of Frankfurt	Germany	12	11/10/2024
9	Jean-Francois Adelle and Philippe Dupont; Cristina Fussi and Huan Tan	International Bar Association (**IBA**) Co-Chairs Banking & Financial Law Committee; Co-Chairs Insolvency Section	United Kingdom (International)	23	11/10/2024 (updated 15/10/2024)
10	Peter M. Werner	Senior Counsel, International Swaps & Derivatives Association (**ISDA**)	United Kingdom (International)	3	11/10/2024
11	Andrés López	Costa Rica Bar Association (*Colegio de Abogados de Costa Rica*)	Costa Rica	2	11/10/2024
12	Paweł Kuglarz and Mateusz Kaliński	INSO Section of the Allerhand Institute	Poland	4	11/10/2024
13	Kateryna Yashchenko, Srdjan Kokotovic	Staff, European Bank for Reconstruction and Development, Capital & Financial Market Development (**EBRD CFMD**)	United Kingdom (European)	30[2]	11/10/2024
14	Gabriel Limón	Executive Secretary, Institute for the Protection of Bank Savings (**IPAB**)	Mexico	25[3]	11/10/2024
15	Liz Marcela Bejarano Castillo	Financial and Risks Director, *Asociación Bancaria y de Entidades Financieras de Colombia (***Asobancaria***)*	Colombia	5	12/10/2024

[1] He would like to thank Professor Jorge Corredor and attorney Juan F. Rivas for their contributions.
[2] Comments were made on 30 pages of the draft Legislative Guide on Bank Liquidation.
[3] Comments were made on 25 pages of the draft Legislative Guide on Bank Liquidation.

16	Alastair Beveridge	President, INSOL International	United Kingdom (International)	57	14/10/2024
17	Miguel Gallardo Guerra	Partner, Bello, Gallardo, Bonequi y Garcí (bgbg)	Mexico	20	15/10/2024
18	Yuri Suzuki; Kenichi Tanizaki	Respectively Co-Chair, Inter-Pacific Bar Association (IPBA) Banking, Finance & Securities Committee; and Member IPBA, law firm Atsumi and Sakai	Japan	2	16/10/2024
19	Cigdem Akdag	Savings Deposit Insurance Fund of Türkiye (**SDIF**)	Türkiye	1	18/10/2024
20	Alice van der Schee[4]	President, INSOL Europe	Netherlands (European)	10	22/10/2024
21	Catherine Bridge Zoller	EBRD, Legal Transition Programme (**EBRD LTP**)	United Kingdom (European)	44[5]	25/10/2024
22	Alex Majerus		Luxembourg	1	06/11/2024

[4] This feedback has been prepared by the Academic Forum and Yanil members of INSOL Europe with Dr Paul Omar as coordinator. Members: Mr Gert-Jan Boon (University of Leiden); Mr Charles Mak (Robert Gordon University); Dr Edoardo Piermattei (University of Bologna); and Dr Geleite Xu (University of Derby).

[5] General comments were submitted in a 3-page document, accompanied by specific comments on 41 pages of the draft Legislative Guide on Bank Liquidation. In addition, reference was made to the "*EBRD Core Principles of an Effective Insolvency System*" (2020) and the "*EBRD Principles for an Effective Professional and Regulatory Framework for Insolvency Office Holders*" (2021) as useful documents concerning liquidators.

III. COMMENTS CATEGORISED BY CHAPTER AND PARAGRAPH NUMBER

A. GENERAL COMMENTS

#	Comment	Submitted by
1.	The main impression on the Draft Legislative Guide on Bank Liquidation is that that the structure and the content of the document are balanced. Practically all the aspects of the bank liquidation are reflected in the recommendations; they are balanced, meaningful and important. We support those parts of the document that contain clear rules, as well as those which are unified and suggest predictable procedures. The balance between interests of different groups of liquidation procedure is well constituted, taking into account the interests of creditors, especially ensured ones. Private and public interests are presented with good explanation. I need to say, that the recommendations are fully in line with expectations for further development of this area of legislation in Ukraine. This as an impression of Ukrainian specialists in this area who are familiar with application of relevant procedure – withdrawal of insolvent bank from the market. This is evidenced by the latest so-called "banks downfall" in 2014-2017. Since 2014, 94 banks have been liquidated in Ukraine; most procedures were initiated in 2014-2015. Starting from 2017, the National Bank of Ukraine actively continued cleaning up the financial market; and as a result, 45% of all banks were affected in one or another way. We are sure that approval of the Legislative Guide on Bank Liquidation and its further application in Ukraine will help to better structure further legislative changes and correct the court practice. It is going to be a good piece of international soft law that is relevant to current situation in Ukraine. We congratulate the UNIDROIT Working Group and would like to thank for the great work for preparing such a high-quality international document. I will continue informing local specialists in this field and assist the Legislator and policymakers in development of effective bank liquidation regimes in the country. We look forward to the completion of work on the Draft Legislative Guide on Bank Liquidation and its publication.	Oleksandr Biryukov (Ukraine)
2.	In reply to your kind message dated 8 July 2024 sent to UNIDROIT Correspondents, I am writing to express my strong support to the draft of the Legislative Guide on Bank Liquidation circulated for consultations. This comprehensive document represents a significant achievement in providing much-needed guidance on bank liquidation frameworks.	Hernany Veytia (Mexico)

	I confidently extended the invitation to comment it to my former colleagues at Deloitte in US, Canada, the Mexican Institute for the Protection of Savings Banks (IPAB) regulators, Brazilian and Peruvian bankers, UK, American, and Swiss lawyers, creditors, insurers, and academics many of them were already contacted and are familiar with the FSB standards. I agree with them that the new legislative guide complements rather than overlaps the best practices for bank liquidation procedures. This Guide will help national legislators to draft legislative project initiatives in line with BIS recommendations, IADI Core Principles, UNCITRAL Insolvency works and other practices in the sector that have proven to be successful around the globe (especially in the US and for FSB members). *[Secretariat: feedback on specific elements of the draft LGBL is included in the remainder of this document.]* I also take the opportunity to share with one of my first impressions when I was partner at Deloitte and I was appointed as liquidator of six Mexican banks, we entered to the banks and discovered that key employees had gone with valuable information on intangible assets (including copy of databases). Nowadays open banking and data portability are more regulated, but transferring costumer data, secure data handling are issues that have to be considered by the legislators in dealing with bank liquidations. Some guidance to legislators on how to handle the issue of the use of artificial intelligence (AI) in liquidation process is missing. The potential use of AI and Machine learning in managing the liquidation process, especially in the responsibility of the liquidators using AI for asset valuation and/or creditors/debtors communication. Given the critical importance of effective bank liquidation regimes for financial stability, I believe publishing this Guide would make an invaluable contribution to improving regulatory frameworks worldwide. The recommendations provide a solid foundation for jurisdictions looking to enhance their bank liquidation laws and procedures. I strongly encourage moving forward with publication of this excellent draft Guide. It represents a landmark achievement that deserves to be widely disseminated and utilised. Please let me know if I can support this initiative in any other capacity, and/or if UNIDROIT would be interested in supporting a "pilot demonstration" of the implementation of this legislative guide in a particular region or country (i.e. Central America and the Caribbean countries).	
3.	We would like to thank you for the opportunity to comment on the Draft Legislative Guide on Bank Liquidation of the UNIDROIT Working Group on Bank Insolvency as part of the public consultation. With this document, we are submitting our general considerations regarding the UNIDROIT regulatory proposal and also providing suggestions as to how the special features of the business activities of specialized institutions in the German banking market should be taken into account. We kindly request that you take our suggestions into account when finalizing the Legislative Guide on Bank Liquidation. We recognize that the purpose of UNIDROIT's regulatory proposal is to assist policymakers in designing effective bank resolution regimes and to supplement existing international standards. We agree that jurisdictions with developed banking sectors should have laws and regulations in place to enable the resolution of banks without jeopardizing financial stability and without imposing	German Banking Industry Committee

	costs on taxpayers. In particular, it must be ensured that, if the existence of banks is jeopardized, critical functions can be maintained, significant impairment of financial stability can be avoided and the spreading of risks and problems to other financial market participants can be ruled out. The discussion initiated by UNIDROIT regarding the legal framework for the resolution of banks is generally welcome, although this should not lead to the introduction of new rules for their own sake and the disregard of proven principles. According to its own objective, UNIDROIT is focusing on the orderly resolution of "non-systemically important banks" as defined by the FSB - Key Attributes of Effective Resolution Regimes for Financial Institutions (FSB - Key Attributes), which have not yet been subject to a resolution procedure, as well as on separate business segments of institutions that are to be transferred in connection with a resolution measure (para. 5). Since the German banking market is characterized by a large number of less significant institutions (LSI), the share of institutions potentially referred to by the UNIDROIT regulatory efforts and designated as "non-systemic banks" is higher than in other countries. Furthermore, the German banking market is particularly heterogeneous due to the large number of specialized institutions. It is therefore essential that the legal framework for banks whose existence is at risk takes these national particularities into account. We are of the opinion that the European approach of a "dual track regime" implemented in German legal and administrative provisions has proven itself for the German banking market. From our perspective, we therefore do not recognize the need for regulation for "non-systemically important banks" as affirmed by UNIDROIT. This should also be reflected in the provisions of the Legislative Guide on Bank Liquidation of UNIDROIT.	
4.	Reference is made to the consultation by the UNIDROIT Working Group on Bank Insolvency concerning its Draft Legislative Guide on Bank Liquidation, published in June 2024. We, the National Association of German Cooperative Banks and the German Savings Banks Finance Group, appreciate the opportunity to comment on the draft and would be grateful if the following comments relating to Institutional Protection Schemes could be taken into account: **1) General comments on Institutional Protection Schemes** The Draft Legislative Guide on Bank Liquidation (hereinafter referred to as the "Draft") sheds light on deposit insurance systems (DIS) in many respects, which is appreciated. However, we would like to also see a stronger reference in the Draft to Institutional Protection Schemes (IPS), which are only briefly mentioned in a footnote of the Draft and which play an important role in several jurisdictions, including Austria, Germany, Italy, Poland and Spain. In the case of the German cooperative banks and German savings banks, for example, the IPS has the task of ensuring that customers, the money markets and the capital markets always have confidence in the Cooperative Financial Network and the Group of German Savings Banks. It does this by averting or remedying imminent or existing financial difficulties at its member institutions ("bank protection"), thereby ensuring comprehensive protection of customer deposits. In performing this function, the IPS primarily implements preventive measures to avert adverse developments at the affiliated institutions and, if necessary, takes measures to restructure the institutions concerned. Moreover, in the EU, IPS may be recognized as statutory DIS if they meet the requirements set out in Art. 113 (7) of Regulation (EU) 575/2013 (Capital Requirements Regulation) and in Art. 1 (2) point c) and Art. 4 (2) of Directive 2014/49/EU (Deposit	National Association of German Cooperative Banks and the German Savings Banks Finance Group

	Guarantee Schemes Directive). This provides a form of dual protection for customer deposits, ensuring the liquidity and solvency of member banks and guaranteeing the deposits of member banks. […] Aside from the aforementioned aspects, we refer to the comprehensive statement made by the German Banking Industry Committee.	
5.	The Oesterreichische Nationalbank (OeNB) as part of the Austrian and European banking supervision and resolution framework strongly appreciates UNIDROITS efforts in improving the market exit of failing banks. Therefore, we strongly welcome the opportunity to comment on the "Draft Legislative Guide for Bank Liquidation". As a general remark, we would like to highlight that we deem a narrow scope for bank resolution frameworks (dual track regime) more efficient. It creates less costs for supervisors and banks by leaving out additional reporting requirements, the creation of resolution plans and issuances of bail-in-able debt. Along this line, the Guide could consider putting more emphasis on the principle of proportionality and explaining in more detail, which banks should go into resolution and which ones should be dealt with by orderly liquidation. In our experience, modern insolvency regimes are flexible enough to deal with the failure of non-systemic banks. In Austria, we experienced over the last few years 4 bank failures without any major economic implications. In all cases (i) covered depositors were paid out within 7 days by the deposit guarantee scheme (DGS), (ii) insolvency proceedings ensured a fast recovery of depleted DGS funds, (iii) shareholders and creditors paid the costs (ensuring market discipline) and (iv) contagion was avoided. However, this was not only the result of the Austrian insolvency regime but rather a combination of an active micro- and macroprudential supervision and improvements to DGS funding[6]. 1This experience might imply for your guide that even insolvency regimes without modified rules for banks are well-suited to deal with the failure of non-systemic banks given a resilient banking sector and strong DGS funding.	OeNB
6.	FROB (Spanish executive resolution authority) welcomes the invitation to express its views on the Draft Legislative Guide on Bank Liquidation prepared by the Unidroit Working Group on Bank Insolvency ("Legislative Guide"). Assuming the comments below can be taken on board, FROB would support this international bank-specific insolvency guidance which complements the existing international standards for managing bank failures, as we fully agree that the failure of smaller banks may give rise to public policy concerns.	FROB

[6] For further details please see https://www.oenb.at/dam/jcr:5d51ace7-b355-4884-8dbd-205b93b73d52/05-FSR-46_Austrias-deposit-guarantee.pdf.

7.	I would like to express my sincerest gratitude for the opportunity to contribute to the consultation on the draft legislative guide on bank liquidation. Let me begin by congratulating the UNIDROIT Working Group for producing such a comprehensive, thoughtful and modern legal guide on bank liquidation. The topic of bank liquidation has constituted a significant area of research within my academic field for approximately a decade. I am the author of a comprehensive legal commentary on German bank insolvency law and have published journal articles on topics related to the SRMR, BRRD, and German bank insolvency law. I will provide a brief evaluation on the key considerations and recommendations proposed by the Working Group, following the sequence of the draft. However, I will limit my assessment to those considerations and recommendations that I have extensively researched and published on, in order to ensure an objective evaluation.	Dominik Skauradszun (Germany)
8.	Thank you for inviting the Banking & Financial Law Committee and the Insolvency Section of the International Bar Association to participate in the consultation on the UNIDROIT Draft Legislative Guide on Bank Liquidation. We would like to congratulate UNIDROIT and the expert Working Group on Bank Insolvency on your extensive efforts to prepare this excellent Guide. The Legislative Guide will provide a very useful and much needed instrument for legislation relating to insolvency and near insolvency of non-systemic banks. It is not only the failure of systemic banks that may pose challenges, but also the failure of smaller banks can set a chain reaction in motion due to the nature of the business. In response to the invitation, we are delighted to share with you some comments and observations on the Legislative Guide as well as suggestions for further amelioration. Given a very high quality of the Guide, our limited comments are simply aimed at providing an additional perspective on selected points. The contribution is based on comments collected from banking and insolvency practitioners among IBA members from multiple jurisdictions and legal systems. We hope our feedback will be helpful in refinement of the Legislative Guide and its successful finalization. Obviously, the below comments address possible changes, and we will not elaborate on our support for all the good proposals that the UNIDROIT Working Group have made. However, we wholeheartedly support the UNIDROIT Working Group's work. In this respect, we will be very pleased, as and when appropriate, to further exchange on this draft Legislative Guide and to further elaborate on the points below and beyond them, based on the practice of our section's members.	IBA
9.	INSO Section of the Allerhand Institute would like to express gratitude for the possibility to actively review the Draft Legislative Guide on Bank Liquidation (the "**Draft**"). First of all, with regard to the Draft, we would like to congratulate the authors on truly well-balanced and interesting document, allowing to implement a lot of good legislation towards national laws. We find the Draft an important document with regard to harmonization and setting high standards of bank insolvency and liquidation.	INSO Section, Allerhand Institute

	[…]Should you have any questions or concerns regarding the above, we are more than happy to elaborate more or explain our position – please e-mail us at: sekcja@inso.org.pl. Within our INSO Section, we have on board very experienced insolvency practitioners and lawyers, who are ready and happy to answer UNIDROIT possible questions or share their experience related to bank insolvency and liquidation. It was a great pleasure and honour to have a chance to review the Draft and share our position.	
10.	Thank you for the opportunity to review and respond to UNIDROIT's Draft Legislative Guide on Bank Liquidation. I enclose our response to the consultation. Our response comprises the views and comments of various members of the English restructuring and insolvency community who have collectively advised on some of the largest and most complex bank and financial services restructurings and insolvencies globally. Please note that our response is from the perspective of English insolvency law and practice only and is not exhaustive. The views expressed in this response are the personal views of the contributors who made each specific comment and do not necessarily represent the views of the other contributors, their organisations, nor of INSOL International. The information provided in this report is for general informational purposes only. Neither the contributors, their organisations, INSOL International, nor any of their affiliates, associates or representatives shall have any liability for any loss or damage of any kind incurred as a result of the use or reliance on any information provided, or view expressed, in this response. Should you have any questions on our response, please do not hesitate to get in touch.	INSOL International
11.	On behalf of the Savings Deposit Insurance Fund of Türkiye (SDIF), we thank the International Institute for the Unification of Private Law (UNIDROIT) for the opportunity to comment on its consultative document regarding the Legislative Guide on Bank Liquidation Process. **I. Introduction** SDIF was established in 1983 under the administration of Central Bank and became an autonomous corporation in 2003. SDIF is the sole responsible authority for deposit insurance, bank resolution and recovery activities. Moreover, SDIF has additional duties and powers for liquidation of savings companies and trusteeship operations. Our mission is to protect the rights and benefits of the depositors by insuring their deposits and participation funds, manage and resolve the banks, companies and assets in the most efficient manner and contribute to the safety and soundness of Turkish financial system. SDIF has loss minimizer mandate and risk based premium system. In Türkiye, membership to deposit insurance system is compulsory for all deposit taking banks and participation banks (namely Islamic banks) and currently there are 43 member banks operating in the banking system, 34 of them are deposit taking banks and 9 of them are participation banks.	SDIF

	The duties and responsibilities of SDIF for its deposit insurance and bank resolution functions are defined in the Banking Law (Law No: 5411)[1] together with other relevant legislation. Regarding with our resolution function, if the Banking Regulation and Supervision Agency of (BRSA) determines that a bank has met the conditions for intervention process, it would choose one of two possible options – either to revoke the bank's operating permission/licence - or to transfer the shareholders' rights (except dividends) together with management and control of the bank to the SDIF. Once the BRSA transfers the management and control of a failed bank to the SDIF, the SDIF selects and implements its resolution strategy that falls within its statutory remit and cooperates with other authorities – primarily with the BRSA – during the resolution process. Accordingly; ▪ When operating permission of a bank is revoked by the BRSA, the SDIF executes the bankruptcy liquidation after completing the payout process for insured deposits and participation funds. ▪ When the BRSA transfers the management and control of a bank to the SDIF without revoking its license, the SDIF exercises its resolution powers as set in the Banking Law. (i) If the SDIF owns all or majority of shares of a bank, SDIF has powers to recapitalize the bank and execute Merger & Acquisition, Bank Sale and Asset/Liability Sale (Purchase and Assumption) tools. (ii) If the SDIF does not take over all or majority of shares, it has the authority to utilize from partial P&A tool for only insured deposits of that bank. Further, SDIF has the authority to ask the BRSA for revoking the operating license of a bank in resolution, if the resolution is foreseen infeasible or ineffective by the SDIF Board. **II. Evaluations** We appreciate the UNIDROIT's issuance of this guidance will provide important clarity on orderly liquidation of non-systemic banks for liquidators as well as other financial authorities. The guidance defines the basic features of bank liquidation process and sets the appropriate best practices standards. In particular, the document has a well-designed structure to easily follow up the subjects for liquidation process. The proposed key considerations and recommendations for each section are welcomed and would play an important role in guiding the authorities to address weaknesses in their legislation, if any. We believe that having a unified set of regulatory guidance for an orderly bank liquidation will help jurisdictions on how they should improve the effectiveness of their liquidation framework. We again thank the International Institute for the Unification of Private Law (UNIDROIT) and BIS Financial Stability Institute for this opportunity to respond. We think that many jurisdictions, financial authorities and global financial system would benefit from this standardized guidance.	

[1] Banking Law, Law No.5411 - https://www.bddk.org.tr/Mevzuat/DokumanGetir/961)

12.	Banks play an important role in our economy. When they fail, this may have significant impact on the economy. The regulation of systemically important financial institutions ("SIFIs") has received ample attention by legislators and standard-setting organisations over the last two decades. The Financial Stability Board's ("FSB") 2011 Key Attributes of Effective Resolution Regimes for Financial Institutions ("Key Attributes"), as amended in 2014 and 2024, have introduced global guidance for resolution of financial institutions. The Key Attributes apply to SIFIs, regardless of their size, as long as the role the institution plays in the jurisdiction's financial framework is regarded as being of systemic importance. This is provided the financial institution is not reliant on public funding. There is a facility in the Key Attributes to extend any domestic resolution regime to any financial institution in the event of its failure, albeit this may only be available where the impact of that failure is regarded as systemically important. Alternatively, a jurisdiction may extend its resolution regime to any financial institution. To cover those financial institutions that may fall outside the resolution regime of the Key Attributes or to which the resolution regime in any particular jurisdiction does not apply, UNIDROIT's Draft Legislative Guide on Bank Liquidation ("Guide") has been formulated.[7] However, this is a situation that is not always covered by the 2011 Key Attributes, despite the facility it contains enabling an extension of its application. They are also intended to cover the situation where a resolution regime has been applied to a SIFI, subsequent to which a wind-down takes place and liquidation efforts are required for residual parts of the bank. This is a matter that has also been left largely unaddressed under the Key Attributes. Overall, the Guide is aimed at facilitating the "orderly liquidation of non-systemic banks", though its terms may also be of relevance to elements of the resolution regimes. It does so by providing recommendations on the following topics: 1. Key objectives of an effective bank liquidation framework; 2. Institutional Arrangements; 3. Procedural and Operational Aspects; 4. Preparation and Cooperation; 5. Grounds for Opening Bank Liquidation Proceedings; 6. Liquidation Tools; 7. Funding; 8. Creditor Hierarchy; 9. Group Dimension; and 10. Cross-Border Aspects. The recommendations in the Guide are not structured as model rules capable of assimilation into a legal framework directly, but as guidelines against which a domestic framework can be benchmarked or measured. Consultation on the Guide opened in June 2024 for just over 3 months. It is to this consultation that this Response is being provided by INSOL Europe, the Europe-wide practice body representing professionals in the restructuring and insolvency sectors, in which office-holders, judges, policy-makers and academics are represented.	INSOL Europe

[7] UNDROIT 2024 – Study LXXXIV.

	Recognising the importance of orderly resolution of failing banks, including non-SIFI or non-systemic banks, INSOL Europe acknowledges the relevance and timeliness of the Guide prepared by UNIDROIT. Key issues extracted from the Guide and the consultation framework are canvassed below. The Guide, authored by UNIDROIT, has had the input of a great number of experts in the field, which has helped create a useful and pragmatic set of recommendations. The further suggestions here, stemming from both procedural and substantive concerns about the integrity of the process, while still providing for the flexibility required to give flesh to the recommendations during the process of legislative transplantation, are designed to help improve the accessibility and adaptability of the text.	
13.	Many of the 36 emerging economies where the EBRD currently operates do not have tailored and/or developed legislation for bank insolvency, particularly outside of Europe. We welcome UNIDROIT's substantial work in attempting to fill this gap in legislation and practice by developing best practice guidance on bank insolvency. While bank insolvency has not been the focus of EBRD assessment work, we have collected relevant cross-jurisdictional information on the insolvency office holder profession and national insolvency systems across a diverse sample of jurisdictions, mostly civil law, and 'new' jurisdictions. We have also identified different approaches to bank insolvency as part of our project work on non-performing loan resolution strategies (in Hungary, Kazakhstan, Serbia and Turkey) and general corporate insolvency law reform across many different jurisdictions where the EBRD invests. Recently, we have highlighted the importance of national frameworks for insolvency as a building block for specialised insolvency regimes for banks and insurance companies, as part of our ongoing engagement with the Palestinian Authority in the West Bank to prepare a new insolvency law. We note that some countries where the EBRD operates have provisions on bank insolvency, but these are underdeveloped and either contained in a short section of the relevant Banking Law (for example, Kosovo) or Insolvency Law (for example, Uzbekistan). The enclosed mark-up of the Legislative Guide identifies a few areas for clarification. In addition, some observations are set out below. These are provided from a general corporate insolvency perspective and based on EBRD's experience of legal reform in emerging economies.	EBRD LTP

B. CHAPTER 1. INTRODUCTION

#	Paragraph	Comment	Submitted by
14.		In the introduction to its Legislative Guide, UNIDROIT states that there is a need for regulation for "non-systemically important banks" that do not fall within the scope of the FSB Key Attributes (para. 5). This is to be agreed to the extent that an effective bank liquidation procedure should also be provided for these banks (Recommendation 1). However, from our point of view, it is questionable whether this necessarily requires the introduction of an additional or special regulatory regime or liquidation regime for "non-systemically important banks" in line with the proposed recommendations, or whether an existing resolution regime for banks and the "normal" liquidation/insolvency proceedings for companies should be used for this purpose. As the BRR Directive based on the FSB Key Attributes and the SRM Regulation show, a "dual track regime" (para. 14 and 15) can be designed flexibly enough to cover not only the institutions explicitly addressed by the FSB Key Attributes ("Any financial institution that could be systemically significant or critical if it fails should be subject to a resolution regime", para. 4) but also (small and medium-sized) institutions whose solvency could pose a risk to financial stability in individual cases. The existence of a public interest in the resolution is a decisive factor for initiating the administrative resolution regime. This is the case if a resolution measure is necessary to achieve one or more resolution objectives (e.g. maintaining critical functions of the institution) and is proportionate to these objectives. Furthermore, the public interest is not given if the resolution objectives can-not be achieved to the same extent by liquidating the institution through normal insolvency proceedings as through resolution (see Article 18 (5) SRM Regulation). The requirement of public interest makes it clear that resolution is an exception, whereas the implementation of regular insolvency proceedings is the rule. Resolution should therefore be the "ultima ratio". Elke König, in her former role as Chair of the Single Resolution Board (SRB), put it succinctly: "resolution is for the few, not the many" [8]. In our view, the flexible European approach of a "dual track regime" has also proven its worth. From a European perspective, and considering our practical experience, we there-fore do not recognize the need for regulation of "non-systemically important banks" as affirmed by UNIDROIT (see below). It would certainly be helpful for understanding the proposed recommendations if UNIDROIT were also to publish its empirical foundation for its recommendations, e.g. regarding the "administrative model for bank liquidation" preferred in the draft over "court-based liquidation proceedings". It would also appear appropriate to carry out an impact assessment in the form of a cost-benefit analysis before the possible	German Banking Industry Committee

[8] EUROFI article by Elke König - A centralized administrative liquidation tool for banks | Zagreb, April 2020, https://www.eurofi.net/wp-content/uploads/2020/04/views-the-eurofi-magazine_zagreb_april-2020.pdf.

		introduction of a separate resolution regime for "non-systemically important banks". In our view, this should take into account the fact that the number of "non-systemically important banks" whose solvency in individual cases could pose a threat to financial market stability and whose market exit cannot be guaranteed by means of "normal" liquidation/insolvency proceedings for companies is likely to be very small.[9] The introduction of a special regulatory regime for this small group of banks appears disproportionate. Another argument in favour of the flexible approach chosen by the EU is that it avoids having to provide a third resolution/liquidation regime for "non-systemically important banks" in addition to the resolution regime for the institutions addressed by the FSB Key Attributes and the "normal" liquidation/insolvency proceedings for companies, which continue to apply unchanged. In any case, the introduction of additional planning and reporting requirements should not result in a "light" resolution mechanism that would be disproportionate to small and medium-sized institutions. Furthermore, it should be made clear that the Legislative Guide on Bank Liquidation - to the extent that it is at all capable of filling regulatory gaps in certain jurisdictions - is exclusively intended to regulate bank insolvencies and does not otherwise affect national insolvency laws.	
15.		To strengthen the guide, it would be helpful to include examples of jurisdictions that have successfully implemented these frameworks to illustrate the practical benefits. Additionally, the following observations are suggested to improve the clarity and effectiveness of the proposed framework: • **Clarity in objectives**: Although the objectives are well-defined, it would be beneficial to specify clear metrics to measure the success of implementing these objectives. This would facilitate the evaluation and adjustment of policies as needed. • **Focus on coordination**: The guide mentions the importance of coordination but does not sufficiently detail how this will be achieved in practice. It would be helpful to include concrete examples of coordination mechanisms between banking authorities and other relevant entities.	Asobancaria
16.		In its paragraph on the scope of the Legislative Guide it is stated that the purpose of the Legislative Guide is to complement the existing international standards. "*It thereto focuses on the orderly liquidation of (i) banks that are not placed under a resolution procedure* (…) *and parts of banks following, or in the context*	IBA

[9] The risk analysis of the small and medium-sized banks directly supervised by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin) and the Deutsche Bundesbank, which is carried out annually, underlines the low risk to financial market stability posed by these banks. According to the assessment of the potential impact of a solvency or liquidity crisis at a bank on the stability of the financial sector, this is only high for 1.4% of the institutions (as of 31 December 2022).

		of, a resolution action."[10] It is observed that in many jurisdictions such resolution procedures are limited to systemic banks. It is noted that resolution procedures, e.g. such as provided for in EU directive 2014/59/EU, provide both for tools which procure the transfer of the business or part thereof to another legal entity (asset transaction), and for a procedure in which the business of the bank stays within the same legal entity, but some creditors lose their claims or part thereof (bail-in). We also note that the Legislative Guide does not seem to contain such bail-in procedure or the possibility of some reorganization plan in which the assets are not transferred, but the liabilities are adjusted. From an economic viewpoint the transfer of an amalgamate of assets leading to continuation of the business of the bank in another entity on the one hand and the adjustment and reduction of the liabilities of the bank on the other hand amount to the same. The business of the bank is at least partially saved through a reorganization, and the rights of the creditors are curtailed because they receive only partial payment of their claims by way of distribution out of the remaining shell company, or because those rights are adjusted through the bail in instrument. It is therefore appropriate that the resolution procedures provide for both possibilities. Depending on the circumstances one tool may be preferable over the other. For example, using the bail-in tool may provide a more flexible instrument for adjustment of the intercreditor relations such as ranking or the due dates. It may also have tax advantages and facilitate the retention of licenses. For these reasons it would seem preferable to include such bail-in instrument in the Legislative Guide. After all, as the Legislative Guide states, it aims to complement the existing standards and when non-systemic banks do not dispose over such instrument presently, they should be provided with it. The mere fact that the Legislative Guide focuses on "liquidation" of banks does not seem to amount to a justification for excluding the bail-in instrument, because the tools of the Legislative Guide essentially aim both at reorganization of the bank's business and at its liquidation, as the case may require. A limitation to address only the cases in which the legal entity in which the bank conducts its activities are liquidated, does not seem appropriate as the focus should be on the bank's business rather than on its original incorporation. With respect to the supervision of a bank, it is relevant that the audits of a bank are standardized and regularized. Such audits will be important to understand concerns, if any, in relation to banking operations such as repayment status, liquidity concerns, competitive costs, accessibility and security measures.	
17.		It would be useful to have further guidance on applicable international standards in the introduction.	EBRD LTP

[10] Para 6 of the Guide

A. BACKGROUND AND SCOPE OF THE LEGISLATIVE GUIDE			
18.	**Paragraph 2**	This paragraph highlights the critical distinction between ordinary business insolvency regimes and the specialized frameworks required for banks, considering that the unique nature of banking operations, which directly impacts depositors, creditors, and the broader financial system, needs a tailored legal approach to manage bank failures. It is to be considered that standard insolvency processes may not adequately address the urgency and public interest involved in a bank's collapse, where timely intervention is essential to maintain financial stability. It is important that the Legislative Guide emphasizes the need for frameworks that specifically provide to the complexities of bank failures, ensuring that they not only protect the interests of stakeholders but also uphold the integrity of the financial system as a whole. This focus will help jurisdictions to craft laws that are both effective and adaptable to the challenges posed by non-viable banks.	Miguel Gallardo Guerra (Mexico)
19.	**Paragraph 3**	"… minimising the risk of loss to public funds." and cost to taxpayers? "This international standard is being implemented widely for banks and, in some cases, for other financial institutions, including by G20 jurisdictions which have committed to do so." by whom? national authorities and regulators? has there been any formal commitment by G20? what about the EU as a block? is any mapping available?	EBRD LTP
20.	**Paragraph 4**	"… may be systemic in failure depending on the circumstances." And economy in question "This minimum scope of application allows jurisdictions to apply their resolution regime more potentially to all banks, …" wording? not sure about the English	EBRD LTP
21.	**Paragraph 5**	"However, limited attention has been given to regimes for managing the failure of banks that are not considered to be systemic at the point of failure …" Are these words needed? "In addition, guidance is lacking on effective liquidation procedures for any residual parts of banks that are to be wound up…" non-systemic and/or residual parts of systemic banks...	EBRD LTP

		"In addition, guidance is lacking on effective liquidation procedures for any residual parts of banks that are to be wound up following resolution actions, such as the transfer of viable operations to a purchaser, although the FSB Key Attributes specify that frameworks should include the power to "*effect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm*." Perhaps the sentence should start with this for clarity: *While the FSB Key Attributes specify.... as this does not constitute effective guidance*	
22.	**Paragraph 6**	was it decided not to contemplate any bank insolvency rescue/ reorganisation procedure for non-systemically important banks such as in UK special administration? could be worth clarifying	EBRD LTP
23.	**Paragraph 7**	"… mostly aimed at facilitating the orderly liquidation of non-systemic banks…" The paragraph 7 could benefit from aligning with the paragraph 6 and mentioning two focuses of the Legislative Guide as provided in paragraph 6.	EBRD CFMD
24.	**Paragraph 7**	Footnote 5: "For instance, the guidance in *Chapter 8. Creditor Hierarchy*, since the order of distribution in liquidation generally governs the allocation of losses in bank resolution proceedings." Governs or "should mirror"	EBRD LTP
B. ORGANISATION AND PURPOSE			
25.	**Paragraph 9**	The list of jurisdictions analysed is impressive and in our opinion representative for worldwide conclusions, however we are wondering whether Poland should also be included. In Poland we recently (in 2022 and 2023) had resolution (according to BRRD) and following insolvency of two banks – Idea Bank S.A. as well as Getin Noble Bank S.A. In both resolution proceedings, especially with regard to Getin Noble Bank S.A., the European Commission was involved, and these cases are of international impact and interest. Polish Courts requested preliminary rulings related to subject matter to the Court of Justice of the European Union. Therefore, Poland has not only legislative framework for conducting such proceedings, but also practical and empirical examples thereof.	INSO Section, Allerhand Institute
26.	**Paragraph 9**	"… a survey of experts …" specify if extend beyond legal and/or composition of group?	EBRD LTP
27.	**Paragraph 10**	"The Recommendations have differing levels of detail, and as such do not constitute provisions that could be directly enacted in national law." do you need "*have different levels of detail and as such*" - is this the only reason?	EBRD LTP

28.	**Paragraph 11**	"The *Legislative Guide* was developed with due regard to relevant international instruments, and refers to them where appropriate. It aims to complement the existing international standards for managing bank failures. …" which are/ include? maybe some cross-referencing as might immediate trigger a question by reader	EBRD LTP
29.	**Paragraph 12**	"It is expected to be particularly relevant for jurisdictions that do not yet have <u>specific rules</u> for the liquidation of non-systemic banks, although …" legislation on bank insolvency and/or "It is not intended to serve as standard or code used in countries' assessment by international organisations." why? I wonder if this statement is necessary	EBRD LTP
C. GLOSSARY			
30.		The Working Group should consider the draft Legislative Guide from the perspective of competent government ministries for insolvency and ensure that concepts and definitions are as clear as possible to non-specialists who may work in relevant ministries. Given the intersection between insolvency and bank regulation, several government counterparts might be involved in designing any bank insolvency law, particularly where the courts play a role in overseeing the process. For example, it would be helpful to propose a definition for non-systemic banks in the glossary (and also include a definition of systemic banks) given the importance of this concept. would it make sense to define here non-systemic (and also systemic) banks to help the reader? Given the difference in national insolvency law procedures, some procedures may be more adapted to the sale as a going concern than the classic liquidation proceeding. Please consider acknowledging this diversity and whether other insolvency procedures could be adapted to sell a non-systemic insolvent bank. In some jurisdictions, the term bankruptcy is used more widely than liquidation and liquidation may refer to solvent dissolution under the companies law. It could be helpful to tighten the definition of 'liquidation'.	EBRD LTP
31.	**Paragraph 13**	It would be valuable to include a definition of the following terms: "**Bridge Bank"**: A temporary bank established by a regulatory authority to take over and manage the operations of a failing bank. "**Bail-In**": A resolution tool where the bank's creditors and shareholders absorb losses to recapitalize the bank, as opposed to a bailout using public funds.	IPAB

		"**Going Concern**": A business expected to continue functioning in the foreseeable future, as opposed to being liquidated. "**Resolution Plan**": A pre-developed plan detailing ways to act in the event of a bank failure, ensuring continuity of critical functions and minimizing the impact on financial stability. "**No Creditor Worse Off (NCWO)" Principle**: A safeguard in legal frameworks ensuring that no creditor may not be in a less acceptable position after a resolution than that in which they would have been under a liquidation scenario. "**Public Interest**": Elements that justify safeguarding financial stability and minimizing the negative impacts of a bank failure, even if it means temporarily suspending or overriding private interests.	
32.	**Paragraph 13**	The crucial definition is that of a "non-systemic bank", referenced throughout the Guide. As stated in Chapter 1, paragraph 5 of this Guide, the focus of the Guide is on "banks that are not considered to be systemic at the point of failure for the purposes of the FSB Key Attributes." Such banks are referred to as "non-systemic banks" in the Guide. However, a definition of "non-systemic banks" does not appear in the section on terminology, the relevant term of "bank" being used instead.[11] Although defined very widely to include institutions regardless of entity status or function, the Guide has to be read in light of its intention to provide guidelines and recommendations for a "non-systemic bank". While it has to be admitted that it is difficult to create a definition in the negative, particularly if it works off the definition in the 2011 framework, which itself is quite wide and complex, there is still a need to at least provide an indication of the institutions that are intended to be within the scope of the Guide. Actually, it can be inferred from the Guide that it is intended to apply to troubled banks not involved in systemic crises or not relevant to the public interest, including the residual parts of SIFIs following resolution actions. In addition, it is worth pointing out that the term "bank failure" used throughout the Guide deserves to be reconsidered. As recognised in the Guide, the legal frameworks for managing "bank failures" cover not only "liquidation", but also the "resolution" process.[12] As a matter of fact, many of the banks subject to the bank resolution regime do not actually "fail" in the end, but merely experience a crisis. Therefore, it would be preferable to substitute the term "bank failure" with "bank crisis" in the Guide. *Recommendation 1.1: Include a (wide) definition of "non-systemic bank". The Guide could also clarify how its recommendations may apply differently to banks of varying sizes and complexity within the non-systemic category. Additionally, it may be helpful to include examples of the types of institutions that would typically be considered non-systemic in different jurisdictions. While maintaining flexibility, more*	INSOL Europe

[11] Ibid., Chapter 1, paragraph 5; paragraph 34 in Chapter 1 states that for the purposes of the Guide, "bank" is "based on the regulatory definition: that is, the entities that are classified as banks for regulatory purposes, and thereby licensed or authorised to accept deposits and grant loans in the jurisdiction in question."

[12] Ibid., Chapter 1, Section D.

		concrete parameters around the scope would help policymakers better understand how to apply the Guide's recommendations in their specific context. Even if a comprehensive definition is not feasible, additional explanation of the intended scope would improve the Guide's clarity and practical applicability. *Recommendation 1.2: Other definitions could be usefully revisited in order to ensure further coherence between certain terms in the Glossary, for example between terms (v) and (z), a useful addition to (z) could be an amendment stating that it is 'for the distribution of the proceeds to creditors in accordance with the applicable creditor hierarchy.' Also, by way of contrast with term (t), term (w) does not provide for a description of the role of a prospective liquidator, while for term (x), the question could be raised as to whether it is correct to apply resolution here only to systemic banks (and other financial institutions).* *Recommendation 1.3: Substitute the term "bank failure" with "bank crisis" in the Guide*.	
33.	**Paragraph 13 (a)**	Would the term "*delegated powers*" be applicable in case the field of activity of the an administrative authority (and presumably adequate powers in this field) are entrusted by the law?	EBRD CFMD
34.	**Paragraph 13 (b/j)**	The definition of "bank" insofar as is linked to accepting deposits is very broad. For example, online platform service providers which request for deposits and provide some credit in relation to services provided may be caught by wide definition. In Singapore, it is noted that the definition of deposits (which is one of the criteria relevant to determining whether an entity is undertaking banking business and hence is to be regulated as a bank), provides the following definition: ""deposit" means — (a) a sum of money paid on terms — (i) under which it will be repaid, with or without interest or a premium, or with any consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and (ii) **which are not referable to the provision of property or services or to the giving of security**;" (emphasis added) See section 4B(4) of Singapore's Banking Act. Singapore's Banking Act may be accessed via url: https://sso.agc.gov.sg/Act/BA1970 . The words emphasized (in bold and underlined) would serve to make it clear that as far as the deposits referable to provision of property, or services, or the giving of security are concerned, . entities receiving such deposits should not (by reason only of receiving such deposits) be regarded as banks. Thus, hospitals,	IBA

		platforms, agents, etc., that may take deposits and that may extend credit would not be regarded as banks. Next, the definition of bank should be applied when the relevant deposits are received "from the public or a class thereof" (and not just the public in general).	
35.	**Paragraph 13 (b)**	"…For the purposes of this *Guide*, "bank" includes any licensed deposit-taking institution (including cooperatives, credit unions, building societies, saving banks, *Cajas de Ahorro*, *Sparkassen* and others)." national references look lost - do you mean "*or national types of banking institutions such as Cajas*.....etc"	EBRD LTP
36.	**Paragraph 13 (f)**	"…competent bodies…" Should the term "authorities" be used to align with the previous terminology, or in case a broader approach is meant - "competent authorities and/or other bodies"?	EBRD CFMD
37.	**Paragraph 13(g)**	"… or a sale as a going concern …" is it conceivable that this might take place within a procedure e.g. administration that is not a classic liquidation? there is such variety in insolvency systems and procedures	EBRD LTP
38.	**Paragraph 13 (m)**	Consideration should be given to adding "covered bonds" within the list of financial contracts, as such instruments are important for banks to more efficiently and more cheaply raise funds. Efficiency/pricing advantages of such instrument may be eroded if there are stay risks and it is therefore important to ensure that covered bonds are not subject to stay risk either on the basis that it is a type of financial contract that should be subject to stay risk or on the basis of a separate carve out from stay risk.	IBA
39.	**Paragraph 13 (p)**	"… a deposit insurance scheme…" Should the definition be complemented with the words "deposit guarantees or similar deposit protection arrangements" after the words "a deposit insurance scheme" in order to align with the definition (k) "deposit insurer"? Or alternatively in case the term "deposit insurance scheme" covers all three terms - "deposit insurance, deposit guarantees or similar deposit protection arrangements", should the definition of the term "deposit insurance scheme" be introduced? "… and do not exceed the maximum coverage level." A definition could be interpreted as if the deposits (even in case they fall within the scope of coverage of a deposit insurance scheme) exceeding the maximum coverage level are deemed to be not insured	EBRD CFMD

		deposits at all. To avoid a possibility of incorrect interpretation, it is suggested to add "or in case of deposits exceeding the maximum coverage level, the part of eligible deposits that does not exceed such coverage level". The suggested wording is in line with the wording used in Art.2(5): Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemesText with EEA relevance (europa.eu)	
40.	**Paragraph 13(t)**	Since UNIDROIT practice is to use English spelling from UK, consider if it would be needed a note on why there is no reference to trustee or receiver which are common in British insolvency terminology.	Hernany Veytia (Mexico)
41.	**Paragraph 13(t)**	"… for a bank in a liquidation proceeding or … maybe worth clarifying that liquidation proceeding is an insolvency proceeding?	EBRD LTP
42.	**Paragraph 13(t/w)**	These definitions reference the liquidator as a person authorized by a liquidation authority and a liquidation authority is an administrative or judicial authority. We note that the authority of the liquidator may well derive not only from a liquidation authority, but also from applicable laws.	IBA
43.	**Paragraph 13 (v)**	Consider rephrasing the Paragraph (v) of the Glossary as follows: "***Piecemeal liquidation****": a process of selling or disposing of* ***a failed bank's*** *assets* ***in a*** **"***piece by piece***" *** basis****, for the distribution of the proceeds to creditors in accordance with the applicable creditor hierarchy, as opposed to the sale of the* ***whole*** *business or parts thereof as a going concern."*	IPAB
44.	**Paragraph 13 (x)**	Consider if the term resolution should be widened to encompass not only situations of failure, but also situations of the managing banks which are "likely" to fail. There is much to be said about the process of resolution and resolution measures being taken earlier in time.	IBA
45.	**Paragraph 13 (aa)**	Subordination arising at common law or equity should be also considered. In this respect, claims by trust creditors would normally rank ahead of claims of beneficiaries out of trust assets, and such ranking does not arise as a matter of "statute, a court order, or a contractual agreement".	IBA
D. LEGAL FRAMEWORK FOR MANAGING BANK FAILURES			

46.	**Paragraph 14**	"In dual-track regimes, the "liquidation" track may be governed by the ordinary business insolvency law **(**~~, by the ordinary business insolvency law but~~ with **or without** bank-specific modifications**)**~~,~~ or by a bank-specific liquidation law."	IPAB
47.	**Paragraph 14**	This paragraph outlines the fundamental differences in legal frameworks for bank failure management across jurisdictions, as it is considered that the distinction between single-track and dual-track regimes is particularly significant as it highlights how different countries conceptualize and approach bank failures. In single-track regimes, having a tailor-made framework for banks ensures that the unique risks associated with financial institutions are adequately ad-dressed. On the other hand, dual-track regimes may lead to inconsistencies if ordinary business insolvency laws are applied without sufficient modifications for banks. This could potentially com-promise the effectiveness of the framework in responding to the specific challenges posed by bank failures. It is essential for the Legislative Guide to emphasize the importance of creating robust, bank-specific frameworks that can effectively manage these complexities while maintaining public confidence in the financial system. Lastly, there is a repetition in the phrase "by the ordinary business insolvency law" in the last sentence that could be streamlined for clarity.	Miguel Gallardo Guerra (Mexico)
48.	**Paragraph 15**	"For example, the European Union's (EU) framework for bank resolution, set out in the Bank Recovery and Resolution Directive (BRRD), distinguishes between "resolution" and "normal insolvency proceedings", and national implementation by EU Member States takes the form of a dual-track regime." could be useful to spell this out for reader and add "*with separate resolution rules and bespoke insolvency laws for banks*".	EBRD LTP
49.	**Paragraph 16**	"It may also organise a bridge bank to continue the operations of the failed bank until it is sold or liquidated." A bridge bank is regarded as a type of P&A transaction: "A bridge bank transaction is a P&A in which the FDIC acts temporarily as the assuming institution" FDIC Resolutions Handbook, p.18 18c8697.pdf (uscourts.gov).	EBRD CFMD
E. NEUTRALITY OF THE GUIDE			
50.	**Paragraph 19**	Highlight the fact that this Guide can be used also by non-FSB members. In places where it is difficult and expensive to access credit, the Guide can help to improve the legal framework by speeding the bank liquidations after a financial crisis. A good legal framework in the advance preparation for the potential liquidation can be particularly beneficial for managing the failure of small banks efficiently.	Hernany Veytia (Mexico)

51.	**Paragraph 20**	"Nevertheless, most of the aspects discussed in the Guide would be expected to be part of primary legislation. …" whether as part of a country's banking law, general insolvency law or specific bank insolvency law.	EBRD LTP
52.	**Paragraph 21**	In jurisdictions with a dual-track regime, the provisions governing bank liquidation should ideally be included in a dedicated bank liquidation law but could also be integrated in the banking law or general insolvency law. please consider adding "*in a separate section of a*"	EBRD LTP
53.	**Paragraph 22**	Insufficiency and Inefficiency of Corporate Law Solutions The Guide strongly suggests that classic corporate law solutions (which can include solutions in restructuring and insolvency law) are not suitable for banks in general, whether with systemic significance or not. This can be explained from two perspectives. First, some tools (e.g., bridge bank and bail-in) that are helpful in addressing bank crises are missing from corporate law solutions. Second, many arrangements (e.g., triggers, creditor involvement, and creditor hierarchy) established in corporate law solutions are unfit for banks. As a result, while corporate law solutions are becoming more sophisticated, the focus of the solutions, whether geared to rescue of the entity, of its business or of its assets, do not adequately address the structures or business models of banking institutions, or the interests of the various stakeholders associated with the process (including, but not limited to, depositors). In terms of SIFIs, following the 2008 financial crisis, the treatment of troubled SIFIs has been addressed in international guidance (e.g., the Key Attributes) and national legislation. A range of tools has thus been formulated in this regard, providing actions that can be deployed whether the outcome is geared to restructuring, liquidation, or a combination of both. To complement the framework that focuses solely on SIFIs, this Guide addresses banks whose crises do not pose systemic risk. Although this Guide has identified the specificities of the bank liquidation system compared to corporate law solutions,[13] it would benefit from clearly highlighting the insufficiency and inefficiency of corporate law solutions during the discussion. *Recommendation 3.1: (subject to the above Recommendations 2.1 and 2.2) improve on the recommendations in the Guide by strongly suggesting the appropriateness of separate legislative/regulatory frameworks to corporate insolvency solutions.* *[Secretariat: Recommendations 2.1 and 2.2 of INSOL Europe relate to supervision and oversight and have been included in Chapter 3, Section D below]*	INSOL Europe

[13] Ibid., for example, Chapter 1, paragraph 22.

54.	**Illustration 1**	Involvement of administrative authorities: what about an insolvency practitioner supporting the court? is this role redundant? Procedural role and treatment of creditors: "Where others also retain such a right, the administrative authority should at least be heard in the proceedings and before any order is granted." please consider adding "*in any third-party initiated" proceedings*" Creditor hierarchy: "In particular, a privileged ranking for depositors facilitates …" up to statutory agreed amounts? Group dimension: "The legal framework should clearly set out …" please consider adding: "*in the relevant jurisdictions?*" this cannot work without Cross-border dimension: "…with due respect for safeguards such as the non-discriminatory treatment of creditors" foreign?	EBRD LTP
F. BANK LIQUIDATION AND THE BROADER LEGAL AND OPERATIONAL ENVIRONMENT			
55.	**Paragraph 23**	"While outside the scope of this *Guide*, that broader legal and regulatory environment, including the judicial system, affects the liquidation authority's ability to fulfil its mandate and perform its functions effectively and shortcomings may lead to delays in decision-making and legal uncertainty, which can result in sub-optimal outcomes in bank liquidation." it may also determine whether a state adopts a single or dual track model as latter may require court involvement	EBRD LTP
56.	**Paragraph 24**	"Effective prudential regulation and supervision, in accordance with the relevant international standards, are critical for enabling supervisors to identify, assess, and take action with respect to risks arising from individual banks or the financial system as a whole." what kind of risks - failure risks?	EBRD LTP
57.	**Paragraph 25**	"To ensure a smooth continuum from supervision to bank failure management, jurisdictions should have a system of prudential regulation and banking supervision that meets the relevant international standards…" "leading" international standards? or "core" international standards?	EBRD LTP
58.	**Paragraph 27**	"… or as broad-based support." is this support for all banks? I was not sure	EBRD LTP

59.	**Paragraph 28**	"A DIS helps to protect depositors and contributes to financial stability." Helps to protect *"and reassure"* investors? up to certain agreed minimum amounts?	EBRD LTP
60.	**Paragraph 30**	"… The bank liquidation framework specified in this *Guide* is not a substitute for a resolution framework, and the provisions and arrangements it recommends, taken together as a whole, are not tailored to deal with banks that are systemic in failure." do you mean here "systemic banks" - might this point concerning determination at point of failure be included in a definition (of systemic banks)?	EBRD LTP
61.	**Paragraph 31**	I would also mention the institutional framework. We know that many countries do not have commercial courts - see the review of EBRD jurisdictions in the Business Reorganisation Assessment	EBRD LTP
62.	**Paragraph 31**	The Guide refers 45 times to the FSB, there are several references to the World Bank and UNCITRAL works but it can also be improved by including references to other UNIDROIT works, particularly in new topics that may affect cross-border bank liquidations such as Cape Town Convention and Protocols and Liquidation of Bank Art collections (Cultural Property 1994), Fintechs, DeFi (Decentralised Finance), Digital Assets (see UNIDROIT Work in Progress). The Guide on bank liquidation doesn't address how to handle digital assets or cryptocurrencies in bank liquidation. As these become more prevalent in banking, specific guidance may be needed in how to handle the bank partnership with DeFi.	Hernany Veytia (Mexico)
63.	**Paragraph 33**	"The legal framework should provide a mechanism for the fair and quick resolution of disputes. The judiciary should be independent and able to take decisions swiftly." please consider adding "*specialised in commercial legal matters*", some further alignment with the EU 2019/1023 directive on specialisation and training might be useful	EBRD LTP
G. SCOPE OF A BANK LIQUIDATION FRAMEWORK			
64.		It is deemed appropriate that the "Draft Legislative Guide on Bank Liquidation" be applicable to the concept of "bank", which encompasses "*any licensed deposit-taking institution (including cooperatives, credit unions, building societies, savings banks, Cajas de Ahorro, Sparkassen, and others).*" The inclusion of these types of entities is a response to the realities of the credit market in countries like Colombia, where the cooperative sector and financing companies—often dedicated to financing the acquisition of durable consumer goods—play a significant role in the financial system. The aforementioned entities are represented by "*cooperativas financieras, cooperativas de ahorro y crédito y cooperativas multiactivas con sección de ahorro*," despite the comparatively limited amounts handled by these vehicles.	Luis Fernando Lopez Roca (Colombia)

		Conversely, in Colombia, a distinct liquidation system has been in place since 1993, applicable to all financial institutions, including banks, non-bank financial institutions of a commercial nature, insurance companies, securities intermediaries, and pension funds. Therefore, it would be beneficial for new discussion scenarios to be proposed at future Unidroit meetings with a view to analyze proposals regarding the liquidation of financial institutions that are not banks.	
65.	**Paragraph 34**	See comments in relation to paragraphs 13 (b/j) above *[concerning "bank" and "deposits"].*	IBA
66.	**Paragraph 35**	By aligning the scope of the bank liquidation framework with the regulatory perimeter, it ensures that the entities covered are subject to appropriate prudential supervision. This alignment not only clarifies which institutions are included under the framework but also facilitates access to crucial information needed for effective failure management. It is believed that the Guide would benefit from further elaboration on how jurisdictions can effectively implement such frameworks while considering the specific regulatory landscapes in which these banks operate.	Miguel Gallardo Guerra (Mexico)
67.	**Paragraph 39**	further guidance on digital banking might be useful for regulators considering this Guide	EBRD LTP
68.	**Paragraph 40**	The flexibility for extending the bank liquidation framework to include entities that, while not licensed as banks, engage in bank-like activities, is essential in recognizing the evolving nature of financial services. However, it would be beneficial for the Guide to provide clearer guidelines on how jurisdictions can effectively incorporate these entities into their liquidation frameworks, ensuring that they align with the overarching principles set forth for licensed banks. The above is important because there are jurisdictions like Mexico where efforts are being made to promote access for certain sectors of the population to various financial products through banking correspondents or other types of financial institutions, this would thereby strengthen the financial system as a whole.	Miguel Gallardo Guerra (Mexico)
H. KEY OBJECTIVES OF AN EFFECTIVE LIQUIDATION FRAMEWORK			
69.		We recognise the importance of having an effective bank liquidation regime, as part of the broader architecture for strong banking systems and have enormous respect for the impressive list of individuals and institutions that have already dedicated significant efforts to this initiative. We believe that well-designed and well-implemented bank liquidation regimes could indeed occasionally help to minimise the need to draw on the extraordinary powers, and associated risks, of a resolution regime. **However, we have concerns that the Objectives, as currently drafted, may have been set too broadly,** with implications throughout the rest of the Guide. We set out our reasoning below:	INSOL International

		Base assumptions: We believe it is reasonable for the Guide to explicitly assume that for any country that is considering introducing a new bank liquidation regime: • **There is already an existing bank resolution regime in place**, or one is being introduced concurrently, and that this has been designed in line with the Key Attributes. The Guide can (and should) therefore assume that, for any bank that is about to go into liquidation, the authorities have already made all the appropriate evaluations of public interest considerations (including financial stability, depositor protection, avoiding use of public funds and loss to taxpayers, etc). The aim now is to either liquidate the remaining rump following a bank resolution, or to liquidate a bank that has been deemed to not be systemic. The bank liquidator should therefore not need to re-evaluate those complex considerations, except in exceptional circumstances as set out below. • **There is already an existing corporate insolvency or liquidation regime,** with an insolvency practitioner or liquidator normally tasked with doing an orderly winddown, acting in the interests of creditors as a whole (or equivalent standard in the applicable jurisdiction). **The Guide can therefore be seen as a <u>Bridge</u> between these two worlds**, each with its own long and complex history, and ongoing evolution. We believe it would be preferable to design this Guide, or Bridge, as focused as possible, and avoid bringing in or reiterating complexities from either side. The Guide should try to identify what are the most critical things that need to be added to, or taken out from, the corporate insolvency regime to reflect the particularities and importance of banks, and the bank resolution regime. **Though perhaps more difficult to design, we therefore believe that the Guide should focus on the bare minimum required for an effective bank liquidation regime.** This clarity and rigour will also be politically important to enable legislators to implement the required changes. As currently structured, the Guide does not provide this required clarity, mainly, or at least partially, because the Objectives, in our view, require some adjustments. We note that the Objectives were a subject of some debate during the various Working Group sessions. So, we may have missed some important nuances that resulted in the current Objectives. **We believe that the Objectives should be adjusted along the following lines:** **Objective 1. Value preservation and maximisation.** This is normally the overriding objective of a corporate liquidation, and in our view should remain the case for a bank liquidation. Notably, this is normally carried out in the interest of ***creditors as a whole***. To do this, a liquidator, whether of a bank or of a corporate, ideally needs to have the powers: a. **To act fast when needed.** This includes being able to sell businesses or parts of the business as going concerns, including using Purchase and Assumption tools, or similar, if appropriate.	

		Having (i) access to Deposit Insurance funding to facilitate this and (ii) being involved early in the planning process (contingency planning in parallel to any resolution planning), would be of value. b. **To act slowly when needed.** The liquidator should not be under any undue time pressure and would normally want to avoid fire sales at distressed prices. The liquidator should be able to take the required actions and time to stabilise operations, reinforce recovery of loans, and over time either run-off the loan book or package assets into orderly sales, as appropriate, to ensure recoveries are maximised. **Additional Objectives:** In the special case of bank liquidations, we recognise that there are some important additional objectives. However, these should not normally conflict significantly with the primary objective of value preservation and maximisation: **Objective 2. Paying off insured deposits, in an orderly manner, within the required time constraints.** The bank liquidator must have the powers and ability to work closely with the Deposit Insurer to ensure the orderly and timely payment of **insured deposits**, as appropriate. This is different to, and does not include, any broader depositor protection objectives or considerations[14]. **Objective 3. Support any preceding bank resolution actions.** We recognise that it is important that the bank liquidator should cooperate with and not interrupt any earlier bank resolution actions that have been taken. In practice this will most likely need to include: **a. To support certain continued operations of the bank that are to be transitioned into another entity as part of the resolution.** This should be for a limited period of time (as determined during the resolution planning), and ideally with appropriate compensation, else it would be to avoid detriment being caused to creditors as a whole. **b. To not initiate legal claims which are likely to be contrary to the earlier resolution.** We recognise that the bank liquidator should not initiate legal actions to recover value that might unwind or put at risk the earlier resolution. **Objective 4. Broader financial stability, depositor protection, and avoiding use of public funds and loss to taxpayers – but only in <u>exceptional</u> circumstances, with a clearly defined process and controls.** These (complex) assessments should have been carried out by the banking authorities	

[14] As an example, the UK Bank Insolvency Procedure specifically recognises this objective, to prioritise the payment of insured deposits, and indeed changes the oversight structures of the process once this is completed.

		prior to a bank going into liquidation. We therefore do not believe they should be an objective of any individual bank liquidation, and indeed believe it would be detrimental if the liquidator, or the oversight structures around them, are having to take these considerations into account during a bank liquidation. **However, we do recognise that there may be new exceptional circumstances which arise**, during the course of a bank liquidation, where broader financial stability concerns might surface or re-surface, and become overwhelmingly important. We therefore do support the banking authorities having the appropriate powers to monitor the bank liquidation process from that perspective, and potentially the powers to rapidly 're-enter' into the process, and 're-introduce' bank resolution assessments and tools. We believe it is important for those exceptional circumstances and powers to be clearly identified, with appropriate processes and controls put in place. **Objective 5. Certainty and predictability.** We believe this is important, and indeed strengthened by the revised Objectives as set out above. In particular, limiting Objective 4 to exceptional circumstances, with appropriate processes and controls in place, would reduce the uncertainty of reintroducing broader (and difficult to assess) public interest considerations during a bank liquidation. To achieve the above Objectives, there are some key issues that need to be considered in the detailed design. Some also apply to corporate insolvencies, but they are particularly important or unique in the case of banks: **Issue 1. Certainty around the selection, appointment, and replacement of the bank liquidator.** Good early contingency planning and timely actions are required to meet the above objectives. The authorities therefore need to be able to select the bank liquidator in advance, actively involve them in contingency planning (whether or not any resolution or liquidation actions are eventually taken), and ensure that there are no risks or delays around the liquidator's appointment, so that the duties can commence immediately. *[Secretariat: see Chapter 3, Section D]* **Issue 2. The role of the Deposit Insurer in any Creditors Committee, or equivalent governance structure.** To any extent that the Deposit Insurer is involved in paying out insured deposits, either directly or indirectly, it is likely to become one of the main creditors with an interest in the bank liquidation and any eventual distributions. Accordingly, it should play an important role in the oversight and governance of the process, including being an important participant in any Creditors Committee, or equivalent governance structure. However, care must be taken to balance those governance structures to make sure they act in the interests of the ***creditors as a whole***. In practical terms, if the Deposit Insurer has a higher ranking in the distribution of assets, it should not have undue influence to force a fire sale of assets at distressed prices, which could be to the detriment of the creditors as a whole. Thorough and realistic contingency planning prior to entering into the liquidation process can be an important way to formally manage expectations around recoveries and timing, and minimise these conflicts in the Creditors Committee. *[Secretariat: see Chapter 2, Section E]*	

		Issue 3. Care in understanding the different incentives and potential disparities between any NCWO calculations, and the liquidation plan. We would not expect either the liquidation plan or the NCWO calculations to assume fire sales at distressed prices. However, in both processes there are (different) incentives to be conservative in the assessment of recovery values. In exercising their powers, the banking authorities need to use caution and discretion in understanding and calibrating both. *[Secretariat: see Chapter 6]* **Issue 4. Administrative processes, in general, can provide the greater flexibility, versus judicial processes,** however we recognise that these are decisions that need to be taken in the context of each country. *[Secretariat: see Chapter 2]*	
70.		*Recommendation 1.4: In Section H of Chapter 1, five objectives are introduced: (i) value preservations and maximisation; (ii) depositor protection; (iii) financial stability; (iv) avoiding the use of public funds and loss to taxpayers; and (v) certainty and predictability. The relevance and application of these objectives is left largely open and subject to the "broader policy choices and design features of the bank liquidation framework at hand." As such, a question the Guide could usefully answer is what their substantive relevance is in applying the Guide as well as whether priority should be granted to the principles in any particular hierarchical order.*	INSOL Europe
71.	1. Value preservation and maximisation	is this order placing emphasis on any objective? consider linking with depositor protection objective below.	EBRD LTP
72.	1. Value preservation and maximisation **Paragraph 43**	There may arise a conflict as the duty to wind up the affairs of the insolvent entity on one hand and value maximization on the other. Balancing the competing considerations may well mean that the liquidator should be winding down the business in the most beneficial way, but it does not enable the liquidator to undertake new business to maximize returns. Winding down of existing business and assets in a beneficial way per se does not then maximize returns. At the same time, the legal and administrative regime should be careful in allowing the insolvent entity to be undertaking new businesses given the insolvent state of the entity. Accordingly, it may well be that the goal of value maximization should be more readily applicable in the case of existing business and assets and more regulated or controlled where new business is undertaken. An example of such regulation or control could be the imposition of a requirement that approval of the liquidation authority be required before new business is undertaken.	IBA
73.	2. Deposit protection **Paragraphs 46 to 50**	Another tool for depositor protection would be to mandate set-off of clams which the insolvent entity against the amount on deposit. Without set-off, the depositor may well have to seek recovery as an unsecured creditor with any applicable preference for depositors, but face a claim for the full amount of any claim the insolvent entity may have against the depositor. For instance, in Singapore section 62A(1) of the Banking Act provides:	IBA

		"Despite any written law or rule of law relating to the winding up of companies, in the event of the winding up of a bank in Singapore, a liquidator must first set-off a depositor's liabilities to the bank against any deposit of the depositor placed with the bank that is accepted — (a) in Singapore dollars; or (b) on terms under which the deposit may be repaid by the bank in Singapore dollars."	
74.	**Paragraph 46**	The intervention process establishes the impossibility of collection by creditors, including depositors. It is right that this is so, however, it is necessary to develop a regulation that avoids reputational damage that in the long run, especially when the entity is viable and a regularization plan is established, does not bring the bankruptcy of the entity due to loss of public confidence. In that sense, we suggest clarifying under what conditions the transfer of deposits occurs, i.e. as long as it is within the parameters for the application of the DIS or as indicated in point 49.	Costa Rica Bar Association
75.	**Paragraph 46**	"… If depositors' access to their deposits is interrupted, this could cause considerable personal hardship for some depositors …" I would delete "some" depositors may include consumers as well as businesses.....any mention of impact on business transactions?	EBRD LTP
76.	3. Financial stability **Paragraph 53**	Financial stability is an objective that informs the whole liquidation framework. Although we agree that it may lose relevance as the liquidation procedure advances, the purpose of the "sale as a going concern" of the failing bank at the earlier stage of the procedure is always the protection of financial stability. In this regard, as rightly pointed out in paragraph 52, financial stability and deposit protection are very closely linked objectives, since the interruption of the immediate access to deposits (including transaction accounts and to segregated client funds) and disruptions to depositors also remains a potential significant source of financial instability. Therefore, we suggest extending to the financial stability objective the outright statement made in the first sentence of paragraph 48 of the Legislative Guide as regards the importance of depositor protection. Consequently, the second sentence of paragraph 53 may be redrafted along the following lines: *"[...] ~~However~~ **Therefore**, financial stability ~~may~~ **should** also **ideally** be incorporated in the bank liquidation framework as an explicit statutory objective for all or specific parts of the procedure and/or through the mandate of the authorities involved in the process [...]".*	FROB
77.	4. Avoiding use of public funds and loss to taxpayers **Paragraph 55**	Banks should set aside a fund or have access to a fund (e.g. insurance) which would give a liquidator some liquidity to at least take initial steps consistent with the key objectives of an effective bank liquidation framework. It is good to have key objectives, but having a ready initial funding to take initial protective and preservative steps may enhance achieving the objectives. It should be added that securing such initial funding itself may be part of a wider objective that the goals and objectives must be implementable.	IBA

78.	**Paragraph 55**	"Funding for liquidation measures should derive primarily from the balance sheet of the failed bank, with equity absorbing losses first followed by …" please insert comma if court involvement, will there also be IP involvement and hence need to think about IP remuneration frameworks and tariffs (if applicable)?	EBRD LTP
79.	5. Certainty and Predictability **Paragraph 56**	"… and how to deal with banks that are part of a group and cross-border liquidations." The Model Law on Cross Border Insolvency expressly indicates that banks and other types of financial institutions may be excluded at Art 1(2) "*2. This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].*". Should there be guidance on this and whether the Model Law is appropriate for cross-border bank insolvency cooperation? Would the foreign representative as defined definitely include an administration authority representative (definition under Model Law is an establishment within the meaning of subparagraph (f) of this article; (d) *"Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding*;"	EBRD LTP
80.	**Paragraph 58**	Ambiguous or very open regulations, which grant ample discretion to the interventor/administrator especially, together with a closed attitude of the interventor/administrator, also violate this objective. Some degree of transparency should be included hand in hand with very clear rules, in order to avoid desperation on the part of creditors (especially depositors) in the early stages of the resolution/liquidation process.	Costa Rica Bar Association
81.	6. Balancing the objectives **Paragraph 61**	"However, there may be situations in which frictions arise. For example, public interest objectives may be in tension with maximising value for creditors. …" can we illustrate with reference to the type of creditors that banks have (apart from depositors)?	EBRD LTP

82.	**Key Considerations and Recommendations 1-2**	[*About Recommendation 1:*] I agree with the proposition that the legal framework for bank liquidation proceedings can be set out either in a dedicated bank liquidation law or in the banking law or general insolvency law. However, I would like to share the following experience from Germany: In the German legal system, the legislator has chosen to include a specific chapter on the liquidation of banks within the German Banking Act (*Kreditwesengesetz* (KWG), sections 46 et seq.). These provisions address a number of key issues, including the filing for insolvency, the protection of creditors prior to the commencement of insolvency proceedings, cross-border insolvencies involving the assets of banks, and the ranking of creditors. Nevertheless, it seems to me that the allocation of these special provisions in the German Banking Act has led to a *lack of awareness* (even) among insolvency judges and insolvency advisors. Despite the vibrant academic community in Germany, there is a paucity of academic literature on the subject of bank liquidation. These special provisions are frequently neglected or even overlooked from the perspective of insolvency experts. It may therefore be suggested that the UNIDROIT Working Group considers the possibility of providing assistance to key players, such as insolvency judges, insolvency practitioners and insolvency advisors, by positioning the legal framework in a way that makes these provisions *clearly visible*. Depending on the existing national legal framework, a chapter in the *general insolvency law* could *raise awareness* of those provisions that deviate from the general rules on liquidation and insolvency.	Dominik Skauradszun (Germany)
83.	**Key Consideration 1**	"…The bank prudential supervision framework, deposit insurance system, bank resolution framework, lender of last resort function, and the broader legal and judicial framework, …" please consider adding "institutional"	EBRD LTP
84.	**Key Consideration 2**	" … financial stability, avoiding losses to taxpayers, and …" should this be "*avoiding losses to the public purse and taxpayers*" - there could be a distinction	EBRD LTP
85.	**Recommendation 2**	"The design of the legal framework should be informed by the liquidation objectives. …" legal framework "*and any procedure*"?	EBRD LTP

C. CHAPTER 2. INSTITUTIONAL ARRANGEMENTS

#	Paragraph	Comment	Submitted by
86.		In the EU, national insolvency proceedings as they currently stand appear to be suitable for the liquidation of small and medium-sized non-systemic banks, which in principle do not fall under the resolution regime. In principle, the distress of these institutions does not have any negative effects on financial market stability. These institutions can be wound up in an orderly fashion without jeopardizing the stability of the financial market. Positive examples of this are provided, for example, by the latest cases of the German Banks' Compensation Scheme (EdB): • Greensill (2021): approx. 22,000 depositors, approx. 1.1 billion euros compensated by EdB (balance sheet total 4.5 billion euros at the end of 2020). • Sberbank (2022): approx. 35,000 depositors, approx. €950 million compensated by EdB on behalf of the Austrian deposit insurance (cross-border compensation) (balance sheet total €13.6 billion at the end of 2021). • NCB (2023): approx. 460 depositors, approx. 17 million euros reimbursed by EdB (balance sheet total 173 million euros at the end of 2021). We do not recognize the advantage of the administrative model for bank liquidation (Para. 67; FSB - Key Considerations) preferred by UNIDROIT over court-based liquidation proceedings. On the one hand, experience, at least in Germany, shows that court-based liquidation proceedings can also ensure the market exit of "non-systemically relevant banks" very well. The crucial point is that in practice the proposed national rules, whether in the form of an administrative model or a court-based model, are actually applied. For example, possible inefficiencies in the judicial system or state influence on proceedings are not a question of the model chosen but are of a fundamental nature. We concur with UNIDROIT to the extent that the role/tasks of the banking supervisory authority should be clearly defined in court-based winding-up proceedings as well (No. 68; Recommendation 3). It is also fundamentally appropriate that only the banking supervisory authority should be able to file an application for the opening of insolvency proceedings (Recommendation 19). This ensures that reorganization efforts cannot be obstructed by third parties. However, the "strong role" of the banking supervisory authority in the proceedings, which the working group considers necessary, e.g. in the form of the banking supervisory authority being appointed as liquidator or in the selection of a liquidator and as a member of the creditors' committee (see Recommendations 3 and 22), would not be objectively justified. In a dual-track regime, only banks that do not pose a threat to financial stability (see above) can be considered for court-based liquidation proceedings. Therefore, there is no need for a "special role" for banking supervision in these proceedings, especially since its expertise does not lie in insolvency law and it would, for example,	German Banking Industry Committee

		represent an element foreign to the system in the creditors' committee. In principle, the rules of "normal" corporate insolvency law should also be applied to the liquidation of a non-systemically relevant bank. This system, which has also proven itself for decades in the case of "non-systemically relevant banks", requires no modification. In particular, tried and tested principles that have been carefully balanced in a legal system and are required under constitutional law, such as interim legal protection with a suspensive effect, should not be carelessly abandoned and replaced by ex-post legal protection in the form of claims for damages. In the case of small and medium-sized banks, this is not necessary to avoid endangering financial stability.	
87.		**Case Studies**: Include practical examples of how different institutional models have managed bank liquidations.	Asobancaria
88.		The Legislative Guide highlights the existing tension well and correctly states that the know-how of administrators, such as supervisory authorities and central banks, is necessary to carry out a successful liquidation of a bank. However, the Legislative Guide seems to have a bias in favor of administrative models over court-based models. In theory, it seems reasonable to assume that the liquidation process can be completed more quickly if remedies are limited, and the administrator/liquidator makes decisions instead of having to wait for a court to decide. However, our practical experience has shown that involving the court *ex ante* can ultimately lead to faster proceedings, provided that an expedited proceeding is available. It is important to note that concerns over *ex post* disputes can influence and delay the decision-making of administrators and liquidators. This can be counteracted by involving the courts and having them make final decisions through a transparent proceeding. Jurisdictions should therefore consider whether an administrative model combined with (expedited) court proceedings may be the preferable option. At several places (e.g. para. 120) it is stated that the administrative authority should approve (or not oppose) the initiation of a bank liquidation proceeding or at least be heard before the liquidation proceeding is opened. In para. 200 however, it is stated that if the court involvement is required to open a bank liquidation proceeding, it should not be possible for the court to substitute its own assessment for that of the banking authority. It is not clear how these two positions are compatible. Anyway, it seems desirable that in para. 200 the same structure should be applied as in para. 120, i.e. that the banking authority should at least be heard, but that in the end the court takes its own decision. It is necessary to clearly define the mode and manner for appointment of the administrative authority. Such authority can have representative(s) from the legislature, expert(s) from the financial sector involved and/or retired members of the judiciary. It should be constituted in such a way that the risk of bias is minimalized. Also, the role and responsibilities of the administrative authority should be clearly defined.	IBA

		To the extent the courts are involved, the novo assessments ordered or conducted by the courts ought to be avoided when reasonable due diligence has been exercised by the administrative authority by way of a written report that is well reasoned and supported by sufficient documentation. Whilst the Court must give due consideration to the banking authority's assessment about the non-viability of a bank, the banking authority must be able to satisfy the Court that the non-viability has been determined as per the substantive and procedural requirements of the legal framework.	
89.		Generally, we would note that part of the challenges for non-systemic bank liquidations is the infrequency of these events. As such, there is often limited direct experience across each of the staff working in the authorities, insolvency sector and court systems. As such, it may be preferable that the institutional arrangements adopt the same arrangements used within that jurisdiction for other insolvency cases, and with an overlay applied for the specific requirements of banks as provided in this guidance. That should enable stakeholders involved in the process to have the necessary experience and understanding of the framework even if they have not operated a bank liquidation before, allowing a better assessment of risk and quicker decision-making. To consider whether there could be additional guidance in respect of meeting additional objectives and where there are conflicting objectives, the process for confirming the priority of each objective – e.g. client money, financial stability objective etc.	INSOL International
90.		Balancing Administrative and Curial Conduct of Proceedings The Guide suggests that the prominent role accorded to the supervisory/oversight body should continue in the period of financial distress and guide the institution of proceedings and their use to achieve a particular outcome or outcomes. The unique susceptibility of banks to runs and their importance to the functioning of the financial system and real economy through activities such as deposit-taking, provision of credit, and transmission of payments mean that bank failure is significantly more likely to give rise to public policy concerns than court-based regimes.[15] For example, the administrative authorities' ability to intervene in front of the first symptoms of a bank's problems allows the crisis to be dealt with very quickly, to avoid as much as possible the loss of value of the intermediary's assets and the maximization of creditors' interests. The same applies to the process of realization of assets, and in particular to the sale of business, where the assets' liquidation and the payment of the bank's creditors under the supervision of an administrative authority allow for celerity and efficiency. As such, the role of courts and judges, particularly the interventionist roles seen in civil systems, are not always appropriate for procedures and processes that are highly technical and will demand specialist skills to implement. Nonetheless, public policy may dictate the requirement for office-holders to be appointed, who tend to be under the supervision of or owe duties in the management of cases to a court/judge.	INSOL Europe

[15] Consider Chapter 2, Section C, paragraph 81 *et seq*.

		Courts will also be given, in many systems, specific roles to supervise the office-holder, to resolve challenges to decisions impacting on outcomes and, more generally, to play a public protective role in certifying the outcomes as compliant with the law and public policy. Due to this variety, creditors and depositors tend to be treated differently across the globe, fuelling financial breakdown and avoiding the strengthening of the harmonization process. In that light, the key issue is how to structure a system in which a balance is achieved between allowing technically-based management of processes and enabling challenges to decisions that may impact (adversely) on stakeholders (particularly vulnerable ones). Drawing on experience in relation to SIFIs, where very specific tools demand very high skills in their implementation and curial oversight tends to be limited to narrowly defined areas of challenge, it might be appropriate, as far as it is possible, to delineate areas of appropriate administrative and curial supervision or to indicate, where areas overlap, whether primacy should be given to administrative or curial oversight. Any such delineation can take into account the relative lack of challenges, which tend not to occur when dealing with financial institutions generally because of the costs and impact on the speed of procedures. In this regard, timely and fast-moving insolvency proceedings better preserve asset value, thus better protecting the preferred claims of depositors by maximizing the available assets to cover those claims. An administrative authority with appropriate expertise may be better able to direct a complex procedure efficiently and in a way that is consistent with its statutory objectives.[16] An administrative regime may also provide a wider range of options for bank insolvency by conferring additional instruments beyond conventional liquidation actions on the responsible authority, which may increase available options in insolvency.[17] However, depositor protection objectives may also be achieved within appropriately modified court-based procedures. *Recommendation 5.1: The Guide can usefully extend its recommendations on an approach to balance administrative and curial areas of intervention in the conduct of proceedings, which may include a recommendation for a minimal role for courts that can be limited to their public protective role. Specifically, the Guide may indicate a preferred approach under the implementation of an administrative-based model that provides for a judicial phase, especially in cases where a decision on the creditors' rights and claims is necessary. An expanded role for administrative authorities and a reduced field for judicial courts in the proceedings are aimed in particular at protecting depositors by ensuring as far as possible minimum interruption of access to at least part of their funds and, more generally, at promoting speed and efficiency in the insolvency procedure.* *Recommendation 5.2: The Guide can usefully extend recommendations to specify adequate skills bases (to include pre-requisite knowledge and/or CPD) for courts and/or office-holders and any role they may play in the conduct of proceedings. Moreover, the summaries of the judicial toolbox (i.e. judgments,*	

[16] See Chapter 2, Section A, paragraph 67 *et seq*.
[17] Ibid., Chapter 2, Section B, paragraph 75.

		advisory opinions, and orders) delivered by the court in their respective jurisdictions could be used as a useful reference guide by practitioners in future cases. This initiative can also contribute to the knowledge-sharing process concerning the work of the national courts and/or office-holders and – at the same time - help to clarify the formal role that courts play within domestic bank insolvency management.	
91.		The Draft Legislative Guide should emphasise more clearly in places the need for specialised courts or a nominated court (in smaller jurisdictions) to handle any bank insolvency cases (see for example F. 33, page 13 and Key Recommendation 15 where this is missing). This would align with the EU 2019/1023 Directive on preventive restructuring. Many EBRD countries of operation have courts of general civil jurisdiction. Specialised courts would facilitate cases of bank insolvency but also cross-border insolvency cooperation.	EBRD LTP
92.	**A. INTRODUCTION** **Paragraph 65**	In many countries, like Poland, the proper structure of judiciary system is crucial for the effectiveness and efficiency of insolvency proceedings. In Poland currently, unfortunately, the same bankruptcy (insolvency) court at the level of district court handles both corporate restructurings, corporate insolvencies (including banks), and consumer bankruptcy. In our view, this approach is a mistake, and especially for banks – higher hierarchy courts should be proposed, what can result also in consistency of rulings. Such court structure can result in not-disturbing judges by consumer bankruptcies and to fully focus on complex cases, like bank liquidation.	INSO Section, Allerhand Institute
93.	**Paragraph 68**	"If a fully administrative model for bank liquidation is not adopted, the legal framework should nevertheless ensure that relevant banking authorities <u>have a clear role in</u> the process. …" "*and authority to intervene where necessary*" - without the specific authority there might be issues in practice	EBRD LTP
B. INSTITUTIONAL MODELS			
94.		The Guide provides great value in addressing the differences between Administrative and Judicial models. It also provides recommendations on the degree that legal frameworks should follow them. To promote the understanding of these concepts and standardize concepts, a table could be helpful. Annex 1 is included at the end of the document as a reference to work from. *[Secretariat: please see the Annexe to this document for the proposal made by IPAB]*	IPAB
95.	**Paragraph 70**	"*… Those steps …*" Should inventory and appraisal of bank assets for the purpose of forming the bank's liquidation pool be added?	EBRD CFMD

96.	1. Administrative model **Footnote 34**	In Ukraine, Deposit Guarantee Fund is a bank resolution and deposit insurance authority. It is a single-track regime, so the Deposit Guarantee Fund is also entrusted with functions of bank liquidation - which is correctly mentioned in the footnote 37. The National Bank of Ukraine (a supervisor) is only in charge of declaring bank a problem or insolvent bank.	EBRD CFMD
97.	**Paragraph 72**	The draft Guide describes in detail the benefits of an administrative institutional model especially in the context of a transfer-based strategy. It is suggested that the liquidation proceedings could be led by the banking supervisor, since such authority has the broadest view of the activities and financial situation of the concerned bank. There is, however, an element of tension, potential conflict of interest which is not addressed in the Guide: in a liquidation process led by or under the authority of the banking supervisor, the possible liability of such supervisor in the context of the failure of the concerned bank will most likely not be considered and therefore a potential source of revenue for the creditors will be disregarded. This risk does not exist in a Court-based model. It would be good if the Guide could consider the best way to address the above issue.	IBA
98.	**Paragraph 73**	would there be any guidance on organisation of responsibilities within the regulator? could the same department manage both resolution and liquidation?	EBRD LTP
99.	2. Court based model with administrative involvement **Paragraph 76**	the role of the insolvency practitioner (liquidator) and method of appointment would appear to be critically important for the court-based model. "… This may be a commercial court, an insolvency court or a general court. …" should we comment here on what would be preferred i.e. some commercial specialism? insolvency courts not common in our (EBRD) regions. only Armenia and special divisions of commercial courts in a handful of countries including Egypt	EBRD LTP
C. CONSIDERATIONS IN THE DESIGN OF INSTITUTIONAL ARRANGEMENTS			
100.	1. Objectives **Paragraph 82**	The second sentence of this paragraph reads as follows: "*Administrative authorities with supervisory knowledge are decisively placed to weigh public and private considerations in decisions related, for example, to a banks' non viability, the liquidation strategy to pursue and which businesses units or assets and liabilities of the failing bank should be transferred*". We agree that, since banks are subject to prudential supervision and supervisory reporting (see paragraphs 126 and 130 of the Legislative Guide), exercising supervisory powers is indeed a decisive factor to weigh public considerations when taking a decision on a bank's viability. However, decisions on	FROB

		the liquidation strategy or the determination of the perimeter of a transfer are, in our opinion, not related to banking supervision but they are rather tasks akin to those conferred to the resolution authorities in dual-track regimes (for example, the decision on the resolution tool to be applied to a failing bank or on the design of a transfer based strategy under the sale of business or the bridge bank tools[18]). Therefore, we would suggest redrafting the first part of the above sentence as follows: "[...] *Administrative authorities with supervisory* ***and resolution*** *knowledge are decisively placed to* […]".	
101.	**Paragraph 82**	In the same way, the administrative authorities do not have as much experience in balancing the conflicting interests of different creditors and participants. It is important to point out the need, as we mentioned, for clear procedural rules and a principle of transparency that allows for such a balance during the stages in which the procedure is in the hands of administrative authorities.	Costa Rica Bar Association
102.	**Paragraph 84**	"Preparation may be crucial for the success of bank liquidation proceedings as certain strategies can be executed effectively only if they are prepared in advance." repetition of word crucial. Perhaps vary with "critical"?	EBRD LTP
103.	3. Expertise, efficiency and access to information **Paragraph 85**	It is not clear how the depositor may have access to their funds without material interruption. This point is important, because the most relevant damage is for those people who have deposited their savings and depend on them. In Costa Rica, depositors cannot access their resources once the financial institution's Intervention is declared. As indicated in the commentary to point 46 above, this causes an impact on the bank's reputation, from which it does not normally recover. However, resolution mechanisms have allowed depositors to access their resources relatively quickly, when the "good bank" passes into the hands of another institution. We assume that it is in this scenario that the Guide speaks of unrestricted access to funds by depositors. Please clarify.	Costa Rica Bar Association
104.	**Paragraph 89**	"Moreover, in the absence of specialised judges or courts, relevant expertise and experience in bank failures may also be lacking. …" and some specialisation of insolvency practitioner (liquidator) would be required. There could be no random selection system. arguably the administrative authority should have a role?	EBRD LTP
105.	**Paragraph 90**	"… In addition, the involvement of relevant banking authorities as appointed liquidators or a special role for banking authorities in the process …" is this the court model or the administrative model? I find the reference to involving relevant banking authorities as liquidators confusing here. also why would they be the right persons?	EBRD LTP

[18] See articles 37, 38 and 40 of BRRD.

106.	**Paragraph 91**	We agree that for the purpose of fulfilling its liquidation powers more effectively the liquidation authorities will be interested in delegating some specific liquidation powers to a natural or legal person with necessary expertise under their oversight. However, in our view, the authority should retain the most relevant liquidation tasks (especially at the earlier phase of the liquidation process) that should be legally exercised directly by itself. Therefore, the scope of the potential delegation should be limited. For this reason, we would suggest making it clearer in the paragraph 91 this limitation in scope of the delegation: *"[…] Banking authorities that conduct the liquidation itself should also have the legal authority to delegate* ***certain/specific*** *liquidation powers […]*".	FROB
107.	4. Cooperation **Paragraph 93**	For the sake of clarity and in line with paragraphs 125 and 126 and recommendation 19, we would suggest replacing the two references to "*banking supervisor*" with "*banking authority*" in the first sentence of paragraph 93: "*For example, at the domestic level, the banking ~~supervisor~~* ***authority*** *will be involved at the preparatory stage, and coordination between the liquidation authority and the banking ~~supervisor~~* ***authority, if different*** [...]".	FROB
108.	**Paragraph 93**	"Similarly, the liquidation authority will need to cooperate closely with the DI, […]" Should the following words be added "in case the DI and liquidation authorities are different bodies"? "The institutional arrangements should also ensure coordination with the resolution authority." Should the following words be added: "In case the resolution authority and the liquidation authority are different authorities"? E.g. in Ukraine, the Deposit Guarantee Fund is entrusted with both functions - resolution and liquidation.	EBRD CFMD
109.	**Paragraph 95**	" … could mitigate these drawbacks. For instance, if the court can appoint a banking authority as liquidator, this would allow such authority to …" this is the second time this is mentioned - is this the preferred approach and would such person have the requisite skill set and capacity to deal with all creditors? an alternative would surely be to enable the administrative authority to appoint an appropriately qualified IP or other professional.	EBRD LTP
110.	**Paragraph 96**	There seems to be a typo "fora". I am not sure what this cooperation looks like if court is involved. I would think we should advocate for Model Law on Cross Border Insolvency applying to banks and possibly ensuring foreign representatives including administrative authority representatives.	EBRD LTP

111.	5. Independence **Paragraph 97**	Usually, the principle of independence elaborates on the adequate funding. Should any considerations be provided here? […] "This means, for instance, that the liquidation authority should have proper internal checks and balances and organisational arrangements in place that promote sound and independent decision-making, especially where this authority is assigned with multiple mandates, such as both supervision and liquidation." Should the word "resolution" be added after the word "supervision"?	EBRD CFMD
112.	**Paragraph 97**	"Furthermore, existing international standards require liquidators to be independent (and insolvency laws to specify the consequences of a lack of independence)." Please consider adding "*a breach of ethical rules including a lack of independence*" "For administrative authorities, independence requirements also form part of existing international standards, while a liquidator appointed by such an authority would generally be subject to the authority's directions or guidance." Is this correct? It would depend on how the appointment is done. This remark makes it important to clarify earlier references to the administrative authority taking on the role of IP "Furthermore, the liquidation authority should be well-governed and subject to sound governance practices." Liquidation authority reference is confusing	EBRD LTP
113.	6. Accountability **Paragraph 98**	Should the paragraph expressly mention a consideration regarding sensitive nature of information, similarly to IOSCO Principles (6.3. Independence and Accountability below)? *Where accountability is through the government or some other external agency, the confidential and commercially sensitive nature of much of the information in the possession of the regulator must be respected. Safeguards must be in place to protect such information from inappropriate use or disclosure.*	EBRD CFMD
114.	**Paragraph 98**	any comment on timely and full reporting by IP if so appointed? what is the position on confidentiality and how much is shared in public domain?	EBRD LTP
115.	**Paragraph 99**	"It is also an important mechanism of accountability to ensure that administrative authorities act within their legal powers." Should the words "and in good faith" be added after the words "within their legal power"?	EBRD CFMD

116.	**Paragraph 100**	"As a general rule, the ability to scrutinise the actions of the liquidation authority or liquidator should be balanced with the need for an efficient administration of the liquidation proceeding and the liquidation authority's autonomy." what about any requirement for liquidator to scrutinise prior acts of insolvent bank? Should this be considered as well?	EBRD LTP
117.	**Paragraphs 103, 106, 107**	When courts *ex post* scrutinizes acts of liquidation in which an administrative authority has made the decision, there may be a need for immunity from liability for officers and employees of the administrative authority making or implementing the decisions where such officers and employees have acted in good faith. Alternatively, the permission of the courts should be required before any action may be brought by disgruntled parties against the officers and employees of the administrative authority making or implementing the decisions.	IBA
118.	**Paragraph 103**	"Under the applicable principles of administrative law, the scope of judicial scrutiny is often already limited, with courts deferring to the technical expertise and discretion of banking authorities." would they have a need for court experts or would the admin authority exercise this role? would there be any potential for conflicts here?	EBRD LTP
119.	7. Transparency **Paragraph 110**	On this point, we reiterate our previous comments on points 58 and 82 above *[Ambiguous or very open regulations, which grant ample discretion to the interventor/administrator especially, together with a closed attitude of the interventor/administrator, also violate this objective. Some degree of transparency should be included hand in hand with very clear rules, in order to avoid desperation on the part of creditors (especially depositors) in the early stages of the resolution/liquidation process.]* *[In the same way, the administrative authorities do not have as much experience in balancing the conflicting interests of different creditors and participants. It is important to point out the need, as we mentioned, for clear procedural rules and a principle of transparency that allows for such a balance during the stages in which the procedure is in the hands of administrative authorities.]*	Costa Rica Bar Association
120.	**Paragraph 110**	"… Transparency and accountability needs can be considered together, for instance by requiring the liquidation authority to produce ex-post reports on its activities. …" How would this tie in with any reports by IPs should an IP be nominated [by the authority] for appointment by the court?	EBRD LTP
D. ESTABLISHING THE MOST EFFECTIVE INSTITUTIONAL FRAMEWORK			

121.	**Paragraph 111**	It would be beneficial for the Guide to elaborate further on examples of successful hybrid models in different jurisdictions, as this could provide practical insights for policymakers looking to design their frameworks. Nonetheless, the emphasis on jurisdiction-specific factors is crucial, as it highlights that the effectiveness of any institutional model is contingent upon the unique characteristics of each jurisdiction, including legal traditions and the capacity of institutions involved.	Miguel Gallardo Guerra (Mexico)
122.	**Paragraph 112**	This paragraph wisely points out that the role of banking authorities may need to evolve throughout the process, particularly emphasizing their crucial involvement in the initial decision to liquidate a bank, in order to maintain financial stability. It could strengthen this section to include specific criteria or indicators that policymakers should consider when determining the appropriate level of involvement from banking authorities at various stages of the liquidation process.	Miguel Gallardo Guerra (Mexico)
E. ROLE OF DEPOSIT INSURERS			
123.	**Paragraph 115**	We agree with the considerations regarding the institutional role assigned to the DI in bank liquidation proceedings. Nevertheless, we find that, unlike paragraph 156, this paragraph 115 lacks from expressly indicating the possible mitigation measures that may be taken to address the potential and material conflicts of interest with the DI due to its very likely role of major creditor in the liquidation proceedings. On the other hand, we also understand that, beyond these concerns regarding conflicts of interest, assigning liquidation tasks to the DI, where it is not a banking authority under the definition of the Legislative Guide, also poses significant challenges in terms of preparation and cooperation of the proceedings (see Chapter 4). Therefore, we would suggest that the Legislative Guide recommends that the DI could only be assigned a liquidation role or be appointed liquidator where no banking authority is in a better position to carry out liquidation tasks. Additionally, if the DI is a private entity (i.e. industry-controlled), it is neither an administrative authority nor a judicial one and thus its role as liquidation authority or liquidator moves away from the two institutional models provided in the Legislative Guide. Therefore, this possibility should be clearly limited only to DIs whose institutional nature is public, excluding private entities. As a result, we would suggest amending the fourth and sixth sentences of paragraph 115 as follows: *"[…] Legislators and policy makers may consider assigning the role of liquidation authority or liquidator, or other key functions in a bank liquidation process to the DI,* ***where no banking authority is in a better position to assume that role,*** *provided that this is in line with the DI mandate, that the DI adheres to good governance practices, and that sufficient safeguards are in place to protect confidential information and to address potential conflicts of interest with its role as a major creditor* ***(see paragraph***	FROB

		156). *Of particular relevance in this regard is the institutional nature of the DI. Where the DI is a private entity, assigning liquidation functions to such entities poses significant legal and policy challenges that ~~may be~~* ***are*** *insurmountable. […]"*	
124.	**Paragraph 115**	Where the DI has subrogated to and taken over the claims of depositors, the DI should be saddled with any cross claims or liabilities which may be raised personally as against the depositor, or which may reduce the claim subrogated to.	IBA
125.	**Paragraph 115**	could there be a need for a separate section on the role of liquidator with a menu of options and corresponding guidance on method of appointment/ reporting etc.? There may otherwise be practical issues in how to interpret the guidance [*Secretariat: this is covered in Chapter 3*]	EBRD LTP
126.	**Paragraph 117**	In relation to Section E (The Role of Deposit Insurers), we suggest adding a paragraph on the role of IPS and their specific function of preventing insolvency and restoring the viability of a member bank, as outlined above. It should be emphasized that IPS should not be overlooked or ignored in insolvency proceedings and that they must play a strong role there. This is particularly the case where IPS are recognized as statutory DIS and where overlooking an IPS might otherwise interfere with their core mandate. In Recital 117, we recommend adding that the rights that should be attributed to a DIS should also apply to an IPS, where appropriate.	National Association of German Cooperative Banks and the German Savings Banks Finance Group
127.	**Key Consideration 1**	"*An administrative institutional model for bank liquidation proceedings can have clear benefits~~,~~* ***~~which may make it the preferred option for jurisdictions~~***." Fully administrative models are characterized by faster decision-making, due to fewer legal formalities. Hybrid systems are faster than court-based arrangements, but slower than fully-administrative frameworks. Nonetheless, hybrid models balance speed with certain degrees of legal scrutiny, transparency, auditability, and judicial protection, which are also desirable. Recommendation 5 acknowledges the use of courts in reviewing the decision-making process of administrative authorities.	IPAB
128.	**Key Consideration 2**	"…Banking authorities should also play a key role in the preparation and execution of transfer transactions." Please consider adding "*and possibly the nomination of a liquidator to be appointed by the court*"	EBRD LTP
129.	**Key Consideration 3(c)**	Should the paragraph also cover adequate powers?	EBRD CFMD

130.	**Key Consideration 3(e)**	Should the paragraph also cover considerations regarding adequate funding to ensure independence?	EBRD CFMD
131.	**Recommendation 3**	In relation to No. 3, it is evident that the legal framework must clearly define the roles and obligations of the actors involved in the administration of bank liquidation proceedings. I have examined a number of decisions made by the supervisory authority in relation to the assets of a bank in the period *preceding* the filing of insolvency proceedings by the authority with the competent insolvency court. In these cases, it became evident that there was a lack of clarity regarding *the scope* of the supervisory authority's jurisdiction to decide on measures to protect the subsequent insolvency estate, and *the point of time* at which the insolvency court assumes the power to decide on preliminary protective measures. This resulted in the unexpected outcome that the supervisory authority proceeded to implement protective measures and did not revoke them even *after* the insolvency court assumed control.[19] Furthermore, I discovered instances where two protective orders—one from the supervisory authority and one from the insolvency court—were simultaneously in effect with respect to the insolvency estate of the bank, which is an inconsistent and illogical outcome.[20] It would be beneficial for legislators if the legislative guide could provide recommendations regarding the time period during which the resolution authority is permitted to decide on protective measures and the point of time at which the court assumes responsibility (if a court opens liquidation proceedings).	Dominik Skauradszun (Germany)
132.	**Recommendation 3**	These [*the functions and responsibilities of the actor(s) involved in managing bank liquidation proceedings*] are to be determined in conjunction with any resolution framework in place. It would be ideal if a standard bank liquidation process was outlined in order to identify the main areas of responsibility to then be assigned.	INSOL International
133.	**Recommendations 4-5**	As regards Nos. 4 and 5, I understand the idea of allowing the court to limit the review to specific issues and to defer to the banking authority's assessment about the bank's non-viability. In general, I sympathise with the idea of relieving insolvency judges of more business than legal assessments. However, as some grounds for opening liquidation proceedings include a prognosis and, therefore, are close or even intertwined with the assessment about the non-viability of the bank, No. 5 might jeopardise the goal of No. 4. Because in this case No. 5 actually means that the resolution authority has a big say in the court's decision as to whether or not the ground for opening liquidation proceedings is met. As the banking authority is very powerful in its assessment of a bank's non-viability, it seems prudent to require an objective review of the authority's assessment, either by the court *or by a court-appointed expert*.	Dominik Skauradszun (Germany)

[19] A case in point is the proceedings over the assets of Lehman Brothers Bank: measures by the supervisory authority on 15 September 2008, opening of insolvency proceedings on 13 November 2008, lifting of the supervisory authority's measures by the supervisory authority itself only on 23 December 2008.

[20] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR, 229. edition (December 2022), section 46 KWG para 14 et seq.

		Since it is unlikely that a bank in practice could successfully appeal against a court decision once proceedings have been opened, it seems more reasonable to require such a thorough review by a judge or a court appointed expert before the court decides to open proceedings. For this reason, No. 5 does not seem to strike the right balance between the interests of the resolution authority, the bank and those of its creditors, equity holders and other stakeholders. As a minimum, No. 5 could mention the bank's right to be heard in court, similar to No. 89 in favour of the authorities.	
134.	**Recommendation 6**	Compensation requires a mechanism to assess valuation; it should also articulate what would be the potential sources of such compensation (especially if determined definitively post the estate liquidation)	INSOL International
135.	**Recommendation 11**	With regard to No. 11, the strong role of the competent banking authority in the opening of bank liquidation proceedings is, in principle, understandable. German law even gives the banking supervisory authority the exclusive right to request the opening of insolvency proceedings (section 46b(1) sentence 4 German Banking Act[21]). In my research, however, I have found case constellations where this *monopoly* on requesting the opening of insolvency proceedings compromises the members of the bank's board of directors in terms of their personal *risk of being held liable for payments* made after insolvency has occurred.[22] Furthermore, I found constellations where the monopoly on requesting the opening of insolvency proceedings can unjustifiably influence the question of which transaction can be challenged after the opening of liquidation proceedings (transaction avoidance). Example: The bank's board members notify the banking authority on day 1 that illiquidity has occurred. From the moment of illiquidity, the board members are generally prohibited from making payments (section 15b(1) sentence 1 German Insolvency Code[23]). Compliance with this prohibition is not a run of the mill, especially in a large company, and the discussion of exemptions to this prohibition is lengthy. The banking authority examines the notification and the grounds for opening insolvency proceedings, also by requesting a second opinion from a professor of insolvency law, and decides on day 14 to request the opening of insolvency proceedings before the competent court. If the board members of the bank face a higher risk of being held liable for payments made after insolvency has occurred, the monopoly on requesting the opening of insolvency proceedings will compromise the members of the bank's board of directors in terms of their personal liability although they cannot influence the timing of the request from the banking authority. If the board members of the bank were allowed to *directly* request the opening of insolvency proceedings, they would have the opportunity to limit the risk of personal liability for payments	Dominik Skauradszun (Germany)

[21] Section 46b(1) sentence 4 Banking Act reads: „The request to open insolvency proceedings […] can only be made by the Federal Financial Supervisory Authority".

[22] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR,229. edition (December 2022), section 46c KWG para 9 et seq.

[23] Section 15b(1) sentence 1 Insolvency Code reads: "The members of the representative entity and the liquidators of a legal entity who, under section 15a(1) sentence 1 Insolvency Code, are obliged to file a request may, following the commencement of insolvency or of overindebtedness of the legal entity, no longer make any payments on its behalf".

		made after insolvency. Therefore, the legislative guide should protect the members of the board of directors in terms of personal liability for payments made after insolvency has occurred if the banking authority is granted the legal power to file the opening application exclusively.[24]	
136.	**Recommendation 12**	• As seen with SVB in 2023, non-systemic banks can be at risk of failure with very little notice (48hrs-72hrs) giving insufficient time for "adequate preparation". As such, it would assist if banks were to perform preparation work (for insolvency as well as solvent wind down) as part of normal business activities. This can also benefit in identifying risks and hurdles to achieving the liquidation objectives and giving time for the business to take steps to address and mitigate such issues. • It would be ideal to impose via banking authorities a de minimis mandatory preparation standard to include critical timely information provision capabilities, insolvency proofed critical contracts, critical personnel, IT systems etc. • A prospective liquidator may already be engaged by the bank in an advisory role when performing preparation work. Equally, the banking authority may engage their own prospective liquidator to perform the same task. This may result in conflicts and different strategies being developed. The framework may allow a single prospective liquidator with a duty of care to both the bank and banking authority.	INSOL International
137.	**Recommendation 12**	"For instance, the legal framework could allow a prospective liquidator to be involved in …" please consider adding "*at the nomination of the administrative authority*"	EBRD LTP
138.	**Recommendation 13**	• Specify banking authority's capacity to delegate monitoring to third parties as independent monitors. • This should consider the appropriateness of differing forms of intervention – (e.g. monitor vs liquidator) and clearly set out circumstances where they would be appropriate. • Where the banking authority is part of a committee, it may be appropriate that they have preferred voting powers when voting on committee decisions.	INSOL International

[24] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR, 229. edition (December 2022), section 46c KWG para 9 et seq.

139.	**Recommendation 15**	With regard to No. 15, and having examined 26 cases of failed banks in German insolvency proceedings, I strongly support this recommendation. According to my research, even larger German insolvency courts[25] have had to deal with bank liquidations only once or twice in recent decades[26]. This small number of cases per court does not allow insolvency judges to build up experience with bank liquidations. No. 15 could therefore go one step further and recommend that jurisdiction in a country should be concentrated on a very small number of specialised courts, for example a single centralised court for bank insolvency matters in a state or larger district.	Dominik Skauradszun (Germany)
140.	**Recommendation 15**	Agreed but this point on specialism should be further emphasised above as it does not come across. also the reliance of court on IP and role of court in overseeing/ approving actions of IP in many jurisdictions could be added.	EBRD LTP
141.	**Recommendation 17**	• Any additional critical parties to be considered such as banking supervisor, FIU type units (for cases where financial crime or governance breaches are material) or for example other entities involved in or with stakes in decisions related to protecting other critical depositors such as SMEs or retail customers having temporary material deposits in transit (e.g. mortgage down payments, etc.). • Such as with DGSG 2014 art13 – consideration should be given to use of DGS funding in support of resolution tools.	INSOL International

[25] Germany has approximately 190 insolvency courts. As of November 2022, only 14 of them had to hear bank liquidation proceedings. For case list see D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR, 229. edition (December 2022), section 46b KWG para 13.

[26] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR,229. edition (December 2022), section 46b KWG para 13. Even the Frankfurt Insolvency Court only had to deal with six cases between 2002 and 2022.

D. CHAPTER 3. PROCEDURAL AND OPERATIONAL ASPECTS

#	Paragraph	Comment	Submitted by
142.		**Include a Flowchart**: It would be helpful to add a flowchart that visualizes the liquidation process, making it easier to understand. **Selection of Liquidators**: Although criteria for selecting liquidators are presented, it would be beneficial to include examples of best practices and case studies that demonstrate how they have been successfully applied in other jurisdictions. Additionally, it should be indicated whether the selection can be autonomous for the entities or if it must be approved by a governing body.	Asobancaria
B. NOTIFICATION DUTY OF THE BANK'S MANAGEMENT OR BOARD OF DIRECTORS IN THE PERIOD APPROACHING LIQUIDATION			
143.		Given the highly regulated nature of banks, the regulatory information requirements and knowledge, it does not seem appropriate at paragraphs 120 and 121 on page 35 and Sections B and C generally to discuss the application of additional insolvency law filing triggers to bank management. Is there any debate as to whether the regulatory authority should be a joint decision-maker as to whether a bank is put into insolvency? This section should be reviewed for overall coherence. Please see comments in the Draft Guide mark-up.	EBRD LTP
144.	**Paragraph 120**	"…However, the legal framework should stipulate that the administrative authority should approve (or not oppose) the initiation of a bank liquidation proceeding or at least be heard before the liquidation process is opened." Should they not be consulted before any request to approve initiation of the bank liquidation proceeding?	EBRD LTP
145.	**Paragraph 121**	"Should the obligation to file for insolvency in a timely manner apply to the bank's management, …" Not sure about this provision - it might be useful to suspend this pending any consultation with the admin authority.	EBRD LTP
146.	**Paragraph 122**	"Therefore, the legal framework should include an early notification obligation for the bank. To ensure appropriate coordination among administrative authorities and facilitate preparation, the legal framework should require the banking supervisor to inform the resolution authority and the liquidation authority, where the latter is an administrative authority other than the banking supervisor or resolution authority, of a bank's approaching non- viability." A footnote may be added making reference to paragraph 180, indicating that the legal framework should also provide grounds for financial authorities (responsible for supervision, resolution and/or liquidation) to	IPAB

		establish cooperation agreements and specify the time and conditions in which information on the bank's situation will be shared to each authority with sufficient time to act.	
147.	**Paragraph 122**	"…Alternatively, the legal framework could introduce an obligation for the bank to simultaneously notify the relevant banking authorities (banking supervisor, resolution authority, liquidation authority, as appropriate) of its approaching non-viability. …" This could be discussed first, before the discussion on requirement to file or cross reference made to the fact banking supervisor is likely to be abreast of the financial situation and deterioration of the bank	EBRD LTP
148.	**Paragraph 123**	Given potential personal liability of management of banks following non-compliance with notifications duties it is paramount that bank liquidations laws are sufficiently clear on the point in time when notification has to be made.	IBA
C. INITIATION OF BANK LIQUIDATION PROCEEDINGS			
149.	**Paragraphs 125-131**	The paragraphs should also consider to what extent shareholders or members of the bank may be entitled to initiate liquidation. Also, it should be considered if under exceptional circumstances directors of the banks may also have right to seek winding up of the bank.	IBA
150.	**Paragraph 126**	Initiation of bank liquidation proceedings: Paragraph 126 mentions the role of the banking supervisor and resolution authority. The draft legislative guide could include specific provisions for coordination between the banking supervisor, resolution authority, and liquidation authority to ensure a smooth transition and avoid conflicts.	INSOL International
151.	**Paragraph 126**	This appears to conflict with para B statements above on management requirement to file. I would suggest reviewing.	EBRD LTP
152.	**Paragraph 127**	Pursuant to paragraph 126 and recommendation 19, not only the banking supervisor but also the resolution authority may be responsible for initiating liquidation proceedings. As according to the definitions of the Legislative Guide, the term "*banking authority*" encompasses both supervisory and resolution authorities, we would thus propose that the "*supervisor´s assessment*" mentioned in the last sentence of this paragraph 127 to be replaced by the "*banking authority´s assessment*": *"[…] In particular, in a court-based system, a right for the banking authority to be heard before proceedings are opened would function as a minimum safeguard and ensure that the* ***banking authority´s*** ~~*supervisor's*~~ *assessment of the bank's viability is taken into account, and that the court is apprised of other possible (supervisory and/or resolution) measures that could be taken. […]".*	FROB

153.	**Paragraph 126**	By granting banking authorities the power to initiate liquidation proceedings, the framework ensures that decisions are based on comprehensive, regulatory insights rather than isolated creditor interests. This suggests that a centralized and regulated approach to bank liquidation may be more effective in protecting the stability of the financial system. Additionally, the mention of specific resolution frameworks for banks highlights the need for adequate coordination between regulatory and judicial authorities, which is considered essential to minimize the risk of market destabilization.	Miguel Gallardo Guerra (Mexico)
154.	**Paragraph 130**	"Finally, irrespective of whether the framework is administrative or court-based, there are strong arguments for the relevant banking authority to have effective control of the timing of when a bank is put into a liquidation procedure. …" If so it should be clear above for anyone seeking to follow guidance as it reads as a debate.	EBRD LTP
155.	**Paragraph 130**	Consider adding the words in boldface at the end of the last sentence: "*First, the grounds for bank liquidation should include those that are forward-looking (see Chapter 5. Grounds for Opening Bank Liquidation Proceedings)*, ***objective, and clearly defined in regulations, so as to provide sufficient legal certainty.***."	IPAB
D. THE BANK LIQUIDATOR			
156.		The role of the insolvency practitioner (liquidator) and method of appointment would appear to be critically important for the court-based model of bank liquidation. Generally, this concept would benefit from further clarity in the Draft Guide. For example, illustration 1 does not mention the IOH, but this figure would be very important in national systems where the court is involved. Most insolvency systems require IOHs to have a special permission to exercise their duties either through a licensing or a registration system. In the vast majority of EBRD countries this is the case and the court is responsible for an IOH appointment, with some guidance from creditors or the debtor depending on the procedure. Where the IOH is court appointed, states will need more detailed guidance on methods of IOH appointment – many countries have automatic appointment systems and general lists of registered (frequently sole) practitioners which does not seem appropriate for high-value, specialised and sensitive bank insolvency cases. Arguably the legislation in any dual track procedure involving the court should empower the banking regulator to nominate the right professional (see para 89, page 24 of the Draft Guide. This could be added to Key Considerations and Recommendations 3 – 17). The regulator may be in a better position than the court to make such assessment. This would underscore the cooperation between the regulator and the	EBRD LTP

		court. In some countries, e.g. Latvia, the insolvency regulator can recommend the IOH to the court for appointment. Where a private IOH is appointed, there would be a need for bespoke duties and responsibilities, including reporting rules. It could be helpful to highlight this, as well as the issue of IP insurance in the discussion on liabilities. On page 18 of the Draft Guide and elsewhere, do we need to acknowledge that the court fees and IP fees come first. The reference to bank regulators acting as liquidators in a court proceeding at page 90 was unclear given references to the appointment of a presumably private IOH and should be linked to the requirement that the regulator has proper capacity. Would this not create any conflicts of interest or capacity/ efficiency issues? Given that bank insolvency is not that common it could severely stretch the resources of any regulator, particularly in emerging economies. [*Secretariat: in this comment, references are made to Chapters 1 and 2, but since the bank liquidator is discussed in Chapter 3 the comment has been included here*]	
157.	1. Desirable qualities **Paragraph 132**	In case the liquidation authority does not conduct the liquidation, the liquidation authority should have the power to appoint or approve the appointment of the liquidator. In practice the qualities and expertise of a liquidator will have a decisive effect on the overall success of bank's liquidation. Maintaining a list of qualified liquidators is therefore to be supported.	IBA
158.	**Paragraph 133**	*"In line with existing international guidance on business insolvency laws, such requirements should include integrity, independence,* ***transparency****, and impartiality."* When mentioning transparency consider including the following footnote: Footnote: In Mexico, liquidators are appointed following a tender process, following similar procedures and requirements to regular government procurement processes.	IPAB
159.	**Paragraph 133**	"*In addition, the liquidator should have appropriate* ***infrastructure****,* ***resources****, knowledge, and technical expertise in, inter alia, insolvency cases and the functioning of banks****. The nature and complexity of each bank should be taken into account when assessing such factors.*** *To enhance efficiency in this respect, and notwithstanding the general rules on the liquidator's selection and appointment, a list of liquidators with the required qualities could be maintained by the liquidation authority.*" Consider rephrasing paragraph 132 adding this sentence.	IPAB
160.	**Paragraph 133**	"… In addition, the liquidator should have appropriate knowledge and technical expertise in, inter alia, insolvency cases and the functioning of banks. …" This is highly specialised.	EBRD LTP

161.	**Paragraph 133**	Consider adding the following sentence at the end of paragraph 133: "***The legal framework should also allow for the swift substitution of the liquidator, considering its performance, the associated financial costs, and the needs during each stage of the liquidation process***." In later stages, operations are typically simpler and may not require a large team of specialists acting as liquidators. In Mexico, a legal person appointed as liquidator is usually substituted for a natural person in order to reduce costs once the liquidation process reaches its final stages, when the activities are less demanding.	IPAB
162.	**Paragraph 133**	"*In addition, the liquidator should have appropriate knowledge and technical expertise in, inter alia, insolvency cases and the functioning of banks*" Does the requirement cover technical expertise in any insolvency cases including any corporate or individual insolvency or some types only, e.g., insolvency of financial institutions?	EBRD CFMD
163.	2. Selection and appointment procedure **Paragraph 134**	Consider adding the following sentence at the end of paragraph 134: "***The possible use of third parties by the liquidator, such as asset valuation and legal specialists, under the legal framework may provide greater flexibility to the selection process and expand the list of qualified potential liquidators***." Footnote: In Mexico, the competence to select and appoint a liquidator are conferred exclusively to a single authority: IPAB. Nonetheless, an appointed liquidator may hire third parties, such as asset valuation and legal specialists, with flexibility to scale resources based on the size and complexity of the failed bank, reducing administrative burden and improving efficiency and transparency. By outsourcing specialized tasks to third parties, the liquidator can delegate time-consuming technical work, allowing the liquidation process to proceed faster.	IPAB
164.	**Paragraph 135**	"In jurisdictions with a court-based model, the liquidator would be selected, appointed and overseen by the court, possibly acting as an officer of the court. …" Could the admin authority not have a role in nomination? This is the case in some jurisdictions for business insolvency.	EBRD LTP
165.	3. Remuneration **Paragraphs 136-138**	The bank liquidator: Paragraphs 136-138 discuss the remuneration of the liquidator. It would be helpful to specify the key principles for determining remuneration and provide examples of different structures. It might also be helpful to outline the pros and cons of each remuneration model to avoid any undue criticism on bank liquidations and insolvency practice, generally. In particular where remuneration is linked to a percentage of asset recoveries (and the size and scale of bank balance sheet might mean that the	INSOL International

		number is material) – this could result in a liquidator's remuneration seeming overly generous when compared to the skill and expertise applied.	
166.	**Paragraph 139**	*"The method for determining remuneration may be adapted to encourage particular outcomes,* ***particularly if compensation may be renegotiated and the liquidator may be substituted after certain conditions are met (e.g., time elapsed during wind-down)****. For example, even if the remuneration policy is not time-based, the compensation payable may be tailored to reward liquidators who close the process in a timely manner or to reduce the standard compensation in the event of undue delays."*	IPAB
167.	4. Oversight, transparency and accountability **Paragraph 140**	"… However, for the sake of oversight, transparency and accountability, they are commonly obliged to report their activities to a supervising (insolvency) judge, to an administrative authority overseeing the process, or to a creditor committee …" and/or as may do both	EBRD LTP
168.	**Paragraph 141**	"If the liquidation authority has appointed a liquidator, it should submit regular reports to its appointing liquidation authority in line with business insolvency law." It is suggested to add "***or in case of a single- track regime, according to the law governing bank failures***"	EBRD CFMD
169.	4. Oversight, transparency and accountability	Supervision and Oversight The intention in the Guide is, insofar as possible, to ensure that "non-systemic banks" have appropriate supervision and oversight as part of the restructuring and insolvency process. For instance, the Guide discusses oversight, transparency and accountabilities for bank liquidators in Chapter 3, Part D4.[27] To that end, the crisis of such banks should be governed by a regime that aligns with the objectives of the Guide (value-preservation, depositor protection etc.) and with other components of the regulatory framework governing financial institutions. This may require oversight by the same regulatory body or a different regulatory body that functions in a similar way. The role of any such body must be capable of being ascertained in advance, particularly in its intervention powers and duties at the onset of financial distress and continuing into the conduct of any proceedings involving non-systemic banks. Again, the delineation of responsibility between supervisory bodies or agencies will need to be sufficiently defined so that responsibility for oversight is ascertainable in advance and any roles in the resolution or liquidation process are knowable in advance. It would also be desirable for any framework governing non-systemic banks to "dovetail" with other similar frameworks governing other parts of the financial sector, so that banks do not fall out of the system or require time to investigate the appropriateness of the use of any particular framework, particularly given that time is of the essence in dealing with financial distress. Although this Guide is intended to complement	INSOL Europe

[27] Ibid., for example, Chapter 3, paragraphs 140-143.

		other international guidelines,[28] particularly the Key Attributes, a significant gap remains. Since this Guide focuses solely on "liquidation", the international guidelines on restructuring/reorganisation of non-systemic banks are still missing. Taking this Guide into account, while there are international guidelines governing both restructuring/resolution and liquidation for SIFIs, only liquidation guidelines exist for non-systemic banks. Thus, how to better "dovetail" this Guide and other international guidelines merits further consideration. *Recommendation 2.1: extend the guidelines to recommend that frameworks governing SIFIs and non-systemic banks "dovetail" so that determination of the application of frameworks to institutions are facilitated, enabling smooth and efficient application of oversight and intervention mechanisms.* *Recommendation 2.2: restructure the guidelines to recommend that supervisory roles of agencies or bodies in the sector are clearly delineated so that action can be taken by the appropriate pre-identified body at the onset of financial distress. This ensures a pre-identified regulatory body steps in without ambiguity, enhancing systemic resilience across the entire banking sector.*	
170.	5. Personal liability and legal protection **Paragraphs 145-152**	Additionally, court permission must be obtained before the liquidator may be sued. These for one would sieve out frivolous and baseless claims. In addition, by requiring court permission, the court may be able to control the timing in which the claim may be brought or continued. Proceedings may detract from the liquidator carrying out her or his duties, and timing the litigation to a later stage may allow the liquidator to focus on the tasks immediately at hand.	IBA
171.	**Paragraph 151**	What about IP insurance? might be difficult in case of bank insolvency. not widely available in some markets for corporate insolvency cases	EBRD LTP
172.	**Paragraph 152**	"Where the legal framework sets out a liability regime, mandatory insurance for private sector liquidators could therefore be considered, if available in the jurisdiction." Would it be beneficial to add considerations on the legal protection? E.g. Ukraine's legislation provides: "DGF (national deposit insurance, bank resolution and liquidation authority) ensures legal protection of the DGF employees, including after their resignation from the DGF, in particular by providing them with legal assistance by attorneys in law and other legal specialists, in case of lawsuits filed against them or in case they take part in administrative or criminal proceedings related to their exercise of powers in DGF; the legal protection is provided at the cost of DGF."	EBRD CFMD
E. CREDITOR INVOLVEMENT DURING THE LIQUIDATION PROCESS			

[28] Ibid., Chapter 1, paragraph 11.

173.		The comment is related to cases where the administrative authority is a statutory liquidator but its trusties are doing a poor job. Have any of the jurisdictions that were surveyed for this guide and that run such a model found a good model that protects creditors rights (since they cannot replace the liquidator unlike in the case of general business insolvency)?	EBRD CFMD
174.		One should also consider shareholder or member involvement. The assumption that the members and shareholders have no interests in the liquidation process may not always hold true. Shareholders and members may in some instances be crucial for improved realization or recovery. For example, the majority shareholder itself is a state, state own enterprise, a bank or other entity having massive resources, their involvement may be critical to a successful liquidation. Consideration should then be given as to whether the Guide should deal with the involvement of shareholders and members.	IBA
175.	1. General aspects **Paragraph 153**	Taking the opportunity, we would also like to point out the issue of regulating possible competent court with regard to transaction avoidance – namely *actio pauliana* cases, where insolvent banks frequently are parties to such proceedings. In our view, the issue of the governing law (competent court) in the context of CJEU case No C-337/17, relating to the applicable law. According to this ruling, there is exemption from the rule that *actio pauliana* is governed by the law of opening of the proceedings, for the rule of the law applicable to the transaction in question. These important issues can be added to the Proposal to ensure the certainty of law and clear directions within the international cases. *[Secretariat: This is also relevant for Chapter 10]*	INSO Section, Allerhand Institute
176.	**Paragraph 155**	Another issue which touches upon creditors involvement is related to court proceedings regarding bankruptcy estate. In our view, it should be generally regulated that such court proceedings should be resolved within insolvency / liquidation proceedings not regular, general courts. Such disputes (having link with insolvency and effects towards bankruptcy estate) should be therefore resolved by bankruptcy court / competent administrative authority in proceedings (forum) designed for such cases. This regulation will allow to have greater legal certainty, which is very important for creditors and also for the trustee / administrator.	INSO Section, Allerhand Institute
177.	**Paragraph 155, footnote 83**	The first sentence - "*In some jurisdictions (e.g., Ghana, India, Nigeria, Paraguay, Ukraine) creditors have no role in bank liquidation, and there is no provision for creditors' meetings or creditors' agreements*" - mentions countries with administrative or hybrid model. Do I understand correctly that the second sentence - "*In others, the potential for involvement is much more significant and may include, variously, powers to participate in the recognition of claims, propose a creditors' agreement, participate in creditors' meetings to approve or reject such an agreement, propose amendments to a liquidation plan before its approval by the court, and appeal against resolutions adopted in the liquidation proceeding*" - reflects countries with court-based model? If so, would it be beneficial to indicate this tendency? Also, to make examples compatible, it is suggested remove mentioning of specific countries in first instance or include examples in the second instance.	EBRD CFMD

178.	2. Involvement of deposit insurer as a creditor **Paragraph 156**	Following our comment in paragraph 125 above, in our opinion, the potential and material conflicts of interest identified for the DI as liquidation authority or appointed liquidator due to its status of significant creditor of the bank in liquidation, can be more easily mitigated by recommending to the legislators or policy makers that they may only consider assigning the role of liquidation authority or liquidator to the DI, when no banking authority is in a better position to assume that role. Accordingly, we would propose to modify the third sentence and onwards of the paragraph adding some drafting suggestions: *"[…] Where the DI is also the liquidation authority or appointed liquidator, its status as a significant creditor of the bank in liquidation may raise concerns of potential (material) conflicts of interest.* ***Due to the existence of these conflicts of interest, DI may only be assigned the role of liquidation authority or liquidator, where no banking authority is in a better position to assume that role.*** *At the same time, the risk of (potential) conflicts of interest could be reduced by requirements for the DI to serve the interests of all creditors. The existence and extent of a conflict would depend on various factors, such as the internal separation of the DI's functions, its mandate in liquidation, and the existence and type of depositor preference. To the extent that there is such a conflict,* ***and only where no banking authority is in a better position to assume the role of liquidation authority or liquidator,*** *it can be mitigated by governance arrangements to ensure that the DI act independently for all parties involved, in accordance with principles of fairness and neutrality as regards all creditors. […]".*	FROB
179.	**Paragraph 156**	"Where the DI is also the liquidation authority or appointed liquidator, its status as a significant creditor of the bank in liquidation may raise concerns of potential (material) conflicts of interest. At the same time, …." In Mexico, IPAB has found that the coexistence of both roles as deposit insurer and liquidator in a single entity favours the speed of recoveries of payout expenses. This dual role streamlines processes by centralizing decision-making and operational execution, eliminating delays caused by inter-institutional coordination. It also helps to align objectives of the liquidation strategy with a primary goal: recover funds to minimize the financial impact on the deposit insurance fund.	IPAB
180.	**F. Termination of bank liquidation proceedings** **Paragraph 159**	"The legal framework should clarify whether the liquidation authority and any appointed liquidator are subsequently relieved of any further responsibility in connection with the liquidation of the former bank." Would it be beneficial to elaborate what the good practice is in this regard?	EBRD CFMD
181.	**Recommendation 18**	With regard to No. 18, I agree that the legal framework for bank resolution should provide for appropriate legal consequences for non-compliance by the bank. I understand the recommendation in a way that legal consequences for non-compliance should also address members of the board of directors. The most relevant non-compliance by members of the board of directors is the failure to inform the banking authority of the occurrence of the bank's insolvency. However, under German law, civil liability claims for a delay in	Dominik Skauradszun (Germany)

		notifying the banking supervisory authority are primarily of theoretical relevance. In practice, however, it is difficult and often unsuccessful to pursue such claims.[29] *Criminal sanctions*, on the other hand, have a much greater, even preventive, effect. Board members are less concerned about civil liability, knowing that actual enforcement is less likely, than they are about criminal prosecution. For this reason, Recommendation No. 18 should be understood as a recommendation to national legislators to provide for legal consequences under *criminal law*, including imprisonment, in the event of negligent or even wilful non-compliance.[30]	
182.	**Recommendation 18**	• The notion of a trigger may be oversimplistic and should be anchored in and aligned with the supervisory and resolution framework. • The framework should allow for pre-planning / contingency planning and for costs to be borne by the company.	INSOL International
183.	**Recommendations 18-37**	The objective is to enhance the efficiency of liquidation procedures on a cross-border scale, guaranteeing synchronized and legally sound administration of cross-border banking concerns. However, Recommendations 18 to 37 on procedural and operational aspects lack the definition or establishment of objective criteria that would enable the supervisor or the bank to ascertain when a bank has failed. It is acknowledged that this may be due to the fact that it falls under the prudential regulation that each regulator and/or banking supervisor should define. However, it would be beneficial to establish objective criteria that would allow a bank to infer its own financial failure. Indeed, in jurisdictions where the banking supervisor is part of branches of public administration or government subject to possible political instability, and where the law does not regulate the definition of bank failure, defining a criterion or objective standard for determining the entity's insolvency could facilitate the decision of stakeholders or their appointed directors to promptly request its liquidation before the supervisor, who could then order it in a timely manner. For example, in the case of Colombia, Article 2.1.5.1.1 of Decree 2555 of 2010 provides financial deterioration indicators that allow both the bank and the supervisor to adopt recovery plans to promptly address the crisis. It should be noted that this is not intended to initiate the bank's liquidation; rather, it serves as an illustrative example of what could be added for the purpose of defining a bank's insolvency or failure.	Luis Fernando Lopez Roca (Colombia)

[29] There are many reasons for this. First and foremost, it is difficult to quantify and therefore almost impossible to prove any potential damage caused by the delay.

[30] E.g. section 55 German Banking Act reads: "(1) Anyone who, in violation of section 46b(1) sentence 1, also in conjunction with section 53b(3) sentence 1, fails to submit a report or who does not submit it correctly, fully or in time shall be punished by a term of imprisonment of up to three years or by a fine.

184.	**Recommendation 20**	• It should also reference ability of liquidator to contract for services as needed in connection with the liquidation – including legal services. • In continental jurisdictions that contain a form of administration that involves a 'monitoring / approval' role – the role of the administrator vs the role of the management & directors should be clarified as well as the triggers for moving to liquidation.	INSOL International
185.	**Recommendations 23 -24**	The recommendations should make explicit that the liquidator can recover expenses in jurisdictions with the court model not just in the ones with administrative model.	INSOL International
186.	**Recommendation 24**	It should consider flexibility in remuneration models.	INSOL International
187.	**Recommendation 25**	Frequency and structure of reports should be considered in more detail, what does this requirement seek to achieve, greater transparency in what specific area?	INSOL International
188.	**Recommendation 28**	• A replaced liquidator should not have to absorb costs incurred nor should it necessarily be limited to payment of fees before the replacement takes effect. • For the instances where the licence is not withdrawn prior to the start of the insolvency proceedings, the liquidator's prudential regulatory duties and responsibilities would need to be clarified in the new context.	INSOL International
189.	**Recommendation 32**	To align with the explanation in the chapter, should the following sentence from the chapter be reflected at the end of the Recommendation: "*Creditors should, however, have the right to challenge such decisions ex post, although remedies may be limited to financial compensation*."?	EBRD CFMD
190.	**Recommendation 34**	Would special provisions be required in respect of illiquid or long tail assets or liabilities?	INSOL International

E. CHAPTER 4. PREPARATION AND COOPERATION

#	Paragraph	Comment	Submitted by
191.		• **Examples of Best Practices:** To enhance the guide, it is recommended to include examples of best practices in preparation and cooperation, which would provide a more concrete reference for all parties. • **Conflicts of Interest**: On the other hand, while inter-institutional cooperation is mentioned, the guide does not adequately address the management of conflicts of interest among different entities. **Examples of conflict of interest:** **Involvement of Affected Financial Institutions:** If other financial institutions involved in the liquidation process have interests in the assets or liabilities of the bank in liquidation, they may act in their own interest rather than the public interest. **Personal or Professional Relationships:** If the authorities in charge of liquidation have personal or professional relationships with individuals inside or outside the bank being liquidated, they may be influenced in their decisions. **Political Interests:** Sometimes, political interests can influence the bank liquidation process, especially if decisions could significantly affect the local or national economy. **Personal Gain:** There is a risk that those in charge of the liquidation could personally benefit from certain decisions, such as selling assets at prices below market value.	Asobancaria
192.		Preparation for liquidation, including the event of disputes or non-cooperation Preparing for liquidation is indeed key. The Legislative Guide correctly recognizes the importance of the process leading up to the liquidation, the planning, preparation and cooperation of various stakeholders. In view of developments in the financial sector, particularly regarding digitalization, new risks will arise in the future, including for non-systemic banks (e.g. digital bank runs), which will involve practical challenges. It is therefore important for such banks to respond to emerging problems early on, and to place a particular focus on the resilience of their IT systems. When drafting their legal framework, and in particular when drafting rules and processes for the pre-liquidation phase, jurisdictions should bear such developments in mind.	IBA

		One of the additional points that should be taken into account in the Legislative Guide, is the possibility for banks and their managers and shareholders to make observations or contestations to the administrative authorities before the latter take decisions and/or to lodge appeals with the competent courts to contest either the seriousness of the bank's situation, and/or the remedies being considered. In practice, the situation is not always clear-cut. It depends on an assessment of various economic, financial and prudential parameters. The accounts are drawn up within a certain time after the end of the financial year, and may be subject to discussion (for example, concerning the valuation of an asset, or the recording of a provision). Forecasts may also be subject to discussion as to the assumptions to be made. Having prepared a plan in advance, including a contingency plan, to comply with regulations, does not mean that management and shareholders are ready to implement the same when required. This is even more true as liquidation necessarily entails a loss of value for shareholders and creditors. These potential discussions, challenges and appeals can complicate the preparation and delay the opening of the liquidation and/or the implementation of the contingency plan or any other action plan. The supervisory authority generally has the option of appointing a provisional administrator (or prospective liquidator). However, the provisional administrator and/or prospective liquidator him/herself may come up against operational or legal opposition (including challenges to the appointment of the provisional administrator/prospective liquidator), or other resistance from management and shareholders to the measures taken. The courts responsible for examining and settling appeals are not necessarily those which have jurisdiction to open liquidation proceedings. Several proceedings may therefore be opened in parallel. Authorities and courts dealing with disputes or appeals must comply with certain procedures in accordance with the rules applicable in a state governed by the rule of law that respects fundamental freedoms and the principle of the separation of powers. These various challenges and potential appeals require sufficient lead time. In the event of difficulties, the financial situation of a bank is often precarious, particularly in terms of cash flow, much more than that of an insurance company whose business model is based on collecting premiums for future risks. The situation is even more fragile when the confidentiality of the bank's difficulties can no longer be preserved. A bank's business model necessarily relies on the trust of its customers and business partners. If this trust is lost, the bank may quickly find itself faced with a withdrawal of customer deposits and the cessation of all financing from its business partners. Any appeal against a decision by the authority, whether de facto or de jure suspensive, is likely to undermine this confidentiality and delay the resolution of any difficulties.	

		Hence the imperative need for cooperation between the various authorities. <u>The need for clear rules that allow for flexibility and take into consideration all the issues involved, not just those of liquidation</u> To prepare for liquidation effectively, it is essential to establish clear rules that take into consideration the needs of a liquidation process (analysis of the situation, immediate measures to prevent and/or deal with difficulties if liquidation is necessary, implementation of an appropriate process, and so on), as well as other imperatives such as respect for the rule of law and client's protection. The recommendations of the Legislation Guide should take these imperatives into consideration. For example, the reference to the authorities' powers of constraint must consider the existence of limits and counter-powers that are inevitable in a state governed by the rule of law. These clear rules should also always allow for a degree of flexibility. As the Legislative Guide points out, it would not be possible to define a point in time when the process of preparing for liquidation must begin. It is therefore preferable to lay down general rules that provide a framework that can then be adapted to the actual situation. <u>The need for cooperation between all actors, including authorities</u> The Legislative Guide rightly highlights the need for close cooperation between all actors, in addition to the cooperation from the bank with them. *Cooperation between administrative authorities* Here again, this cooperation requires the establishment of clear rules on: i) the role of each of the administrative authorities, and ii) the combination of their respective missions with the issues highlighted by the Legislative Guide such as the balance between confidentiality and the need to inform the third parties concerned, or the speed and effectiveness of the measures put in place. The conclusion of protocols or memoranda of understanding between authorities is indeed a way of adapting the legal framework to the particular circumstances of the planned liquidation and ensuring that this legal framework is respected (for example, compliance with confidentiality, or data protection rules). As far as possible, however, it is preferable to limit the number of administrative authorities in charge. *Cooperation between administrative and judicial authorities* The Legislative Guide distinguishes between the court-based model and the administrative-based model. Nevertheless, the role of administrative and judicial authorities should be seen as complementary rather than competing.	

		In relation to Chapter 2 we observed that, even in the case of primarily administrative proceedings, involving the courts *ex ante* ultimately may lead to faster proceedings. Additionally, if there are independent administrative authorities, by virtue of the principle of separation of powers, the courts should still have a role in protecting freedoms. Regardless of whether they are regulated, banks should be protected against any abuse by the administrative authority. Furthermore, the courts are not only in charge of the liquidation procedure. There may be other courts responsible for reviewing the decisions of administrative authorities or, on the other side, enforcing them by issuing rulings at the request of these administrative authorities. Here again, cooperation between these different authorities is of the essence. Cooperation must be combined with a principle of independence. Procedures should be adapted to this end. The legitimacy of the administrative authorities (particularly in terms of how they are appointed and how they operate), should be carefully designed. There may be various mechanisms where the administrative authorities are involved in the liquidation procedure, even if the procedure is judicially opened and monitored (for example, appointment of a representative of the administrative authorities to assist the judge and/or the court). The effectiveness of the authorities' intervention is also based on a principle of accountability. In this respect, it is not uncommon for administrative authorities to face liability actions, either for alleged failure to act, or for alleged abuse of power. Here again, the courts make their own assessment of this alleged liability (see also comment to paragraph 72).	
193.	**Paragraphs 160, 164, 165, and 167** **Recommendation 38**	The Legislative Guide provides guidance on the preparation for bank liquidation proceedings. It recommends the development of contingency plans, which, among other elements, differ from the regular resolution planning required to banks within the context of resolution, because contingency planning would be undertaken "in the run-up to a banks' non viability" (paragraphs 164 and 167 of the Legislative Guide) but not on a regular basis. In this regard, as indicated in paragraph 162, transfer strategies in bank liquidation proceedings ideally need to be completed simultaneously with the opening of the proceedings. Therefore, they require a significant amount of preparation, which involves a range of actions to be taken beforehand (e.g. valuation of the assets and liabilities of the non-viable bank, the marketing of the entity for a bidding process, the drafting of contractual documentation, etc.). In our experience as executive resolution authority, the preparation of this wide range of actions is crucial to ensure a successful bank failure management. As a result, we believe that some sort of planning should be also developed in the banking liquidation context before the authorities see the crisis of the bank on the horizon.	FROB

		Moreover, the extent of preparation of contingency plans that authorities may undertake are completely different in a slow burn scenario or in a fast burn case. As the Legislative Guide makes recommendations applying to a broad range of possible liquidation scenarios and one of its primary aim is to ensure that liquidation authorities are able to prepare for the possible liquidation of a bank, we would be in favour that it also recommends the development of ex-ante liquidation planning by the authorities in "peace times" instead of contingency plans "in the run-up to a bank non-viability" (which do not ensure sufficient and adequate preparation for authorities for a swift and effective application of bank liquidation tools, especially in fast burn crisis scenarios). In this respect, as ex-ante regular planning is well established in the context of bank resolution, the Legislative Guide may recommend a sort of liquidation planning similar to the resolution planning under the FSB Key Attributes recognizing, at the same time, that proportionality and flexibility should be guiding principles for the development of those liquidation plans (e.g. emphasis should be put mostly on operational aspects of transfer strategies, separability analysis and on crisis readiness). Therefore, we would strongly suggest revisiting the text (and, particularly, paragraphs 160, 164, 165 and 167) in order to introduce the idea that ex-ante preparation for the liquidation through the development of liquidation plans focused on operational aspects of transfer strategies, separability analysis and on crisis readiness is also recommended. In this regard, we believe that the use of the term "liquidation plan" in the Legislative Guide does not bring confusion with the liquidation plans under general insolvency law since the scope of them are completely different. In any event, the use of an alternative term such as "pre-liquidation planning" or similar can be explored. Finally, note that the accompanying recommendation 38 would need to be amended accordingly.	
194.	**A. INTRODUCTION** **Paragraph 160**	"*Contingency plans are often crucial for the success of a bank's liquidation.* ***Preparation in the run-up to a bank's non-viability is also helpful to ensure a swift payout of insured depositors if (part of) a bank is liquidated pursuant to a piecemeal liquidation strategy.*** *Piecemeal liquidation is typically a suboptimal solution (see Chapter 6. Liquidation Tools) and a sale as a going concern, which may often achieve better results, can be thwarted if there is insufficient preparation.* ~~***Preparation in the run-up to a bank's non-viability is also helpful to ensure a swift payout of insured depositors if (part of) a bank is liquidated pursuant to a piecemeal liquidation strategy***~~*."*	IPAB
B. NEED FOR PREPARATION			
195.		A more logical sequence could be achieved by rearranging the paragraphs as follows: 165, 166, 167, 164, 162, 163, 168, 169.	IPAB

196.	**Paragraphs 162-169**	See comments to paragraph 55 above *[on liquidity for the liquidator]*	IBA
197.	**Paragraph 162**	A point to develop here could be the creation of standardized protocols or frameworks that can guide the preparation process, as by creating a clear set of guidelines, authorities could streamline the necessary actions, ensuring that they are executed efficiently and effectively, thus reducing delays and potential risks during the transition.	Miguel Gallardo Guerra (Mexico)
198.	**Paragraph 163**	"[…] and, where applicable, the involvement of the DI in providing funding to facilitate the transfer strategy (see Chapter 6. Liquidation Tools and Chapter 7. Funding)." Footnote: In Mexico, the DI's fund may be used to cover the "funding gap" between the estimated values of the failed bank's assets and its liabilities to be transferred. This differential amount is then subrogated in favour of the DI during the liquidation process.	IPAB
199.	**Paragraph 163**	"All this requires full and timely access to up-to-date information on the state of the bank's affairs and the banking sector, where potential acquirers may be found ***before the bank's license is revoked and its operations cease. In this sense, in both administrative and court-led models, the legal framework must allow for the marketing of the failed bank's assets prior to the bank's license being revoked, ensuring that potential acquirers have access to reliable information to make informed decisions, thereby improving the chances of achieving an optimal outcome and maximizing the value recovered from the liquidation.***	IPAB
200.	**Paragraph 164**	In Mexico, the approach to developing contingency plans for bank liquidation closely aligns with the principles outlined in this paragraph as the National Banking Securities Commission and the Institute for the Protection of Banking Savings play a crucial role in overseeing the preparation for potential bank failures. The use of early warning indicators and risk assessment helps authorities identify at-risk institutions before they reach non-viability.	Miguel Gallardo Guerra (Mexico)
201.	**Paragraph 166**	The apparent notion that non-systemic banks should be rather subject to liquidation than resolution may not always be correct. Given the complexity of banks (also non-systemic banks) in general resolution should not generally ruled out for non-systemic banks as resolution tools may better achieve that values are not destroyed (i.e. tools to avoids fire sales).	IBA

D. COOPERATION BETWEEN ALL ACTORS IN THE PERIOD APPROACHING LIQUIDATION			
202.	**Paragraph 178**	We invite you to consider that in dual-track jurisdictions with administrative institutional frameworks where the authority responsible of bank resolution is separated of the banking supervisor (such as in Spain and the EU Single Resolution Board), the resolution authority may also oversee liquidation functions. In this case, it would not be necessary to have a structural separation between supervision and failure management functions (unlike the case of the integration of liquidation tasks within banking supervisor). On top of the expertise, efficiency, resources, and access to information that the resolution authorities already have, the combination of liquidation and resolution functions within one single authority provides broad synergies particularly in terms of preparation for liquidation. Finally, we should recall that, as indicated in footnote 98 of the Legislative Guide, in jurisdictions with dual-track regimes the choice between resolution or liquidation is made by the resolution authorities. Therefore, if the resolution authority also exercises liquidation functions, a seamless continuum of decisions is ensured and the preparatory actions for the applications of any of both regimes would be fully aligned. Therefore, our suggestion would be to redraft the last sentence of paragraph 178 along the following lines: *"[...] In other countries with administrative institutional frameworks, relevant functions may be located within the same authority (e.g., **the banking resolution may be in charge of liquidation**, or the banking supervisor may also be in charge of resolution and liquidation, subject to structural separation between supervision and failure management functions **in this latter case**)* [...]*".*	FROB
203.	1. Cooperation among administrative authorities **Paragraph 179**	"Bank liquidation frameworks should be aligned with cooperation arrangements under the aforement**ion**ed standards, and any obstacles to such cooperation should be removed."	IPAB
204.	2. Cooperation with the bank **Paragraphs 186-188**	In this context, one may also consider what are some matters of guidance which could apply where the bank is a branch (and cooperation is needed with the head office and other branches), or is the head office (and cooperation is needed with the branches).	IBA

205.	**Paragraph 186**	"… the liquidation authority should have the power to require the bank to provide it directly …" The legal framework should include a clear set of sanctions to incentivize the banks to fully cooperate with authorities, in order to preserve the maximum value of the assets and cover the most liabilities in a liquidation process. At the end of the paragraph: Footnote: In Mexico, the resolution authority has the power to carry out on-site inspection visits to banks in order to access and assess information. This legal power is crucial for developing transfer and liquidation strategies, as part of preparatory activities and as a complement to information shared by the banking supervisor.	IPAB
206.	**Paragraph 188**	Consider adding the following sentence at the end of paragraph 188: ***"Authorities should be able to identify key personnel and resources as part of preparatory activities."***	IPAB
207.	**Recommendation 38**	The Recommendation flags the requirement for contingency plans with paragraph 162 stating this involves "a significant amount of preparation". We would observe that the rapid market movements in SVB UK, meant that i) there was only a limited 72 hours (48 hours being over the weekend) during which contingency planning work could be performed before an outcome was required and ii) Management necessarily were dividing their time between the business sale/transfer strategy, managing the bank's operations and supporting with contingency planning work for a bank liquidation; inevitably that limited their focus on contingency planning.	INSOL International
208.	**Recommendations 38 - 41**	We note this guidance is for non-systemic banks and therefore it may have been deemed "not proportionate" for them to have performed such extensive wind down planning work, and if done, it may have only been performed on a solvent basis and therefore not be directly applicable to a bank liquidation scenario. It should be clear to what extent wind down planning is performed on a solvent or insolvent (i.e. bank liquidation) basis.	INSOL International
209.	**Recommendation 39**	• There may be conflicts between open testing of the market against risks of "bank run". In practice, the burning platform and sensitivity of the situation may not provide the ability for such public marketing to be performed, as any publicity increases the risk of causing a run on the bank event, or if a run on the bank has already initiated, there is unlikely to be any time to test the market. • There is often a cross border consideration with banks often being part of global groups. As such, the framework should also support/encourage cross border banking authority coordination, although noting that there may be conflicts between banking authorities in prioritising the	INSOL International

		protection of their own customers/financial sector to the expense of those in other jurisdictions. See our comments more generally on cross border consideration at Chapter 10 below.	
210.	**Recommendation 40**	• We note that management may deem there to be conflicts in sharing information with the banking authorities (i.e. the banking authorities taking action that may protect customers but is detrimental to shareholders) and therefore be reluctant to share information. As such, the legal framework should be clear on requirement to fully cooperate. • There may not be sufficient time to run the process to "remove non-cooperative management" and instead banking authorities may need to rely on other remedial actions, including i) powers to appoint supervisor/prospective liquidator and ii) powers to make personal claims against management after the event.	INSOL International

F. CHAPTER 5. GROUNDS FOR OPENING BANKING LIQUIDATION PROCEEDINGS

#	Paragraph	Comment	Submitted by
211.		• **Future Viability:** It is essential for the guide to provide more detailed guidelines on how to assess the future viability of a bank to decide whether to proceed with its liquidation. The reasons for initiating these proceedings should be broader than the traditional ones, which often focus solely on insolvency. Similarly, it should align with the Going Concern assumption found in the Conceptual Framework of the International Standard. • **Definition of Clear Reasons:** The guide should include concrete examples of situations that justify liquidation to avoid ambiguous interpretations.	Asobancaria
B. TYPES OF GROUNDS			
212.	**Paragraph 191**	Take the opportunity in this paragraph to show the legislators the "big picture" on why it is important for the common good and how financial and non-financial ground are aligned (or not) with the voters needs in the short term.	Hernany Veytia (Mexico)
213.	**Paragraph 191**	A non-financial ground, other than legal or regulatory infraction, could also be that a bank has not effected any banking transaction within a year since (or other set period) from the day it was issued a license.	EBRD CFMD
214.	**Paragraph 191**	It is appropriate to categorize the grounds for initiating bank liquidation proceedings into financial and non-financial criteria, providing a comprehensive overview of the various factors that may trigger such actions, and also highlighting the importance of having a robust legal framework that addresses both financial health and broader regulatory compliance issues. An area of concern, however, could be the potential overlap and interaction between these grounds, which may complicate decision-making processes for regulatory authorities, so clear guidelines on how to weigh these factors against each other would enhance the effectiveness of the liquidation process.	Miguel Gallardo Guerra (Mexico)
215.	**Paragraph 193**	"The general classification of grounds for opening bank liquidation proceedings overlaps with the distinction between ~~grounds~~ **those** specifically linked to the violation of the banking regulatory regime…	IPAB

216.	Subsections 2-3 **Paragraphs 194-203**	By way of an example of possible perspective of a particular jurisdiction, Section 2(2) of the Singapore Banking Act provides: "*Without affecting any other meaning which the word "insolvent" may have, a bank or merchant bank is, for the purposes of this Act, deemed to be insolvent if either it has* ***ceased to pay its debts in the ordinary course of business*** *or is unable to pay its debts as they become due."* Liquidation and a liquidation authority should be able to take action once a bank has failed to pay its debts in the ordinary of business. Without prejudice to any other ground or basis for liquidation, failure to make payment in the ordinary course of business should be a sufficient ground itself.	IBA
217.	**Paragraph 194**	"*Therefore, the grounds for opening bank liquidation proceedings should not be limited to or overly reliant on traditional insolvency grounds, but include additional* ***~~grounds~~ ones***."	IPAB
218.	**Paragraph 194**	This paragraph highlights the need for specific grounds for bank liquidation that address the unique challenges these institutions face. Notably, the reference to banks reliance on maturity transformation and the urgent demands of depositors highlights the importance of a proactive intervention approach, as relying solely on standard indicators of insolvency can negatively impact on financial stability and weaken depositor confidence, potentially resulting in broader systemic risks.	Miguel Gallardo Guerra (Mexico)
219.	**Paragraph 195**	Consider adding the following sentence at the end of paragraph 195: ***"This heightened sensibility increases with the adoption of digital technologies that allow fast payments and the generalized use of social media platforms by depositors."***	IPAB
220.	**Paragraph 197**	One aspect that should be taken into account in bank insolvency proceedings is the importance of cash flow. Failure to pay depositors' demands for demand deposits (even if the bank is financially overcapitalised) could be a trigger of commencement of the insolvency procedure. In this context, it is worth considering that governments and/or central banks could consider putting in place a legal framework that would allow them to support the cash flows of potentially failing banks. For example, it may be worth considering setting up a mechanism whereby the central bank purchases assets held by such failing banks (financial assets such as foreign and domestic loan claims, mortgage claims, securities, etc.) at a reasonable price (as an emergency evacuation measure). In particular, as the practice of responding to the refund of time deposits before designated maturity is well established in Japan, it is important to respond to depositors' refund requests at the appropriate time, regardless of whether the deposit type is savings, current or time deposits.	Kenichi Tanizaki (Japan)

221.	**Paragraph 199**	Recital 199 states that it is the responsibility of the banking authority to assess on a case-by-case basis whether a bank is or is likely to become non-viable. In this context, we suggest adding a recommendation that, where appropriate, the banking authority should be required to consult the IPS of which the bank is a member when assessing this issue. One reason for this is that the IPS, through its monitoring of its member banks, has a comprehensive insight into the condition of the bank and can provide valuable information for the banking authority. In addition, such a hearing would give the IPS the opportunity to take preventive action against the bank's failure before the banking authority would have to initiate insolvency proceedings. This means that preventive action by the IPS would not only be in the interest of financial stability and customer protection, but is the core mandate of the IPS. Furthermore, we assume that recourse to such preventive measures by an IPS would also be in line with the degree of flexibility of the legal framework deliberately promoted by UNIDROIT.	National Association of German Cooperative Banks and the German Savings Banks Finance Group
222.	**Paragraph 201**	In the same vein, we recommend that the following recital 201 of the Draft explicitly refers to such preventive measures by an IPS. These are the best example of "*other less intrusive measures [that] appear to be capable of resolving the crisis*", as stated in the Draft.	National Association of German Cooperative Banks and the German Savings Banks Finance Group
C. INTERACTION WITH LICENCE REVOCATION			
223.	**Paragraph 204**	The guide addresses licence revocation as an "all or nothing" decision, but it would be helpful to also acknowledge there are typically a host of different actions available to a supervisory authority that fall some way short of full revocation, but which may render a bank unviable (for example variations to a licence or the broader operating conditions of an institution). Often these variations are themselves capable of being sufficiently impactful to render an institution non-viable and (frequently) may be sufficient to meet traditional grounds for liquidation.	INSOL International
224.	**Paragraphs 207-210, Recommendation 44**	Certain carve outs may be required here. Using licence revocation as a ground for opening liquidation proceedings may not be appropriate in all situations, for example where: • the licence is relinquished by agreement / voluntarily; • the authority provides an exemption (e.g. licence is revoked only whilst remedial actions are taken); • there is a viable business remaining post licence-revocation; and • where there is a better outcome outside of liquidation e.g. in the event a sale process is ongoing.	INSOL International

225.	**Paragraphs 209 and 250**	In jurisdictions where the revocation of the banking license goes hand in hand with the opening of bankruptcy over the bank, it must be carefully assessed what the impact and consequences of such revocation of the banking license are. The banking regulator may lose its supervisory/regulatory powers which may still be helpful in a liquidation/bankruptcy process. In a current bank bankruptcy proceeding issues emerged that the bank in bankruptcy no longer has access to payment/securities transfer systems (and it is difficult and time consuming to find other banks that are willing and able to assist the failed bank to make payments/securities transfers to clients), and the bank is no longer allowed/able to execute FX or securities transactions for client money/segregated securities deposited with the failed bank. Sometimes clients may have no other bank accounts, or only bank accounts with a bank in another jurisdiction which complicates and delays the possibility to make payments/transfers to them swiftly. With respect to bank accounts abroad it emerged in practice that it may not be possible to transfer monies to such foreign bank accounts in local currency which is why an FX transaction (with consent and at the cost of the client) would be necessary, but not possible due to the revocation of the banking license.	IBA
226.	**Paragraph 210 and Key consideration 3**	Key consideration 3 states that license revocation as a ground for opening bank liquidation proceedings has clear benefits. However, the text does not provide a further explanation of those benefits. Although we agree that the revocation of banking license and the commencement of banking liquidation proceedings are closely linked and that the grounds for opening bank liquidation proceedings should be aligned with the triggers for revocation license, it is important to notice that the revocation of a banking license is an administrative proceeding that, once initiated by the supervisor after determining that a trigger for revocation exists, takes certain procedural steps (including the right to be heard to the bank affected) and decisions. In the European Banking Union context, the legislative framework does not foresee a deadline for a final decision to be taken by the supervisor on the withdrawal as the timeline for a decision depends on the circumstances of each case and any legal or procedural requirements under applicable law. Therefore, we first propose to add in paragraph 210 a sentence remarking that the timeline of the procedure for the relevant supervisory to take a decision on license revocation may make it legally difficult that the revocation constitutes a ground for opening bank liquidation proceedings: *"210. While the approach of initiating liquidation proceedings after the licence has been withdrawn could ensure certainty, a potential disadvantage is that in certain exceptional cases, even though an entity's banking licence has been revoked, its liquidation and dissolution may appear unnecessary and disproportionate. Evidently, this exceptional situation would not apply to entities which are insolvent or illiquid in the narrow sense of general business insolvency law, or those of which the licence was revoked in response to serious wrongdoing (e.g., serious violations of AML/CFT requirements or facilitation of or engagement in criminal activities) so that their dissolution can be pursued in the public interest.* ***Finally, the timeline of the procedure for the relevant supervisory decision on license revocation may***	FROB

		***make it legally difficult that the revocation constitutes a ground for opening bank liquidation proceedings.*"** We would also suggest reformulating the current drafting of Key consideration 3 of this Chapter (as we doubt that license revocation as a ground for opening bank liquidation has clear benefits) by being instead more neutral. We propose then the following wording: *"Licence revocation **may be** ~~as~~ a ground for**, or a consequence of,** opening bank liquidation proceedings ~~has clear benefits; if liquidation proceedings are initiated based on other grounds, licence revocation should generally also be one of the immediate consequences~~".*	
227.	**Paragraph 214**	The relationship between the administrative authority's decision to revoke a banking licence and the court's decision to initiate a liquidation proceeding appears to involve difficult issues. A decision by the administrative/regulatory authorities to revoke a banking licence is regarded an administrative action, the content of which may be disputed by the bank subject to such decision. In such a case, the effect of the revocation of the licence would be provisional and, if it is the case, the validity of the administrative action would be debated in court. This would be positioned as an administrative action. On the other hand, the liquidation proceedings of the bank would be argued in the competent courts with jurisdiction over bankruptcy proceedings. Given the need for these two decisions to be consistent, it seems worth considering the introduction of a system in which, for example, the chambers that decide on the validity of such an administrative action and the chambers that decide on the commencement of liquidation proceedings of the bank would work together.	Kenichi Tanizaki (Japan)
228.	**Paragraph 215**	May need to consider the definition of "revoke" used throughout, particularly in the context of a revoked licence remaining in force in so far as necessary for the efficient conduct of the liquidation proceedings, as set out in this section. It may be appropriate to revoke permissions in respect to "new" business whilst maintaining all of the obligations for existing banking activities.	INSOL International
229.	**D. INTERACTION WITH TRIGGERS FOR RESOLUTION**	No complete alignment of triggers for resolution with the grounds for insolvency Regarding Chapter 5, Section D (Interaction with triggers for resolution), we have concerns about the proposed complete alignment of triggers for resolution proceedings with the grounds for opening insolvency proceedings. It is true that there is already an overlap in this respect, for example, in German law ("dual track regime"). However, the threat to the institution's ability to continue as a going concern as a prerequisite for resolution may arise earlier and under different circumstances that do not (yet) constitute grounds for insolvency. This makes sense because the resolution regime pursues different objectives than insolvency proceedings, for example, ensuring the continuity of critical functions or safeguarding financial stability. However, if these objectives are not at risk, there is no reason to extend the grounds for insolvency and align them with the threat to the institution's existence in the resolution mechanism.	German Banking Industry Committee

230.	**Recommendation 43**	I understand that a forward-looking ground for opening bank liquidation for example, imminent illiquidity—can promote better outcomes for the creditors. It is worth noting that German law requires banks to inform the supervisory authority even if the bank is only *imminently* illiquid, i.e. the bank will become illiquid within the next 24 months (section 18 German Insolvency Code[31], section 46b(1) German Banking Act)[32]. The German legal situation appears to be similar to Recommendation No. 43. However, after reviewing the last 26 bank insolvencies in Germany, I could not find a single case where the insolvency court opened proceedings because of *imminent* illiquidity and, therefore, based on such a forward-looking ground. The court opened proceedings either because of illiquidity or balance sheet insolvency.[33] It may be that Recommendation No. 43 is less realistic in practice.	Dominik Skauradszun (Germany)
231.	**Recommendation 43**	Insolvency practitioners often look at the position on an "estimated outcome" / gone concern basis (as per Recommendation 54) before the event to determine, as best as can be estimated, a) the point of non-viability, b) the optimal resolution or insolvency route incl. transactional solutions, and c) the impact on the hierarchy of creditors. This includes a forward looking element. This approach perhaps could be considered in Recommendation 43 at an earlier stage than otherwise brought in to the Guidance.	INSOL International
232.	**Recommendation 44**	Caution is needed in further broadening non-financial grounds for opening liquidation proceedings if there is already complete alignment between licence revocation (including on non-financial grounds) and liquidation proceedings. The proper administration of the licence revocation process (pre-failure) would typically ensure traditional insolvency grounds can be met anyway at the necessary time (by rendering a business model unviable); conversely if the particular consequence of licence revocation means that traditional insolvency grounds are still not met, it may mean liquidation is not in fact appropriate anyway.	INSOL International

[31] Section 18(2) Insolvency Code reads: „A debtor is deemed to be faced with imminent insolvency if it is likely that the debtor will be unable to meet existing obligations to pay on the date of their maturity. The forecasting period is generally to be 24 months".

[32] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR, 229. edition (December 2022), section 46b KWG para 21.

[33] Cf. D. Skauradszun, in: Beck/Samm/Kokemoor, Kreditwesengesetz (KWG) mit CRR, 229. edition (December 2022), section 46b KWG para 13. Illiquidity was the ground for opening insolvency proceedings in seven cases, balance sheet insolvency in six cases.

G. CHAPTER 6. LIQUIDATION TOOLS

#	Paragraph	Comment	Submitted by
233.		**Need for Transfer-Based Tools:** Traditional insolvency tools are insufficient for banks. Tools that allow for the transfer of assets and liabilities to a viable acquirer are necessary. This is because traditional insolvency tools, such as fragmented liquidation, may not be suitable for banks due to the nature of their assets and liabilities, and the importance of maintaining public confidence. **Practical Examples:** It would be helpful to include examples of how these tools have been applied in recent bank liquidations to demonstrate their effectiveness in practice. **Flexibility in Tools:** The guide should address the risks that may arise from the flexibility in choosing tools and offer strategies to mitigate these risks.	Asobancaria
234.		A Modular Approach to Restructuring/Liquidation Tools In terms of restructuring and/or liquidation processes, the modern approach recommended by experts and included within the recent amendments to UNCITRAL's Legislative Guide that address, in particular, micro- and small-enterprises ("MSEs") is the modular approach. This approach generally enables a range of tools to be deployed (singly or, where appropriate, in combination with other tools) depending on the circumstances of financial distress and any intended outcomes in relation to business as a whole. As far as financial institutions are concerned, the range of tools made available in many jurisdictions in their resolution regimes approximates this approach. What will be important, whether the focus is on SIFIs or non-systemic banks, is to ensure that the modular approach forms part of the process by which restructuring or liquidation proceedings in respect of banks incorporate the range of tools necessary for use at various stages of proceedings, again, either singly or in combination. This will be helpful since the specially designed tools, whether found in this Guide or in the Key Attributes, are useful tools which can complement each other in addressing bank crises. Notably, it may still be the case that liquidation will follow the "resolution" process, allowing the residual bank to eventually exit the market.[34] Thus, highlighting a modular approach in the discussion can help better "dovetail" this Guide and other international guidelines, such as the Key Attributes. In the same vein, in jurisdictions with a "dual-track regime" (as discussed in Chapter 1, Section D), where the specially designed tools are scattered across statutory or regulatory instruments related to both "resolution" and "insolvency proceedings", the modular approach can help establish links between these	INSOL Europe

[34] Ibid., Chapter 1, paragraph 62.

		two tracks. In light of this, the Guide can usefully indicate a preference for this approach as part of the background consideration for structuring appropriate legislative or regulatory frameworks. *Recommendation 4.1: The Guide could usefully provide an indication of a preferred approach under the overall aegis of restructuring and/or liquidation, which could be a modular approach.* *Recommendation 4.2: The Guide could usefully align with the modular approach currently being seen in the development of restructuring and/or liquidation frameworks, which could include an indicative list (capable of change/evolution) of tools that could be deployed within an overall resolution and liquidation framework dealing with financial distress.*	
235.	**A. INTRODUCTION**	The Chapter provides guidance on the tools and powers that should be included in the legal framework to allow an orderly liquidation of banks, whose resolution leaves a residual part to be liquidated, or which are not placed in resolution. Again, by way of sample perspective from a particular jurisdiction, in Spain almost none of the banks that had financial difficulties (and there have been many), have been dealt with in insolvency proceedings. Only the insolvency of Banco di Madrid used such instruments and in that procedure the creditors collected their claims in full and the investors recovered their investments. The situation of non-systemic banks was solved by mergers with larger and more solvent banks and of the two cases of systemic banks. One was solved by government aid (Bankia), and subsequent absorption by CaixaBank, and the other by Banco de Madrid acquiring the bank (Banco Popular).	IBA
B. TRADITIONAL INSOLVENCY TOOLS AND THE NEED FOR TRANSFER-BASED TOOLS			
236.	**Paragraph 225**	Incentives for takeover of banks in liquidation (bankruptcy) are important with regard to creating space for takeovers and avoiding piecemeal liquidation of banks, which may cause serious troubles. Such incentives may be of tax issues or preferential treatment by general law provisions.	INSO Section, Allerhand Institute
237.	**Paragraph 226**	This paragraph highlights a fundamental point about the limitations of piecemeal liquidation in the banking sector, as the main critique lies in the lack of a comprehensive approach that considers the unique dynamics of banks. Unlike other businesses, where the liquidation of individual assets may be more straightforward, in the banking context, it is considered that the interconnection between deposits and loans is vital. The mention that the lack of ongoing operations can lead to asset depreciation highlights the need to implement solutions that preserve business continuity.	Miguel Gallardo Guerra (Mexico)

238.	**Paragraphs 227-228**	Transfer of deposits and loans, also non-mature, can make transfer of banks as a going-concern easier and more compliant with all relevant regulations, if addressed in the Draft. Sometimes, the possibility to transfer non-mature claims originating from loans is non regulated and thus may cause legal uncertainty. This may lead to smoother and more efficient and effective transfer, as a tool for liquidation with preserving value and maximizing recovery for creditors, which is generally accepted aim and goal of insolvency proceedings.	INSO Section, Allerhand Institute
C. TRANSFER-BASED TOOLS: NATURE AND APPLICABILITY			
239.	1. Types of transfer-based tools **Paragraph 234**	In our experience as executive resolution authority, a share deal (which only makes sense if it refers to all the share capital of the failing bank) does not increase the complexity of the transfer transaction as has been indicated in the paragraph, but rather it is the other way around. In our view, carving out the unattractive parts of a failing bank to execute a partial transfer requires delivering a prior separability analysis (i.e., the bank's ability to implement a transfer of: i) legal entities, ii) business lines, or iii) portfolios of assets and liabilities at short notice to a third party). For that purpose, the liquidation authorities should have access to relevant updated information from the bank and its cooperation would be key to define, among other elements, the potential transfer perimeter; as well as the financial, tax, legal and operational interconnections of the carve-out business. This analysis will hence require more intensive preparation beforehand and add legal and operational uncertainties to the transaction. Additionally, although we concur that a share deal enables the survival and continuation of the legal entity of the failing bank, on most occasions the acquirer is another banking institution, and thus the failing bank will become a subsidiary part of its consolidated group. Consequently, although in a share deal the entity legally survives, from a prudential and supervisory standpoint, the failed bank is integrated into a banking group which to some extent can be seen as the exit of the bank from the market. Finally, the Legislative Guide offers more an array of options for deploying different liquidation tools than a rigid playbook as the liquidation authorities should have flexibility and discretion in the choice of tools (as indicated in paragraph 237). Therefore, we understand that it is not advisable to maintain the current emphatic wording on the option of applying a transfer strategy through a share deal. Considering the foregoing, we propose to redraft paragraph 234 along the following lines: *"Apart from sale of assets and liabilities as a going concern, frameworks may provide for share deals, i.e., transfers involving the mandatory sale of **all** the failed bank's shares to an acquirer. The essential differences between a sale as a going concern and share deals are that, while the former preserves certain operations of the failing bank but not its legal entity, which is dissolved, share deals preserve the legal entity itself. **Although** share deals are more likely to be a resolution tool (and as such, to be included in single-track regimes), they ~~but not to~~ **may also** be available in the context of the separate liquidation proceedings of dual-track regimes. ~~There are various reasons why share deals are unlikely to~~*	FROB

		~~*be particularly useful in bank liquidation. They are likely to impede a carve-out of unattractive parts of the failing bank's business or possible hidden and contingent liabilities, thus depressing prices or increasing the complexity of the transfer transaction. Furthermore, to the extent that they enable the survival and continuation of the legal entity, they may be inconsistent with legal provisions that characterise liquidation as the orderly winding up of the failed bank. Share deals thus play a marginal role in liquidation, at most."*~~	
240.	**Paragraph 235**	The legal framework should ensure that the regime for transfers of assets and liabilities: (i) works also for branches of the foreign bank within the jurisdiction, and (ii) provides (so as to save costs) for a short form winding up of the bank in the jurisdiction following the transfer of all assets and liabilities. Also, the transfer tool should be wide enough to facilitate different forms of transfers, e.g. shares or interests in return for the transfer of the business, the transfer of and continuation of legal proceedings, the retention of seniority benefits (e.g. in employment) etc.	IBA – Banking & Financial Law Committee and Insolvency Section
241.	2. Tools in the procedural organisation of the bank failure management regime **Paragraph 236**	The second sentence of this paragraph explains why liquidation and resolution processes differ when it comes to transfer-based tools, indicating "*the manner in which the available tools can be used and applicable safeguards and constraints [...]*". However, we don't see a major difference between the considerations and recommendations regarding liquidation tools provided in Chapter 6 and the application of transfer tools in resolution pursuant to the FSB Key Attributes. In this regard, the transfer under both frameworks shares a common objective: the sale as going concern of the business, wholly or partially, of the failing bank. Therefore, in our opinion, the boundaries between both processes do not arise in terms of the operationalization and implementation of the transfer strategy (which regardless of the size or interconnections of the failing bank, follows in essence a very similar procedure aiming at ensuring the swift and effective implementation of the transfer at an early point and within a tight timeframe). They rather differ in respect of their objectives: in the case of liquidation, value maximization is also a core objective along with the depositor protection and financial stability which, in contrast, are the overring objectives in resolution. In addition, we note that applicable safeguards and constraints as described in points G (protection of the liquidation estate) and H (limited stay on enforcement of certain financial contracts) of this Chapter 6 are fully in line with the resolution framework and the FSB Key Attributes. As a result, we propose the following drafting of the mentioned second sentence of <u>paragraph 236</u>: "*[...] Introducing transfer-based tools in the liquidation framework would not blur the boundaries between the two processes, which would still differ in terms of the objectives sought,* ~~*the manner in*~~	FROB

		~~*which the available tools can be used, the applicable safeguards and constraints,*~~ *or the availability of external funding. [...]*"	
242.	**Paragraph 236**	In dual-track regimes, one of the key differences between the use of tools in a liquidation (rather than resolution) context is the wider operational environment for the institution at the time the tools are used. A bank in liquidation, by then under the (very public) control of an appointed liquidator, is in a very different situation to a bank being subject to resolution tools, even if the tools are similar and (hopefully) being used by the liquidator in the very immediate period following their appointment. The approach in this section 6 reflected by the statement in this paragraph "the guidance on the liquidation [tools]…are equally relevant to both single-track and dual-track regimes" does not take account of this divergence sufficiently.	INSOL International
243.	**Paragraph 236**	**A general remark regarding the dichotomy resolution vs. administrative liquidation** I take note that the draft guide "does not prescribe or assume the existence of a specific type of regime". However, the boundaries may be highly ambiguous and difficult to articulate. In the case of a dual-track approach with an administrative liquidation regime, the differences between a transfer in liquidation and a transfer in resolution may be difficult to articulate. Apart from the trigger criteria and the corresponding legal basis, issues could notably arise regarding the setting of MREL requirements. It should notably be avoided that transfers in liquidation are perceived to be externally funded (cf. state aid, DGS) while transfers in resolution would be funded internally. This could moreover give rise to unsound incentives for banks (or even authorities). Considering that the key concept to motivate resolution is based on public interest considerations, it would moreover seem challenging to consistently invoke public interest to impose a transfer in liquidation and thus outside of resolution. Accordingly, if a transfer is unavoidable and a must (due to critical functions, financial stability considerations or other resolution objectives) rather than a nice-to-have option to simply enhance value preservation, the transfer should take place in resolution. I think various scholars have often pointed to the artificial dichotomy between resolution and liquidation. I consider that it would be useful to draw the lessons from past experience within the EU and avoid ambiguities in terms of LAC requirements as well as unnecessarily complex issues in terms of public vs. private law legal bases.	Alex Majerus (Luxembourg)

244.	3. Discretion in the choice of tools **Paragraph 237 – Recommendation 46**	"…*liquidation authority should be able to select*…" – this may need to be expanded to acknowledge that the liquidator will need to be involved in this decision.	INSOL International
245.	4. Legal and others prerequisites **Paragraph 240**	*"It is furthermore essential that the legal framework ensure that such transfers are final and irreversible. "* Art. 38(6) of the BRRD provides that "*6. Following an application of the sale of business tool, resolution authorities may, with the consent of the purchaser, exercise the transfer powers in respect of assets, rights or liabilities transferred to the purchaser in order to transfer the assets, rights or liabilities back to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership."* According to EBA explanations, "*The purpose of this provision in Article 38 (6) of Directive 2014/59/EU (BRRD) is to allow, where necessary, for an agreement with a purchaser to transfer back assets, rights or liabilities to the institution under resolution or to transfer back the instruments of ownership to the original owners. The period of time should be agreed on a case-by-case basis with the purchaser and should reflect the time that is appropriate in view of the reasons in relation to which the possibility to transfer back is necessary. Such reasons may include the need to correct for any errors made in the initial transfer or may be linked to any other provisions of the contract (e.g. linked to valuation of assets or liabilities)."* Should similar considerations be provided in the Guide?	EBRD CFMD
246.	**Paragraph 240**	"It is essential that no legal obstacles…" Particular attention should be given by administrative authorities to anti-trust requirements and regulations, as part of preparatory activities.	IPAB
247.	**Paragraph 240**	Recommendation 47 states: *"The legal framework should provide the liquidation authority and/or the liquidator with the power to transfer a failed bank´s assets and liabilities wholly or partially, to a viable acquirer, without individually notifying, or obtaining the consent form, third parties."* We understand that the proposed recommendation strives for agility in the decision making of the liquidator and/or liquidation authority and, according to paragraph 240, even legal certainty (it proposes that the decision be final and irreversible).	IBA

		However, to leave such a decision solely in the hands of the liquidator would mean, on the one hand, that the liquidator would have powers that, at least in civil law countries, are unprecedented and, on the other hand, that creditors and interested third parties are deprived of a legitimate right of defence. We understand the desire for agility and speed regarding the sale, even in such a fluctuating market as the financial one. It is conceivable that the opportunity for a sale arises in a specific situation and that any delay may thwart that opportunity. But the abovementioned right of defence is paramount and it is therefore undesirable that a decision of the liquidator with respect to a sale is irrevocable in the absence of judicial review and even less so if this decision has been taken without a right of third parties (creditors, other bidders, etc.) to be heard. In other words, viability is an inspiring purpose, but it should not erase important safeguards. As and when deemed appropriate, the auction process can be conducted before a "third-party observer", who can prepare a detailed compliance report after conclusion of the auction process. Moreover, because transfers are done under severe time constraints, the acquirer will typically be unable to conduct a proper due diligence and in particular be unable to verify whether AML/KYC/KYT requirements have been properly met by the failing bank. To encourage potential acquirers to bid for businesses or parts of businesses that could be transferred in a liquidation, the Guide could provide that, from a regulatory point of view, the acquirer will be granted a reasonable period of time (the "remediation period") to review all accounts and to bring compliance matters in order without incurring in the meanwhile the risk of administrative sanctions. It should equally be provided that the acquirer does not incur any criminal liability: (i) in relation to matters that occurred prior to the transfer of the business, and (ii) during the remediation period in relation to incomplete or improper AML/KYC files "inherited" from the transferor.	
248.	**Recommendation 46**	Perhaps the Guide could make a specific reference to the "least-cost" rule, while it already acknowledges differences in methodologies.	IPAB
D. SALE AS A GOING CONCERN: PROCESS AND SAFEGUARDS			

249.	1. General approach and preparatory steps **Paragraph 244 – Recommendation 47**	It may be challenging to justify transferring without individually notifying (depositors/customers). Perhaps consideration could be given to an obligation on the transferee undertaking to do this. GDPR in the EU may also be a concern as depositors/customers would not, as a consequence, be aware that their data is being held or processed by a transferee bank, and no consent would have been given to do so. **Recommendation 47**: Consideration could be given to some form of Universal Succession i.e. an automatic transfer of customer relationships i.e loans, deposits etc that can be triggered by the authority.	INSOL International
250.	**Paragraph 245**	As mentioned in point 58, giving broad discretion to the liquidation authority, in addition to a non-transparent attitude on the part of that authority, generates nervousness among creditors, which affects confidence in the entity and in the system in general.	Costa Rica Bar Association
251.	**Paragraph 248**	At the end of this paragraph the Legislative Guide points out that the success of transfer strategies depends on several actions, all of them "may benefit from pre-liquidation preparation and contingency planning". Given the paramount importance of planning and preparation works ahead of a bank failure, as extensively provided in Chapter 4 of the Legislative Guide, we would recommend redrafting the paragraph by replacing the term "may" by "shall".	FROB
252.	**Paragraph 248 – Recommendation 48**	There is an inevitable tension between transfer power being implemented at an early point and within a tight timeframe, and the desire for legal certainty in execution and operational and transactional continuity in delivery. That tension cannot be addressed by the legal framework in isolation; it needs support from the wider regulatory regime to ensure the environment a liquidator faces at the time of transfer makes the use of the transfer powers viable (per Chapter 4).	INSOL International
253.	2. Perimeter of the transfer, licensing and succession **Paragraph 249-251 and Recommendation 51**	One of the core objectives of the liquidation regime is depositor protection, and within it, the insured depositors would deserve the maximum protection (beyond the fact that DI already protects them through the payout function or by using its funding resources to support a transfer). For this reason, we would advocate making it clearer that to serve the liquidation objectives any transfer strategy should always include, at least, the insured deposits of the bank's deposit base. Accordingly, apart from including a specific sentence to address this comment in paragraph 249, the text could be also updated as follows: • paragraph 249: *"The legal framework should not hamper: [...] (iii) the transfer of the bank's deposit base (whether solely* ***and at least*** *the insured deposits or other deposits too). [...]".* • paragraph 251:	FROB

		"To facilitate the implementation of transfers that include insured deposits ***(which should be the minimum perimeter covered in the transfer)*** *[...]*". Also, we also suggest updating recommendation 51 (probably its letter e) to address this comment.	
254.	**Paragraph 249**	Should the Guide elaborate on what cannot be transferred? E.g. IADI P&A paper mentions the following cases: Assets Excluded from P&A Transactions: Illegal loans, and assets necessary for the payment of senior claims (e.g. severance pay for employees, national tax) and distribution of dividends to creditors Liabilities Excluded from P&A Transactions Liabilities for employee benefits, loan loss reserves, reserve accounts for all tax liabilities, deferred gains, and any surplus or net profit reflected on the failing bank's books at the time of closure. p.22, P&A Technical Paper (iadi.org)	EBRD CFMD
255.	**Paragraph 251**	"In such case, it is preferable not to prescribe in restrictive terms the form of the contribution (e.g., by confining it to a cash payment) in the legislation, but to use instead generally worded enabling provisions, which leave to the DI the responsibility for designing the funding arrangements in a way that is consistent with its mandate and its capacity, including by entering into more complex funding arrangements, such as loss-sharing or risk-sharing agreements, or by providing guarantees for the value of assets transferred." If the DI has a status of public authority, they might be reluctant to provide support in a way which is not clearly identified by the law. Depending on the legal tradition, the law might need to clearly identify such methods, although the list of such methods in the law could be as non- exhaustive list.	EBRD CFMD
256.	**Paragraph 250**	Retention of a banking licence post-liquidation (even in exceptional circumstances) can cause issues for the liquidator if not combined with appropriate waivers or permissive derogation from regulatory standards where they do not align with the objectives of the bank liquidation. There is also likely to be a significant funding impact (see Chapter 7).	INSOL International
257.	3. Non-bank acquirers **Paragraph 252**	Consideration could be given as to whether this should be the liquidator in addition to, or instead of, the authority undertaking this activity.	INSOL International
258.	4. Disclosure of information to potential acquirers and building process	Concerns regarding marketing prior to the commencement of insolvency proceedings We are concerned about the early marketing of a credit institution prior to the commencement of insolvency proceedings as proposed in Chapter 6 – Section D (Sale as a going concern: process and safeguards) under para. 4. (Disclosure of information to potential acquirers and bidding process). Such a sale would be a significant and unjustified interference with the rights of the institution and its owners at this stage. There would be a significant risk of business secrets being violated and, in addition, of the	German Banking Industry Committee

		company's difficulties becoming public knowledge – with the consequence of a potential bank run on the institution. A final failure of the institution would then be more than likely, although it might otherwise still be averted.	
259.	4. Disclosure of information to potential acquirers and building process **Paragraph 255**	In chapter 6, section D.4, Recital 255, the Draft proposes to provide rules for the pre-marketing of a failing bank prior to the commencement of liquidation proceedings. We consider this proposal to be very critical as such pre-marketing is likely to violate business secrets and trigger a run on the bank if information about the bank's financial difficulties becomes public. We therefore strongly recommend that this proposal be removed from the Draft. If the proposal is nevertheless retained in the Draft, we would suggest adding an exemption for banks that are members of an IPS. In this case, only the IPS should be engaged in any sale of the bank and, accordingly, its marketing to potential acquirers. We believe that such a special rule for IPS is essential to protect their core mandate.	National Association of German Cooperative Banks and the German Savings Banks Finance Group
260.	**Paragraph 255**	"The relevant provisions should require that the disclosure of confidential information be kept to the necessary minimum and that potential acquirers be strictly bound by confidentiality requirements." Art.27(2) of the BRRD provides that powers of the resolution authorities should include the power to require the institution to contact potential purchasers in order to prepare for the resolution of the institution. Should a similar consideration be added in the Guide?	EBRD CFMD
261.	**Paragraph 256**	"A due diligence process allows potential acquirers to assess the situation of the bank and/or the quality and economic value of the portfolios of assets and liabilities within the parameters of the transfer." Should the Guide mention that the process should be non-discriminatory and all potential acquirers should have an equal access to the information?	EBRD CFMD
262.	**Paragraph 256**	"Preparatory steps taken in cooperation with the failing bank in the run-up to its liquidation can set up the facilities, such as a virtual data room, to give potential acquirers access **in equal conditions** to detailed information…"	IPAB
263.	**Paragraph 258**	Similarly, in recital 258, which refers to the selection of acquirers of a failing bank, we suggest adding that special rules must apply to banks that are members of an IPS. In this context, it is usually essential that the bank remains within the group or network of banks belonging to the IPS. The "selection of the winning bid", as stated in the Draft, should not be made by an external party, but only by the IPS.	National Association of German Cooperative Banks and the German Savings Banks Finance Group

264.	5. Valuation **Paragraph 261**	*"… The valuation should in principle be conducted by an independent expert,* ***who may provide a reference value for sales or transfers****. The liquidation authority should …."*	IPAB
265.	**Paragraph 262**	The statement that the price obtained through a bidding process should in any event trump the valuation price does not seem to take into account that such transactions usually need to be completed within a very short time frame without sufficient time to conduct a proper/customary due diligence by bidders with respect to assets/liabilities. In such case we would expect that they apply a discount for uncertainty and hence best bid may not trump valuation price.	IBA
266.	6. Safeguards: creditor treatment **Paragraph 263**	The sales/transfers should not enable the selling bank or its liquidator to cherry pick and break up certain financial contracts, e.g. derivatives. Broad powers of sale and transfer enabling certain liabilities to be left behind should not be to the detriment of counterparties of financial contracts which serve liquidity and other financial and economic purposes. Whilst paragraphs 263 to 266 reflect commonly known rules, they are in actual practice quite difficult to apply because typically business transfers are done in emergency situations that do not allow for a proper and detailed analysis. Ex post litigation in these matters is preprogrammed and it will be very difficult for courts to put themselves into the shoes of those who took decisions months or years earlier under time constraints. It would be helpful if the Guide could address this issue, for instance by providing for liability standards that are adapted to the peculiar nature of bank insolvencies.	IBA
267.	8. Execution aspects **Paragraph 268 ss.**	These are important points raised, i.e. the legal framework needs to contain clear rules (often deviating from general rules) as to how a court, regulator, or liquidator can affect transfers of assets and liabilities to third parties (e.g. real estate, employees, transfer of assets and liabilities), and what the conditions/requirements are. An important aspect that was not mentioned is competition law/merger control/foreign direct investment restrictions. These rules may also prevent a swift transfer/sale and cause timing issues and uncertainty (e.g. risk of subsequent restrictions, or requirement of divestments) – in particular for multi-jurisdiction bank groups where various local laws would apply.	IBA
268.	**Paragraph 269**	"… the existence of all necessary authorisations or approvals…" Should the Guide provide that all relevant authorisation procedures could be streamlined?	EBRD CFMD
269.	**Paragraphs 269-270**	As indicated repeatedly in the Legislative Guide, a swift transfer of the business of the bank as a going of concern is of the essence to preserve the liquidation objectives (particularly, the deposit protection and financial stability, but also the preservation of value of the assets if any delay in the execution of the transfer should likely have an impact on it).	FROB

		Therefore, a key consideration regarding the execution of a transfer strategy is that it should take legal effect on the same date that the decision of the liquidation authority is adopted, becoming immediately enforceable and binding on the liquidated entity, its creditors, shareholders as well as on its acquirer and any third party. Accordingly, as the exercise of administrative powers by the liquidation authority should have immediate legal effects on adoption, the transfer should not be subject to any limitation or requirement or the need to carry out any procedure under the applicable law or established contractually for its legal effectiveness. As we cannot see the above message in the text (or it is not clearer enough for a reader) we strongly recommend updating the Legislative Guide (specifically its paragraphs 269 and 270) to address this comment. Also, we would suggest adding it as an express accompanying recommendation.	
270.	**Paragraph 272**	"For example, jurisdictions may consider matters such as accrual of interest after the transfer and the applicable rates…" What is the stance regarding the non-accrued interest implicitly contained in zero coupon bonds that have substantial remaining time to maturity, how should such bonds be valued and how is the interest treated in liquidation, especially when prevailing market interest rates differ from those implicitly contained in such bonds?	EBRD CFMD
E. OTHER TRANSFER-BASED TOOLS: BRIDGE BANK AND ASSET MANAGEMENT COMPANY			
271.	**Paragraph 274**	"The bridge bank operates temporarily under public ownership …" Art.40(2)(a) of the BRRD provides that the bridge institution shall be a legal person that meets all of the following requirements: it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority. In line with that, should the Guide acknowledge a possibility of the partial public ownership of the bridge bank?	EBRD CFMD
272.		Concerns regarding the proposals for a bridge institution and an asset management company With regard to Chapter 6 – Section E (Other transfer-based tools: bridge bank and asset management company), we would like to point out that the proposals in this section ultimately lead to the introduction of complex resolution tools and thus of unfamiliar elements into the insolvency regime. As the legislative guide itself emphasizes (marginal number 277), the bridge institution tool is costly and requires advance planning. The same applies to the asset management company tool. Insolvency proceedings are not designed for such methods and would be unnecessarily complicated. Furthermore, there is no need for such mechanisms for credit institutions that are not systemically important.	German Banking Industry Committee

		We fear that implementing such a proposal would increasingly blur the lines between the insolvency regime and the resolution mechanism. As emphasized above, we consider it problematic to establish a "light" resolution mechanism through such proposals. We therefore suggest that sections D and E of chapter 6 be deleted entirely.	
273.		The use of bridge banks or an asset management company in most cases involves the intervention of a public bank set up for this purpose, while the use of private bridge banks is not very common. The use of public bridge banks may not be desirable in the context of a liquidation process. In several instances governments have used such a bridge bank to avoid a judicial insolvency process. Given the scarcity of judicialised insolvency proceedings for non-systemic banks, liquidators may not always be the preferred experts in the liquidation of financial institutions, as the proces of finding a buyer for the bank or its assets and liabilities poses its own challenges. It may therefore be advisable to open up the possibility that the liquidator can be advised by an entity specialized in liquidations, or at least in transfers, and that this entity can even place the bank on the market, taking charge of the search for potential buyers. All this on the basis of the necessary specialization and restrictiveness of the market for the sale and purchase of financial institutions. Recommendation 53 again seeks to establish extraordinary powers for liquidators, this time in transactions with parties related to the bank, without the power of third parties to object. We refer to our earlier observations on this topic.	IBA
274.	**Paragraphs 274-275**	These paragraphs present two essential strategies for managing failed banks: the establishment of bridge banks and asset management companies (AMCs). It is considered that the bridge bank concept is particularly convincing, as it allows for the temporary continuation of banking operations, thereby maintaining depositor access and preserving value during the transition to a more permanent solution. This approach addresses the urgent need to stabilize the banking environment immediately following a failure, as abrupt termination of operations could lead to a loss of depositor confidence and intensify systemic risks. On the other hand, AMCs serve a critical function in managing and disposing of non-performing assets. However, it is considered that the challenges associated with their establishment and governance cannot be overlooked, as their effectiveness depends on various factors, including jurisdictional circumstances and the scale of the crisis. Overall, while both strategies offer potential pathways to mitigate the fallout from bank failures, the effectiveness of each will largely depend on the specific context of the failure and the regulatory	Miguel Gallardo Guerra (Mexico)

		framework. It is recommended to develop a more detailed exploration of these frame-works, in order to enhance the understanding of their operational viability and impact on financial stability.	
275.	**Paragraph 277**	The focus has been on the negative aspects of bridge banks, but as noted in footnote 130, bridge banks can work well with regard to the resolution of small and medium-sized banks. There is room for reconsideration as to how this system should be designed. In addition, the question of how losses arising from the business should be borne in the case of the sale of a failed bank to a third party (several measures could be considered, including business transfer, share transfer and corporate split) should also be discussed. For example, (i) the government or DIC (the Deposit Insurance Corporation of Japan) could bear a certain percentage of the losses arising from the transferred business, or (ii) profit/loss sharing could be an alternative (as it is assumed that there may be cases where profits are generated rather than losses). This is an issue that should be considered from the perspective of reducing the burden on the public and the extent to which the burden and risk on third parties (acquirers) can be reduced in order to transfer the existing and failing banking business with going concern value. It would be desirable to establish the framework/design in this respect in advance.	Kenichi Tanizaki (Japan)
276.	**Paragraph 277, footnote 130**	Ukraine's example may also be added. Ukraine's law provides for two types of bridge banks, namely a long bridge bank (for a period not exceeding one year with a possible extension for up to one year in case of failure of a bank with state participation, a bank whose liabilities equal two or more percent of all banks' liabilities in the banking system, or systemically important bank, or simultaneous failure of two or more banks provided that there is an investor) or a short bridge bank which is used in other cases (inter alia, for banks which are not systemically important) and could be regarded as a type of P&A. A short bridge bank shall be set for a period no longer than three months. It can only be created if there is an investor which submitted a written obligation to purchase the bridge bank and transferred a guarantee payment to the Deposit Guarantee Fund (DGF) account. The requirements towards such bank are simplified. The DGF only appoints a manager (director), a chief account and their deputies which shall conduct the functions of the managing and control bodies of a bank. No consent from the NBU for their appointment or checks of the professional suitability is required. The authorized capital of the bridge bank is formed in the amount that meets the minimum requirements for the authorized capital of a joint-stock company. Such bridge bank is not subject to the requirements established by the NBU on mandatory economic standards, currency position limits, the procedure for forming and maintaining required reserves, forming provisions for losses on bank asset transactions and determining the amount of credit risk on all bank asset transactions. The investor undertakes an obligation to bring the bridge bank in line with banking legislation of Ukraine in terms of capital and liquidity standards or to merge a bridge bank with an existing solvent bank. The bridge bank loses its status of the bridge institution after the investor fulfils its obligation under sales purchase agreement. The failure to fulfil this condition serves the basis for termination of the contract of sale of shares of the bridge bank at the request of DGF. After the investor has taken measures to bring the bridge bank in line with the requirements of the banking legislation of Ukraine in terms of capital and liquidity standards, the National Bank of Ukraine (NBU) shall	EBRD CFMD

		conduct an inspection. If the results of the inspection do not confirm the compliance, the NBU makes a decision to revoke the banking license and liquidate the bank. The DGF may transfer all or part of the property (assets) and all or part of the liabilities to another bridge bank.	
277.	**Recommendation 50**	"Derogations from statutory rules of regulatory, corporate, and insolvency law should be clearly stated and adopted at the statutory level." Should capital markets law be added here?	EBRD CFMD
278.	**Recommendation 51**	The licence revocation process at 51(a) needs to work closely with the guidance at 51(g) to ensure certain regulated activities can continue in the liquidation in so far as necessary, while providing waivers or permissive derogation from regulatory standards where they do not align with the objectives of the bank liquidation.	INSOL International
279.	**Recommendation 51**	"The legal framework should ensure that the general power to transfer assets and liabilities (see Recommendation 47) ensures the swift, effective and final transfer of assets and/or liabilities under terms that are fair, reasonable, and consistent with the bank liquidation objectives" Should the Guide also provide that the transfer procedure shall be non-discriminatory referring, inter alia, to equal access of all potential acquirers to the information?	EBRD CFMD
F. PIECEMEAL LIQUIDATION			
280.		Piecemeal liquidation will be necessary when a sale as a going concern is not feasible or desiderable, but also when a transfer does not cover all assets. In this situation, we understand that continuing the business of the bank does not have the highest priority, but that obtaining the highest possible proceeds from the sale of assets takes precedence. In these instances the legal framework should require the liquidator to establish a new balance sheet based on the estimated liquidation values of the bank´s assets. Caution should be observed when facilitating advance payments to uninsured depositors in a piecemeal liquidation.	IBA
281.	**Paragraph 279**	The necessity of piecemeal liquidation, as outlined in this paragraph, highlights the complexities of managing a failed bank's estate. While it serves as a baseline for comparisons, it is considered that relying on this method can intensify the already fragile state of the financial system. It is noted that this is a necessary approach, however, piecemeal liquidation can probably prove inefficient, as it can result in a significant loss of value, especially in the banking context where the interconnection between assets and liabilities is critical. This situation suggests that mechanisms should	Miguel Gallardo Guerra (Mexico)

		be explored to facilitate a smoother transition toward the sale or transfer of assets rather than quickly resorting to liquidation.	
282.	**Paragraph 281**	Should the legal framework empower the liquidator to: - exercise powers of managing bodies of the bank; - take measures to recover accounts receivable of the bank, the debt of borrowers to the bank and to seek, detect, return the property of the bank held by the third parties; - dismiss employees of the bank; - involve other experts into its work within the scope of the expense budget?	EBRD CFMD
283.	**Paragraph 283**	"In jurisdictions with a DIS, insured depositors should be exempt from the requirement to submit claims in relation to amounts covered by deposit insurance." Should the Guide prescribe that a bank should maintain a database of depositors which should regularly updated (e.g. on daily basis) and the banking authorities could check the compliance with this requirement?	EBRD CFMD
284.	**Paragraph 283**	It is observed that this paragraph identifies the critical importance of defining the process for determining creditor claims in bank liquidation. However, it also reveals potential difficulties in the existing frameworks that could burden the liquidator and slow down the process. Relying solely on the bank's records may streamline claims assessment, but it assumes that these records are accurate and comprehensive, which may not always be the case. It is suggested that there should be safeguards in place to validate these records, ensuring that all creditors, especially depositors, are treated fairly.	Miguel Gallardo Guerra (Mexico)
285.	**Paragraph 283 – Recommendation 55**	Claims should still be agreed according to the legal framework, and therefore a change could be considered that claims do not need to be submitted only where a liquidator determines that the records can be relied upon and this is not disputed by the claimant. Where failure is a result of financial crime, or poor record keeping, or poor controls, the liquidator would not be under an obligation to then rely on the records.	INSOL International
286.	**Paragraph 283**	In many jurisdictions, there can be a mismatch between the deadline for depositors to claim their money back (up to several years – cf. current BRRD + CMDI proposal) and the deadline under insolvency law to file a claim as a creditor (often around or less than 6 months), thus also for the DGS under its subrogated rights, to declare and file their claims with the liquidator. This could ultimately impact the sustainability of the DGS. While it is not problematic for the efficiency of the insolvency proceedings per se, the guide could perhaps try to address the existence of this issue. One option could be to provisionally foresee the reimbursement of all covered deposits, including of sleepy depositors who are not claiming any reimbursement, keep this money on a dedicated account on behalf of these depositors, in order to be able to file a claim with the liquidator. Of course, if the depositors never claim their money back, this could be challenged by other creditors as it could be argued that the DGS enriched itself or filed a claim which is not justified. The question of what to do with the money on	Alex Majerus (Luxembourg)

		the dedicated account – when depositors have not claimed their money within the deadline foreseen under the DGS protection – would need to be solved. I'd be happy to further discuss this point. This issue may generally not seem to be all too relevant in practice as one can legitimately assume that depositors are likely to quickly claim their reimbursement. At the same time, this risk could be conceived as having a "low probability, high impact" dimension and could impact the sustainability of a DGS (cf. if a large depositor or multiple depositors would, for some reason, file a claim with the DGS after the deadline for the DGS to file its claim under insolvency has expired (e.g. 6 months). Footnote 154 tackles some aspects regarding subrogation, but it does not address this specific risk. Maybe the guide could try to somehow tackle this issue.	
287.	**Paragraph 284**	This paragraph suggests that the legal framework should allow advance payments to uninsured depositors. Recommendation 56 repeats this point, but adds an important *proviso* on equal treatment of creditors. It would be good if this *proviso* could be explained in paragraph 284, in particular how this should actually be handled in practice. Piecemeal liquidation should not lead to discriminatory treatment between creditors of the same class.	IBA
288.	**Paragraph 284** **Footnote 133**	<u>Concerns regarding advance payments</u> Finally, in Section F (Piecemeal liquidation), we have concerns regarding the proposal in para. 284 (footnote 133) to make advance payments to depositors whose deposits are not covered by deposit insurance. Unconditional advance payments can lead to individual creditors being disadvantaged and we see particular dangers for deposit guarantee schemes if their priority claims are jeopardized. The proposal should therefore, if it is to be maintained at all, be specified to clarify that such advance payments may only be made if the creditor protection of the deposit guarantee schemes is sufficiently guaran-teed and their claims with respect to the insolvency estate are not reduced.	German Banking Industry Committee
289.	**Recommendation 54**	*"The legal framework should require the liquidator to establish a balance sheet for the bank* ***<u>promptly</u>****, based on …*	IPAB
290.	**Paragraph 284 – Recommendation 56**	Advance payments to uninsured depositors would need to be considered in the context of the legal framework, the creditor hierarchy and the general insolvency framework. An advanced payment to uninsured depositors ahead of insured depositors would create unequal treatment that may not work within context of the framework and hierarchy.	INSOL International
291.	**Recommendations 54-56**	There is unacknowledged tension between speed and certainty in prescribing these. These requirements are likely to act as a barrier to transfers if not applied flexibly or with discretion on the liquidator/court to derogate from them if the objectives of the liquidation require it.	INSOL International

G. PROTECTION OF THE LIQIDATION ESTATE: STAY OF ENFORCEMENT, CONTRACT TERMINATION AND TRANSACTION AVOIDANCE			
292.	**Paragraph 285**	"*The preservation of the insolvency estate is a key objective of an effective and efficient general insolvency framework.*[134] *This and the need to stabilise business operations and ensure their continuity* ***and prevent early expiration*** *is even more acute for banks.…"*	IPAB
293.	**Paragraph 287**	Provide further details on how the legislator can provide authority to the liquidation authority to adopt provisional measures, give examples of them and make cross-reference between related sections to improve navigation of the document.	Hernany Veytia (Mexico)
294.	**Paragraph 288**	The possibility that existing contracts may be terminated in the liquidation processes or that the liquidation authority may determine in which cases such termination is appropriate or not, depending on whether the contract is essential for the continuity of the entity's business, is very important. This is true while the sale or liquidation is being carried out but should also cover the intervention and resolution stage.	Costa Rica Bar Association
295.	**Paragraph 289**	Consider adding the following sentence at the end of Paragraph 289: "***The legal framework should also provide mechanisms for the liquidator to control or remove administrative bodies of the bank***."	IPAB
296.	**Paragraph 291**	There might be a cross reference to the discussion above on scrutiny of a liquidator's actions and need to limit this.	EBRD LTP
297.	**Recommendations 57-61**	It should be recognised that these suggested elements of the legal framework, while all advantageous in their own right, need to enmesh with the principles of insolvency law in the given jurisdiction and particular authority of the local courts to enforce them.	INSOL International
298.	**Recommendation 58(a)**	"*Jurisdictions may consider different approaches, including a general rule of contract continuity, or a more limited* ~~***limited***~~ *approach by identifying ex ante certain types of executory contracts as essential and declaring their continuity, establishing exceptions to the rule of contract continuity, or by applying general rules of business insolvency, with special rules seeking to ensure that contracts essential for operational continuity are not disrupted when a transfer tool is applied.*	IPAB

299.	**Recommendation 62**	This appears to be a broad recommendation. We have previously adopted a policy of "no positive action". If a transaction in flight can settle without further intervention, then let it do so. If not, then the transaction was not "complete", and gets reversed.	INSOL International
H. LIMITED STAY ON ENFORCEMENT OF CERTAIN FINANCIAL CONTRACTS			
300.	**Paragraph 297**	Paragraph 297 recommends procedures for the treatment of financial contracts "that incorporate standard-form close-out netting". Close-out netting can be effected under contracts that are in standard-form and ones which are not standard-form. The key is their inclusion of close-out netting provisions. There is no purpose served by addressing only standard-form contracts. The Paragraph goes on to say such contracts "may trigger close-out netting upon the initiation of the bank failure management process". Note that it is uncommon for events of default specified in such contracts to trigger close-out. More usually the event of default, including insolvency related events, entitle the non-defaulting party (i.e. the party other than the one in respect of which the event of default has occurred) to initiate close-out if and when it determines to do so, and it is uncommon for close-out itself to be triggered by the relevant event. There are various references in Section H to trigger events and these should be adjusted accordingly. Paragraph 297 specifically identifies derivatives obligations. It would be helpful to mention also securities repurchase and securities lending obligations, as these are frequently important for liquidity and timely settlement in financial markets. .	ISDA
301.	**Paragraph 297**	Would it be possible to also mention securities lending and repurchase transactions (and not only derivatives) in this paragraph as they sometimes get forgotten by legislators/authorities, but are of great significance (significant volumes), and a lot of effort is also put into the documentation of these agreements to ensure that a close-out netting works which is important for financial stability considerations as well.	IBA
302.	**Paragraph 297**	It should be borne in mind that there are other contracts of a financial nature for which a moratoria may have a systemic effect and, therefore, it would be advisable to consider including them in the exceptions described in this point. Such is the example of the contracts called Global Master Repurchase Agreement (GMRA).	Costa Rica Bar Association
303.	**Paragraph 298**	Paragraph 298 refers to close-out netting terms providing a procedure whereby multiple obligations between the parties are terminated and replaced by a single net payment obligation. It is crucial to remember that these contracts house a mutual trading relationship between the parties and while there may be multiple obligations because of multiple transactions, the parties will generally manage their relationship covered by the contract on an aggregate basis. Indeed, the parties may be required by	ISDA

		regulation to manage on an aggregate basis, for example to comply with regulatory requirements in respect of collateralisation which require financial market parties to take or provide collateral so as in effect to reduce their net aggregate exposure to zero on a daily, or at least regular, basis.	
304.	**Paragraph 299**	Paragraph 299 refers to insolvency procedures applying a moratorium on debt collection and to the enforcement of close-out netting as "an exception" to insolvency law and practice. This is misleading, first because it characterises the relationship under such contracts as a debtor creditor relationship, whereas, as explained above, it is more normally a mutual trading relationship in which both parties will have on-going and often daily obligations to each other. Indeed, the broad purpose of much post-Financial Crisis banking regulation has been to require parties to collateralise their mutual obligations so far as practical on a daily basis so that at the end of each day each party's exposure on the other is zero i.e. neither party is either a net debtor or a net creditor. Second, it is misleading because it is common to find market movements have been such that on calculation of the single net payment following close-out, it is the insolvent that is the creditor, the insolvent having been net in the money at that point in time. In such circumstances, far from being an exception to insolvency practice, close-out serves as a mechanism whereby the insolvent can realise funds that can be added to the monies that will be available for distribution to the insolvent's creditors. Indeed, statutory set-off of mutual obligations on insolvency is a simplistic version of close-out netting, because it too is designed to determine the single net obligation between the insolvent and each of its counterparties. Statutory set-off has been a feature of very many insolvency laws for many decades. Far from being an exception, close-out netting can be regarded as an implementation of a long-standing policy of insolvency laws.	ISDA
305.	**Paragraph 302**	Paragraph 302 seems to suggest that close-out netting can prompt market instability. Surely it is the relevant insolvency that prompts market instability. Close-out netting may well contribute to restoring market stability, on the basis that parties have a clear process they can follow enabling them to ascertain their exposure or liability.	ISDA
306.	**Section H**	There are three aspects of FSB Key Attributes resolution regimes that are insufficiently highlighted in Section H. The first is that while entry into resolution is not to constitute an event of default that would entitle a party to close-out, if the substantive contractual obligation do not continue to be performed, the default in their performance will continue to entitle the non-defaulting party to close-out should the non-performance constitute an event of default. In other words, the FSB's Key Attributes are predicated on continuing performance of obligations by the party subject to resolution. This is crucial in the context of a proposal, such as the one under consideration, to extend resolution type powers and procedures to other insolvency procedures. For example, in what are referred to in the Introduction to the Consultation paper as "dual track" regimes, the second track, usually liquidation, itself generally terminates the ability of the insolvent to continue to perform its obligations. If a regime is to be put into place in which such	ISDA

		an insolvency law prescribed termination of the insolvent's ability to perform is overridden, such that the insolvent may continue to perform, that would represent a very significant departure under many insolvency laws. And any uncertainty while it was being determined whether or not the insolvent can carry on performing particular obligations could itself trigger significant market volatility. Second, an important element of resolution regimes is the "No Creditor Worse Off" principle. Whether or not such a principle would apply here, and how, is not addressed in this section of the Consultation paper. This principle is an important safeguard which should not be overlooked. Third, although it is recognised elsewhere in the Consultation paper, this Section H does not highlight the dependence for success of a resolution procedure of the kind indicated in the FSB Key Attributes on there being an authority, such as a banking regulator, which has sufficient familiarity with the state of the insolvent's business to be able to put together a resolution type rescue at pace within the time frame before market confidence is adversely affected. Essentially the proposal made by the Consultation paper is to extend resolution regimes beyond the systemically important institutions to which such regimes currently apply. That the regime does not interfere with non-resolution insolvency procedures (eg, the second track in a dual track system) is crucial. Who would be the "liquidation authority", how it would be established and how it would operate needs considerable further attention? The authority would need to be engaged from pre-insolvency and on an on-going basis in order for it to be able to act and to act fast when called upon to do so in the event of an insolvency.	
307.	**Recommendations 63-66**	The points made above need to be reflected in the text of Recommendations 63-66. In Recommendation 65, the reference to the duration of any stay should not be "should not exceed e.g. two business days" . The "e.g." should be removed, in conformity with the FSB Key Attributes. In addition, in Recommendation 66(c), to respect the maximum two-day duration of a stay, it should expire at the end of that period, whether or not any action is taken to "lift" the stay.	ISDA
308.	**Section H**	Strictly limited possibility of a temporary suspension of termination rights in certain financial contracts We expressly welcome the fact that UNIDROIT recognizes the critical function of netting agreements in financial transactions and, in particular, clarifies that any rights to tempo-rarily suspend contractual termination rights in netting agreements (moratoria) can only exist within strict time limits (Recommendations 63-66):	German Banking Industry Committee

		Netting agreements are a key risk management tool regarding financial transactions and the potential default of the counterparty. The possibility of a termination in the event of default and, in particular, in the event of an insolvency of the counterparty limits the risks from the transactions concluded under the netting agreement to the net amount of the claims of the parties against each other and neither party is exposed to the risk of future market value changes. A suspension of the termination rights directly interferes with this core function of netting agreements. Such an interference can therefore only be justified if the suspension of termination rights is strictly limited in time. Furthermore, such a suspension can justified for the purpose of an orderly transfer of the transactions as a whole and not for the purpose of liquidation: In the event of an orderly liquidation, there is simply no need to postpone the termination of the agreements through close-out netting that is necessary for the purpose of the liquidation anyway. Furthermore, such a suspension must not block termination rights for other reasons (e.g. failure to make payments or non-provision of collateral). These aspects are addressed in a general manner in the Guide (Recommendations 64 – 66). However, the following clarifications would be important: 1.) It should be explicitly stated that the duration of the suspension should not exceed 48 hours or two banking days. 2.) It could be more clearly emphasized that any suspension and transfer can only relate to the netting agreement and all transactions, claims and collateral concluded under it as a whole (no "cherry picking"). 3.) It should also be made explicitly clear that a possibility of a time-limited suspension can only be used for the purposes of an orderly resolution and, in particular, transfer – but not in the case of liquidation. 4.) Insofar as the netting agreement and the transactions concluded under it are terminated and settled as part of the resolution, this must be done in accordance with the terms of the relevant netting agreement. In addition, we suggest to a include a reference to other standard netting agreements customary in the market in the explanations (which currently only mention the ISDA master agreements) various. Master agreement documentations besides the ISDA master agreements for derivatives transactions as well as the ICMA and ISLA master agreements for securities financing transactions (GMRA and GMSLA) with practical relevance include EBF master agreement (European Master Agreement) and the various national master agreement documentation such as the German master agreements, the Swiss master agreement, the French master agreement (Convention cadre FBF relative aux opérations sur instruments financiers à terme) and the Chinese master agreement (NAFMII Master Agreement). Contractual netting provisions comparable to those included in the mentioned master agreements are also an essential element of the rules and regulations of central counterparties.	

309.	**Recommendation 63**	Consideration could be given as to the definition of "enforceable". Not clear whether this means crystallisation, the ability to apply close out netting, and early termination, all in order to form a claim within the bank liquidation, or whether this has a wider definition as to other enforcement remedies available for performance.	INSOL International
310.	**Recommendation 66**	"The stay should be imposed at the discretion of the liquidation authority" – this should be expanded to include the liquidator who ultimately will be responsible for claims.	INSOL International

H. CHAPTER 7. FUNDING

#	Paragraph	Comment	Submitted by
311.		**Use of Deposit Insurance Funds:** The guide should provide more details about the limits and conditions for the use of these funds to avoid mismanagement.	Asobancaria
312.		Protecting Depositors and Other (Vulnerable) Stakeholders The place of depositors in any banking eco-system is a very sensitive one. This is acknowledged by its place within the Guide as one of the leading principles underpinning the construction of financial regulation. The role of depositors in the eco-system tends to be largely passive, as they undergo the application of the framework and associated procedures. The rules on depositor protection are intended to operate as an exception to the principle in the Guide that public funds should not be used within a resolution process, albeit the exception can be justified by recourse to public protection principles. According to the European legal system, the fragmented design of national bank liquidation laws leads to significant weaknesses in the current bank failure management framework, including the effectiveness disparity among national insolvency procedures, tensions and inconsistencies between the resolution framework and national insolvency regimes; and specific obstacles to an orderly management of the failure of mid-sized banks.[35] Inasmuch as the depositor protection rules are implemented at domestic level, albeit guided by supranational principles and structures (e.g., within the European Union), guidance could be given in respect of an appropriate structure for depositor protection rules, including any guiding principles. For these reasons, it seems reasonable to consider the Guide's impact on global regulatory convergence and how a potentially more effective approach would address some of the deficiencies of the national insolvency regimes in terms of funding and deposit guarantee schemes ("DGS"). *Recommendation 6.1: The Guide could extend its coverage of framework principles to provide an update approach to depositor protection rules as part of a recommended structure for procedures in respect of non-systemic banks.* *Recommendation 6.2: The Guide could also cover deeper technical questions such as the definition of deposit guarantee schemes' interventions other than pay-outs, or the so-called issue of temporary high deposit balances could be covered. The Guide should suggest therefore to secure adequate DGS funding to better support transfer measures in liquidation while maintaining a reasonable financial cap, based on the net cost to the DGS of paying out covered deposits in liquidation.*	INSOL Europe

[35] See Chapter 7, paragraph 307 *et seq*.

313.		It is agreed that the primary source of financing for the management of a banking failure should be the bank's own resources, although these may on occasion prove insufficient. In such cases, both international standards and the reforms implemented since 2008 aim to ensure that external financing is utilized exclusively when the bank's own resources are insufficient. This is done with the objective of safeguarding depositors and preserving trust in the banking system. Secondly, it is agreed that resources originating from the banking sector, which form part of the insolvency funds managed within deposit insurance schemes, should be used to provide external financing to banks in the event of failure. This would guarantee that depositors can access their deposits without the necessity of direct reimbursement through deposit insurance. Furthermore, the use of these resources should be contingent upon the assurance of accountability and the appropriate deployment of said funds. Similarly, it is agreed that the number of resources provided should be limited to the costs that would have been incurred in reimbursing insured deposits, net of potential recoveries. Thirdly, it is agreed that public resources should not be employed for the liquidation of non-systemic banks, as the use of such resources should be exceptional. Furthermore, it is agreed that the potential for moral hazard must be minimized and that public funds should only be utilized when absolutely necessary for the sake of financial stability, provided that all private sources have been exhausted. Fourthly, it is agreed that in cases of liquidity and insolvency problems involving multiple banks, it is of the utmost importance to have emergency financing mechanisms in place that involve the financial safety net. For example, in response to the various systemic financial crises that Colombia experienced in the 1980s and 1990s, robust liquidity support mechanisms were established through Fogafin and the Central Bank (Banco de la República) as a lender of last resort in the event of temporary liquidity challenges.	Luis Fernando Lopez Roca (Colombia)
314.	**A. INTRODUCTION** **Paragraph 307**	See comments in relation to paragraph 55 above [*Secretariat: concerning liquidity for the liquidator*]	IBA
B. NEED FOR EXTERNAL FUNDING			
315.	**Paragraph 310**	It is considered that the focus on regulatory reforms about banks' ability to absorb losses has primarily been on large, "systemically important" banks, which leaves smaller banks or other financial institutions potentially exposed. This is concerning because while big banks can create significant disruption if they fail, smaller banks or other financial institutions, also play a crucial role in local economies, especially in	Miguel Gallardo Guerra (Mexico)

		countries like Mexico, which have an interest to promote access for less advantaged sectors to financial products through other types of financial institutions. Ignoring the loss-absorption needs of these smaller institutions could lead to instability in the financial system during times of crisis. It is considered that a more inclusive approach that considers all banks, regardless of their size, and other financial institutions, is necessary to ensure the overall health and resilience of the financial sector, as without this broader focus, we risk overlooking vulnerabilities that could lead to future financial issues. This does not disregard that the objective of this guide is directed towards banks, meaning that the development of criteria or procedures for other types of financial institutions could be carried out in a separate project.	
316.	**Paragraph 311 and/or 313**	Legislator may consider the structure of an insurance-linked securities (ILS) (under the Bermuda, London or Singapore legal framework) to transfer the risk of lack of funding in non-systemic banks. A correlation to Section C can also be done.	Hernany Veytia (Mexico)
317.	**Paragraph 313**	"Such funding may take the form of guarantees against potential future losses." Should loss-sharing agreements be also mentioned?	EBRD CFMD
C. USE OF DEPOSIT INSURANCE FUNDS			
318.		<u>Funding through Deposit Insurance Systems</u> Regarding Section C (Use of deposit insurance funds), we suggest that it should be emphasized more evidently that the use of deposit insurance systems for purposes other than compensating depositors should be permitted only to finance insolvency measures under the conditions set out in IADI Core Principle 9, Essential Criterion 8. Otherwise, there is a risk of a financial drain on the deposit insurance schemes, which would have critical consequences for depositor confidence and financial stability.	German Banking Industry Committee
319.	**Paragraph 318**	Observation that "net of expected recoveries" is often hard to quantify with any accuracy in a bank liquidation given the complexities involved, at least initially.	INSOL International
D. DESIGN OF DIF FINANCING TRANSACTIONS			
320.	**Paragraph 321**	As the paragraph elaborates on challenges of alternative forms of support, a sentence highlighting benefits of such form of support may be added, e.g.:	EBRD CFMD

		"*Shared-loss agreements can reduce the risks to the acquirer, thus increasing the bid price it may be willing to submit, but not without cost to the resolution authority.*" (p.2) "Higher bids can help decrease the initial funding needed to complete the transfer which may be particularly important in crises when many banks are failing and available resolution funding may become stretched". (p.23) FSI Insights on policy implementation No 55 Bank transfers in resolution – practices and lessons)	
321.	**Paragraph 321**	Any complex forms of support may need controls to be in line with paragraph 317 concept of "payment counterfactual" e.g. a cap on cost.	INSOL International
322.	**Paragraph 321, footnote 156**	Payments are ultimately made to facilitate a transfer for the benefit of the insured depositor, the impact of which puts the acquiring bank in a better position.	INSOL International
323.	**Paragraph 322**	"DIF funding would be highly case-specific" - this may need to be considered together with the "detailed methodology" proposed in paragraph 319 as it may be challenging to comprehensively set out such methodology in that context.	INSOL International
324.	**Paragraph 322**	"General corporate powers, such as the power to enter into contracts, could suffice in most transfer transactions." In case the DI is a public authority, possibly also with resolution/supervisory mandate, they might be reluctant to enter into any transactions unless it is explicitly allowed in the law. This could be especially relevant when the use of financial resources are involved. Therefore, it is suggested to revise this sentence.	EBRD CFMD
325.	**E. BACKSTOPS AND RECOVERY MECHANISM** **Paragraphs 325 - 326**	Paragraph 325 states that "public funding should not be available for the liquidation of non-systemic banks". Paragraph 326 builds on this to outline the use of public funds where "necessary for financial stability". There may be scope to consider a "public interest" test incorporating exemptions to this – for example should a bank disproportionately service a vulnerable customer base, the impact on vulnerable depositors of an unfunded failure could be disproportionate but not affect financial stability as a whole – in such case a "public interest" test may trigger the use of public funds.	INSOL International
326.	**Key Consideration 2**	The issue is not only to introduce legal changes and entrust the DIS with relevant mandate. Considerations also include capacity, maturity, quantitative constraints. Given this, should the paragraph put emphasis on advantages having a DIS with the relevant mandate rather than on advantage to grant such mandate in case there is a DIS?	EBRD CFMD

327.	**Recommendation 67**	Recommendation 67 suggests the *use of external uses of funding (including the Deposit Insurance Fund) for orderly liquidation/market exit*. We support this additional flexibility providing safeguards to ensure that such a use of the Deposit Insurance Fund leads to an economically more beneficial outcome, does not undermine the principle of bail-in and is accompanied with a market exit of the respective institution. Thus we suggest, that each decision to deploy funds of the DIF should build up on a cost comparison (least cost test) Other safeguards could include a limit for the proportion of external funding for insolvency that is provided by the DIF (e.g., 50%) or also the need for a compelling argumentation in case the DIF is used for access to other funds that support resolution (such as, e.g., the EUs Resolution Fund).	OeNB
328.	**Recommendation 67**	"… DI governance, funding sources, …." Should "*backstops and recovery mechanisms*" be added here?	EBRD CFMD

I. CHAPTER 8. CREDITOR HIERARCHY

#	Paragraph	Comment	Submitted by
329.		Regarding the hierarchy and priority of creditors in the liquidation process of a bank, it is asserted that: Firstly, it is agreed that the mechanisms for the resolution and liquidation of banks must have a transparent and clearly defined system for classifying creditors. This guarantees the equitable treatment of creditors and streamlines the cross-border recognition of their rights. Conversely, the establishment of transparent and well-defined criteria for the categorization of claims provides a sense of assurance to creditors, enabling them to effectively navigate the inherent risks associated with their interactions with financial institutions. This, in turn, fosters a greater degree of trust within the financial market, thereby facilitating the process of credit allocation. Secondly, it is agreed that in exceptional circumstances, differentiated treatment for creditors should be established within the context of the bank's liquidation process. In our legal system, a hierarchy of claims exists with respect to various types of obligations, including those pertaining to taxes, labor, security interests, and mortgages, among others. Therefore, this flexibility is crucial for adapting the liquidation process to the diverse characteristics of the claims involved. Furthermore, it would be prudent to include provisions that guarantee the efficacy of the real guarantees provided by secured creditors throughout the liquidation process. Thirdly, it is agreed that the principle of "pari passu" should be recognized within the context of the bank's liquidation process. Accordingly, creditors with equivalent conditions should be treated in a proportional manner, whereby they would receive distributions commensurate with the magnitude of their claims. However, it is also acknowledged that the "pari passu" principle should be subject to certain exceptions. These may include instances where the partial transfer of assets and liabilities results in the maximization of value for the benefit of all creditors, or where the objective of protecting depositors is achieved. Nevertheless, it is imperative that no creditor is financially disadvantaged because of receiving less than their anticipated share due to a fragmented liquidation of the entire estate.	Luis Fernando Lopez Roca (Colombia)
330.		**Priority of Deposits**: It is essential that deposits take precedence over other unsecured claims to protect depositors and maintain confidence in the banking system. Retail and small and medium-sized enterprises rely on their funds for daily operations. By prioritizing deposits, the likelihood of recovery in the event of bank liquidation is increased, helping to prevent financial panics**.**	Asobancaria

A. INTRODUCTION			
331.		Clarify the scope and purpose: The introduction could emphasise the importance of creditor hierarchy in ensuring (i) the orderly liquidation of banks and (ii) protecting the interests of various stakeholders. Perhaps expand paragraph 327 to include a more detailed explanation.	INSOL International
332.		The general comment refers to the issues of hierarchy of new liquidity providers and host country liquidity initiation following a home country resolution or liquidation opening. The guide unfortunately doesn't/can't provide a definitive solution to these complex issues and leave it to the authorities to try and find a proper balance.	EBRD CFMD
333.	**Paragraph 327**	Should this mention the principle that court costs and IP fees paid first (given earlier discussion on insufficient funds)?	EBRD LTP
334.	**Paragraph 330**	Consider to include a diagram with all the mentioned Sections and provide examples on how *pari passu* principle will be applied.	Hernany Veytia (Mexico)
B. ESTABLISHING RULES ON CREDITOR RANKING			
335.	**Paragraph 334**	Establishing Rules on Creditor Ranking: Improve transparency and predictability: Paragraph 334 should emphasise the need for transparency in the creditor hierarchy. It should recommend that jurisdictions clearly state the hierarchy of claims in their legal framework, preferably through dedicated bank liquidation legislation. This will help creditors understand their position, manage risks effectively and ensure that bank liquidations are more efficient in their process.	INSOL International
336.	**Paragraph 334 – Recommendation 68**	As stated in the draft Guide, the legal framework should clearly set out the creditor hierarchy applicable in bank liquidation proceedings. Where possible, reliance on contractual drafting to implement this should be avoided. For example, with subordinated debt, to avoid disputes about ranking it would be desirable for the subordination to be achieved by the contractual instrument referring to a section of a statute that would fix its ranking in insolvency, rather than by more complex subordination drafting. In the UK Lehman Brothers administrations there has been litigation spanning more than 10 years, at all levels of the English courts, on these very issues around the interpretation of subordination clauses in capital instruments. This could have been avoided if the subordination had been governed by statute.	INSOL International

337.	**Recommendation 68**	Recommendation 68 states that *the number of creditor classes should be kept to a minimum*. While we see merits in limiting complexity, a too uniform treatment of creditors might spur incentive conflicts and cause funding problems.	OeNB
338.	**Paragraph 337 – Recommendation 69**	This paragraph states that, "*Deviations from the pari passu treatment of creditors of the same class should only occur to maximise value for the benefit of all creditors as a whole or to protect depositors…*". If there are to be any permitted deviations from pari passu treatment of creditors within a class, the circumstances in which this could happen should be set out clearly in advance.	INSOL International
339.	**Recommendation 69**	I agree with recommendation No. 69 to keep the number of creditor classes to a minimum. Because of the European law on bank resolution (BRRD), the German legislator had to transpose special classes into national law. The sequence of classes in a waterfall is so complex in a German bank resolution that it justified a research project. As a result, 12 classes have to be distinguished in a German bank liquidation.[36] Even for experts in insolvency law or banking law, it is can be difficult to distinguish between the classes, since some of them are very similar and therefore difficult to distinguish.	Dominik Skauradszun (Germany)
C. RANKING OF DEPOSITORS			
340.	**Paragraph 338**	The statement that a deposit insurance scheme is key to avoid a ”bank run“ is partially certainly correct. However, considering that a deposit insurance scheme usually only insures deposits up to a certain threshold (e.g. EUR/CHF 100k), and may not apply to certain types of depositors (e.g. other financial institutions), a deposit insurance scheme may mitigate the probability of a bank run, but will most likely never prevent it. Rather, once (public) confidence in a bank institution is lost, non-secured depositors (as mentioned, often other financial institutions), and larger depositors holding more than the insured number of deposits will withdraw their deposits and this may well be sufficient to cause irreparable liquidity issues for the bank. An aspect that accelerates this, is that financial institutions and other large depositors often benefit from an information gap (e.g. early/earlier knowledge of financial difficulties of bank and consequences of an insolvency of such bank), if compared to a customary retail depositor and hence these large depositors are likely to make withdrawals earlier than retail depositors so that a ”bank run“ by retail creditors may not even be necessary to cause illiquidity of a bank, but it is the uninsured depositors that cause it already. Another aspect is by whom a DIS is funded and how much such funding amounts to. A DIS may need to be funded by all financial institutions in that jurisdiction (in order to avoid that governmental funds/tax	IBA

[36] D. Skauradszun and B. Herz, 'Die Haftungskaskade bei der Bankenabwicklung nach dem SAG und deren Verzahnung mit dem (Banken-)Insolvenzrecht', Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (DZWIR) 2016 (11), p. 501-509. See, in particular, section 46f(4)(5) German Banking Act.

		payer money is used), so may be limited in its capacity and may not be sufficient to cover all depositors if a larger bank becomes bankrupt (which in turn may have the consequence that deposits in in the intended/publicly perceived insured amount (e.g. EUR/CHF 100k) are factually not covered up to such amount). Also, if the DIS is set up based on contingent funding by other financial institutions, the financial impact on them must also be taken into account.	
341.	**Paragraphs 338 – 344, Recommendation 73**	The different options for depositor ranking described in these paragraphs envisage some complex options. Complexity is undesirable and any system should be designed for maximum clarity and, ideally, simplicity. For example, in one case the status of a deposit depended on the degree of ownership and control by the bank of the depositor at the time when the deposit was made. The deposit had been made 10 years pre-insolvency and the bank did not have sufficient records to enable it to determine with certainty what the degree of ownership and control was at that time, and so how to treat the deposit. Uncertainty with respect to the ranking of one or more large deposits could cause a delay in treatment of other deposits, if the liquidator needed to make provision for the uncertain deposit when paying others.	INSOL International
342.	**Paragraph 339**	Rank (hierarchy) of claims is important with regard to resolution authority, irrespective of the nature – whether it is court-based or administrative-based, or e.g. National Bank or other body. The costs of resolution, especially in the EU should have priority over other costs and claims. With respect to other creditors, proposed hierarchy should lift more space for country-by-country distinctions, however some coherence is also advantageous, especially with reference to the existing bank groups in different jurisdictions.	INSO Section, Allerhand Institute
343.	**Paragraph 339, footnote 173**	"… at the time of writing of this Guide." Should this reservation be added to other country examples in the Guide or alternatively should one reservation be included in the introductory section?	EBRD CFMD
344.	**Paragraph 340**	Ranking of depositors: Clarify the types of depositor preference: Paragraph 340 could provide more detailed definitions, description and examples of the different types of depositor preference (for example "temporary high balances" and how those might be treated). This will help jurisdictions choose the most appropriate form of depositor preference for their legal and financial context.	INSOL International
345.	**Paragraph 342**	Ranking of depositors: Address the impact on different stakeholders: Paragraph 342 could discuss the potential advantages and disadvantages of depositor preference in more detail, including its impact on different funding sources, cost of bank funding, and the potential for regulatory arbitrage. This could help policymakers weigh the benefits and drawbacks more effectively.	INSOL International

346.		Strong Role of Deposit Insurance The draft guide also briefly touches upon the so-called super-preference in connection with the liability hierarchy in insolvency and resolution (para. 343). The priority of deposits protected by the statutory deposit guarantee schemes over unsecured claims in the event of insolvency ensures that the deposit guarantee scheme receives payments made as part of a depositor compensation in a preferred manner and relatively quickly and in full in the subsequent insolvency proceedings. As a result, the deposit insurance scheme usually incurs little or no loss. Experience with deposit insurance in the EU shows that recoveries under the super-preference usually reach almost 100%, compared with 30%-60% without it. Without such a super-preference, funding gaps may arise for the deposit guarantee schemes, which have to be covered by increased contributions from the banks, possibly by (unplanned) special contributions. This can lead to crisis-exacerbating effects with negative impacts on financial stability. Considering this, we strongly urge that the Legislative Guide be amended to include the recommendation that a super-preference should generally be provided for deposit guarantee schemes.	German Banking Industry Committee
347.	**Paragraph 349**	The non-discrimination principle set out in this paragraph is obviously very important. It should however be specified that this principle should apply within a single, unique liquidation procedure.	IBA
348.	**Paragraph 349, Recommendation 74**	While it seems clearly right that the framework should not treat foreign creditors differently, this should be qualified in circumstances where the home liquidator would want to be able to agree to apply the host country's rules regarding creditor priorities and similar issues with respect to the wind-down of a local branch. As discussed with respect to Chapter 10, there may well be circumstances in which the liquidation process could be simplified if the home country liquidator could agree to follow the host country's rules with respect to the branch and its creditors, potentially avoiding the need for a local proceeding. To that extent, it would be desirable if the liquidator could treat creditors of the branch differently from creditors of the business in the home jurisdiction.	INSOL International
349.	**Paragraph 352, Recommendation 73**	This paragraph refers to priority payments to depositors and states: "Such withdrawals need to be considered as on-account payments for the purpose of creditors' treatment. This means that the amount of deposits to be paid out should be reduced to take into account the advance payments." There are two possible readings of this and it would be helpful to clarify which is intended, although the distinction may only matter in certain circumstances. The first option is that a depositor who has a claim for £100 and receives a priority payment of £50 is left with a claim for £50. The result would be that, if a distribution of 10p in the £ were then made to all creditors in the class, that depositor would receive a further £5. The second option is that a depositor with a claim for £100 and receives a priority payment of £50 is treated as having received 50p in the £ on the £100. The result would be that, if a distribution of 10p in the £ were then made to all creditors in that class, the depositor would only be entitled to a share of that distribution if and to the extent that all other creditors had also received 50p in the £ first.	INSOL International

350.	**Paragraph 352, Recommendation 73**	This paragraph discusses having separate treatment for related party deposits. Please see the comment above on paras 338 to 344 with respect to the need for clarity with respect to what deposits are to be treated as related party deposits, if they are to be treated differently.	INSOL International
351.	**Paragraph 354**	There may be some doubts that a deposit insurance scheme or preference of intrabank deposits will in practice be able to prevent other banks from making withdrawals if market confidence is lost in another bank as (i) a deposit insurance scheme will usually not be able to insure all deposits (unless funded by government/tax payer money which is not preferable and this would also cause moral hazard issues for banks), (ii) banks are more likely to get knowledge of financial difficulties of another bank and withdraw funds irrespective of insured, preferred or not (to avoid being involved in an insolvency/resolution of the failing bank and avoid uncertainties relating thereto (including, without limitation, loss of immediate access to funds, uncertainty/unfamiliarity of resolution/liquidation regime and risk of potential losses and avoidance of costs to deal with deposits held with failing bank)). Also, it seems somehow difficult to argue why banks should be preferred over other large corporates (e.g. insurance companies).	IBA
352.	**Recommendations 71 – 74**	Recommendations 71 – 74 highlight that *the ranking of depositors' and the DI's claims should serve the objectives of orderly and cost-effective bank failure management*. Regarding the ranking of depositors, we would like to emphasize the importance of a multi-tiered approach in the applicable depositor hierarchy. In particular, there should be a certain differentiation among the classes of depositors (which themselves are a significant part of creditors with a specific hierarchy of their own), depending on the deposited amounts, their contributions to the Deposit Insurance Fund as well as their professional background (retail vs wholesale). In addition, we strongly support a superpreference position of the DIF (and hence indirectly covered depositors) in the creditor hierarchy. This will foster the principle of bailing-in shareholders and creditors, and thus ensuring market discipline while the deposit insurance fund is protected to serve its purpose. Not least, in a crisis contagion in the banking sector through the DGS financing will be limited.	OeNB
D. SUBORDINATED CLAIMS			
353.	**Paragraph 357**	Subordinated Claims: Provide clear guidelines on contractual subordination: Paragraph 357 should include more detailed guidance on the enforcement of subordination agreements in the context of liquidation. It should recommend that the legal framework explicitly recognise both "total" and "partial" subordination clauses to avoid any ambiguity, and that subordination agreements include clarity as to the relative ranking of one subordinated creditor to another.	INSOL International

354.	**Paragraph 357, Recommendation 75**	Please see the comments above regarding para 334 and Recommendation 68. Relying on contractual drafting for subordination can give rise to doubt and disputes as to the effectiveness and extent of subordination. This paragraph also refers to two types of subordination clause: "It is also recommended that such express recognition encompass both "total subordination" clauses, which, e.g., subordinate the claim to "the claims of all ordinary unsecured creditors", and "partial subordination" clauses, which subordinate the claim of a specific creditor to the claims of other, specific creditors." While it is true that both types of clause exist, if reference is to be made to them it may be worth acknowledging that there is a doubt as to how the latter type works in the context of unsecured claims. If a creditor subordinates itself to a specific named unsubordinated creditor, rather than the class of unsubordinated creditors as a whole, it would seem that the subordination (if it is to take effect at all) must in fact work as a subordination to the whole class and not just the individual creditor.	INSOL International
355.	3. Equitable subordination **Paragraph 363**	Subordinated Claims: Address equitable subordination: Paragraph 363 could provide more detailed guidance on the application of equitable subordination, including examples of conduct that may warrant such subordination. This will help jurisdictions implement this concept more effectively and consistently.	INSOL International
356.	4. Related party claims **Paragraph 365**	The general suspicion with respect to related party claims in a group context as set out in the current draft of the Guide may be difficult to handle. It is not uncommon that subsidiaries of a banking group concentrate, under regulatory derogations from large exposure requirements, their cash holdings in accounts with their mother company. If such cash holdings would be subject to a legal subordination or other unfavourable treatment, this would lead to a discriminatory treatment of the creditors of the subsidiary to the benefit of the creditors of the mother company. The same comment applies to rule 86 on page 109. It would be good if this issue could be addressed in the Guide to avoid any such discrimination.	IBA
357.	**Paragraph 366-369**	Related Party Claims: Consider different approaches to subordination: Paragraph 366 to 369 could highlight the pros and cons of different approaches to the subordination of related party claims (e.g., principles-based, mixed, rules-based). This will help jurisdictions choose the most suitable approach for their legal and financial context.	INSOL International
358.	**Paragraph 367**	Related Party Claims: Clearly define related parties: Paragraph 367 should recommend that the legal framework provide a clear definition of related parties. This is a complex area and by helping define what is a related party will help ensure that related party claims are identified and treated appropriately.	INSOL International

359.	**Paragraph 367 et seqq.**	Pursuant to paras. 367 et seqq. of the Guide, each jurisdiction should consider subordinating related party claims and specify their legal approach to subordination accordingly, taking into account the benefits of subordination as a rule and other policy implications (e.g., the cost of intra-group financing). The Guide outlines the following different approaches for a potential subordination: • **"Principle-based" Option 1**: A first, principles-based option, is for the legal framework to vest the liquidation authority with the power to subordinate the claims of creditors who have obtained an advantageous treatment by means of fraud or inequitable conduct, and this would result in an unfair treatment towards other creditors; • **"Mixed" Option 2**: A second, "mixed" option is for the legal framework to provide for the subordination of claims by related parties, setting a precise definition of related parties in line with the definition included in the applicable banking law (e.g., directors, shareholders holding more than 10%, etc.), and subject the subordination to certain conditions, such as when the debt financing is granted in a situation where the company receiving the assistance is undercapitalized or in financial difficulties, or masks what would otherwise be an equity contribution, or there is evidence of self-dealing, and/or when doing so results in unfair treatment towards creditors; and • "**Rules-based" Option 3**: A third, rules-based option is for the legal framework to automatically subordinate the claims from loans granted by certain related parties, as precisely defined in line with the banking law, possibly leaving the space for creditors to present contrary evidence to demonstrate that the financing was granted in market-like terms, with a clear business purpose other than causing relative harm to other creditors, and without self-dealing. Whilst there may be situations, in which a differentiated treatment of related party claims, such as in case of fraudulent behavior or in cases in which the respective financing arrangements were not entered into on an at-arms-length basis, in our experience, the respective safeguards are typically adequately provided for under the applicable corporate and/or accounting laws of the relevant jurisdictions. In contrast to the considerations outlined under paras. 367 et seqq. of the Guide and taking into account the customary restrictions set out under the applicable corporate and accounting laws referred to above, we are of the view that providing for overly restrictive rules on granting related party financing in a crisis scenario which could lead to a subordination and/or lead to legal uncertainties as to the treatment of the respective claims in liquidation proceedings may have unwanted detrimental effects. In a crisis scenario, typically existing shareholders or affiliates may for certain banks be the *de facto* lender of last resort, e.g. because of locally held excess liquidity urgently needed in another jurisdiction. Providing for a restrictive bankruptcy related treatment of such financing arrangements, such as a subordination, even in the absence of fraud or inequitable conduct may in certain instances prevent such related parties from providing much needed financing which may have provided the required funds for a bank to stay, or return to a going-concern. Statutory subordination provisions as mentioned in Option 3 may lead to an unintended ring-fencing of funds, preventing affiliates from routing the required funds to other group	IBA

		affiliates and/or indirectly increasing the liquidity needed on a consolidated level (which could unintentionally restrict lending activities by banks in a going concern). We would, therefore, suggest to include additional wording in paras. 367 et seqq. proposing in-depth analysis on the potential direct or indirect detrimental effects of overly restrictive subordination rules with regard to related party financing arrangements in liquidation which should be taken into account when designing the legal framework. Similar wording is already included in para. 396 of the Guide in the context of a liquidation of a banking group, however, we believe such considerations apply at a broader level for all forms of related party financing arrangements.	
360.	**Paragraphs 368 – 371, Recommendation 76**	While it seems clearly right that there should be scrutiny of related-party claims, it is important to avoid complexity and uncertainty as to their treatment, as disputes could delay distributions to everyone. Further, the funding of financial institutions often reaches the regulated entity as a loan from a related party, even if it ultimately derives from third party financing elsewhere in the group. It is important that the existence of pass-through transactions within the group should not put third-party funders at undue risk. Finally, care should be taken not to make intra-group lending more risky than third-party funding, as that could increase the cost of the business, with consequences for customers.	INSOL International
361.	5. Claims for post-liquidation interest **Paragraph 373**	In some countries, interest can continue to accrue post liquidation and be claimed out security provided. There should be some controls in terms of secured creditors continuing to claim post-liquidation interest out the secured property. In this regard secured creditors should be given a period to enforce their security (say 12 months), which period can be extended for good reasons. If the security is not enforced within the period or extended period, post liquidation interest should be disallowed. See section 233 of the Insolvency, Restructuring and Dissolution Act 2018, which may be accessed at: https://sso.agc.gov.sg/Act/IRDA2018?WholeDoc=1#pr223-.	IBA
362.	**Paragraphs 373 – 376, Recommendation 78**	These paragraphs include a recommendation that subordinated creditors should rank lower than post-liquidation interest on unsubordinated creditors' claims. Consistent with the points raised above, it would plainly be desirable for there to be clarity on the question of relative ranking between subordinated creditors and statutory interest on unsubordinated creditors' claims. But is it definitely right that the correct result is for subordinated creditors to rank lower? Could that increase the cost of raising subordinated debt, with no equivalent reduction in the cost of unsubordinated debt?	INSOL International
363.	**Recommendation 79**	Recommendation 79 is in line with European and German law and seems to be widely accepted.	Dominik Skauradszun (Germany)
364.	**E. RANKING OF SHAREHOLDERS** **Paragraph 377**	Suggestion to remove the text "~~**ictions**~~" above footnote 202, which seems like an orphan text.	IPAB

365.	**G. RANKING OF POST-LIQUIDATION FINANCING** **Paragraph 382**	Consider laws which would provide for and facilitate litigation funding. This may increase recoveries. See for example section 204 and section 99(4) read together with the First Schedule of the Insolvency, Restructuring and Dissolution Act 2018. Super priority/preferential funding should come with safeguards protecting existing preferential or secured creditors. See e.g. sections 67 and 101 of the Insolvency, Restructuring and Dissolution Act 2018, for Singapore's super-priority provisions (which it would be noted contain within them safeguards). The Insolvency, Restructuring and Dissolution Act 2018 can be accessed via url: https://sso.agc.gov.sg/Act/IRDA2018?WholeDoc=1.	IBA
366.	**H. SECURED CREDITORS** **Paragraphs 386-388**	Segregation of assets in the case of covered bonds in insolvency: In our opinion, the Unidroit Legislative Guide does not yet sufficiently address the special features that arise from the segregation of assets of covered bonds from issuers under the EU covered bond regime. The refinancing of banks via covered bonds is a widespread business practice in many countries, in addition to Germany and Austria. UNIDROIT also correctly recognizes that in certain bank financing, security, such as that provided by covered bonds, is of great importance. Therefore, their creditors should also be afforded special protection in the hierarchy of creditors in the legal framework (para. 386). In addition to the preferential treatment that applies to secured creditors in general, the legal framework should therefore provide for additional more specific provisions for certain types of banking transactions (para. 388). We would like to briefly explain the specifics of the segregation of assets for covered bonds in the event of insolvency below. The associated concepts go far beyond questions of the hierarchy of creditors in insolvency proceedings. We suggest that these aspects be further emphasized in the Legislative Guide. Covered bonds enjoy a high level of investor confidence due to their security and thus play a central role in ensuring the stability of international financial markets. They are one of the most important non-sovereign instruments on the European capital market. At the end of 2022, the total volume of covered bonds in circulation amounted to EUR 3,028,817 million.[37] The most important issuers in the EU were credit institutions from Denmark (EUR 463,307 million), Germany (EUR 393,581 million) and France (EUR 367,558 million).[38] Legislation on covered bonds exists in a total of 37 European countries (EU and non-EU states).[39] The reason for the particular trust placed in them is the high (legal) requirements placed on covered bonds to protect investors.	German Banking Industry Committee

[37] ECBC Covered Bonds Fact Book 2023, p. 564.
[38] ECBC Covered Bonds Fact Book 2023, p. 565. In Austria, the volume of covered bonds in circulation at the time was EUR 101,299 million, and in Switzerland EUR 174,458 million.
[39] ECBC Covered Bonds Fact Book 2023, p. 127.

		A key element of this security is the preferential claim of covered bond investors in the event of the insolvency of the issuing bank. In this case, the Covered Bond Directive (CBD)[40] provides for special rules for covered bond creditors. From an insolvency law perspective, the most important elements of a covered bond are:[41] 1. dual recourse, 2. segregation of cover assets, 3. no automatic acceleration upon insolvency of claims against the cover pool. The dual recourse provided for in Art. 4 of the CBD consists of three elements: a. a claim against the issuer, b. in the event of the issuer's insolvency, a claim against the cover pool, c. a default claim against the issuer's insolvency estate if the cover pool is insufficient. According to Art. 12 of the CB Directive, this cover pool must be segregated from the general insolvency estate and protected from attachment by third parties (creditors). The CBD simply describes the framework of this preferential right in insolvency: a. identifiability of the cover assets at all times, b. segregation of assets based on legally binding and enforceable provisions, c. in the event of the issuer's insolvency, the cover assets are protected from attachment by third parties and are not part of the issuer's general insolvency estate. National CB legislators have taken different approaches to achieving this segregation of assets. In some jurisdictions, the segregation occurs upon the initiation of insolvency or resolution proceedings (e.g. Germany, Austria, Denmark, Hungary, etc.). Other jurisdictions work with SPV models in which the cover pool is spun off into independent legal entities. There are a total of five different CB models in Europe.[42] Art. 5 of the CB Directive stipulates that covered bonds may not automatically become due (no automatic acceleration) if insolvency or winding-up proceedings are opened against the issuer's assets. This ensures that investors receive their principal and interest payments on the dates specified in the terms of issue,	

[40] Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328/29-57 of 18 December 2019), hereinafter referred to as the CBD (Covered Bond Directive). Among market participants, the term covered bonds has become established for covered bonds.

[41] Regarding the implementation of these provisions in the EU member states, see the results of the Round Table Covered Bonds Legislation (RTCBL) within the vdp. Within the framework of the RTCBL, leading covered bond analysts and proven experts on European covered bond legislation examine and compare the legal situation in the individual countries. The aim is to contribute to improving the transparency of covered bond legislation in Europe. The results of the ongoing work of the RTCBL are permanently published on the internet platform www.vdpcoveredbonds.com. The results on insolvency proceedings over covered bond issuers can be found at: www.vdpcoveredbonds.com – Questionnaire – chapter X. Insolvency procedures over CB issuers.

[42] Regarding covered bond models: www.vdpcoveredbonds.com – Questionnaire – chapter II. – Question 3. (Which model of CB legislation is existing?) – Detail view – Explanation and Attachment.

		even if the covered bond issuer becomes insolvent. This "timely payment" is of central importance for investors' willingness to accept lower interest rates. Any legislative guide for bank insolvency proceedings should take these special features into account or at least point out their existence.	

J. CHAPTER 9. GROUP DIMENSION

#	Paragraph	Comment	Submitted by
367.		With regard to the liquidation of banks that are part of a financial conglomerate, it is stated that: Firstly, it is agreed that the approach to the resolution and liquidation of banking groups has evolved from a traditional focus on individual entities. It is therefore essential to evaluate the significance of addressing the insolvency of groups as a whole, rather than treating each entity in isolation. It is thus agreed that a group-oriented approach should be pursued in order to facilitate more effective coordination and collaboration in the reorganization and liquidation processes, with the objective of preserving the value of ongoing business operations and maximizing the combined value of the group's assets and activities. Secondly, the liquidation of a banking institution should not be impeded by its affiliation with a financial conglomerate. This implies that intragroup relationships, such as loans between the parent company and the distressed bank, should be managed in a manner that does not impede the liquidation process. It is thus agreed that each jurisdiction should determine whether intragroup debt should be subordinated in liquidation proceedings, depending on the circumstances and the support agreements between the group entities. Thirdly, it is deemed appropriate that resolutions pertaining to intragroup financing during liquidation should not result in a diminution of value and should be aligned with the agreements established in the context of banking resolution processes. An opposing stance could impede the normal progression of the liquidation process. Fourthly, it is agreed that in order to ensure an orderly liquidation of banks within a group, close coordination between the authorities responsible for liquidating the different entities of the group is essential, including the courts when necessary. In the absence of coordination, the efficacy of the liquidation process may be compromised. Therefore, it is imperative that the legal framework provides for seamless collaboration between administrative and judicial authorities, as well as among the various entities within the group. Fifthly, in the case of groups with cross-border operations, international cooperation is of paramount importance. It is therefore essential that legal frameworks facilitate communication and coordination between the involved jurisdictions, as previously discussed in point 2 of this document.	Luis Fernando Lopez Roca (Colombia)

368.		**Intra-Group Transactions**: While the importance of transparency is mentioned, there is a lack of information on how to ensure it in intra-group transactions. It would be helpful to add examples of best practices in this area.	Asobancaria
369.		Groups and Systemic Integrity The Guide structures in a rather comprehensive manner recommendations in respects of groups of financial institutions and their potential impact on systemic integrity. Whereas most banks will operate in a group structure, the concerns of how to effectively handle the bank insolvency of some or all of the group's entities is of particular relevance. Evidently, this may regard only one non-viable bank, but – for instance, as a result of intra-group contagion of financial distress – may also extend to other group members. The latter – although limitedly addressed by the Guide – will increase the complexity of an orderly bank insolvency liquidation. As rightly pointed out by the Guide, (corporate) insolvency laws remain focused on an entity-by-entity approach, though promoting more forms of especially procedural coordination of and cooperation among group entities. To date, it remains difficult to assess the effectiveness of the regimes under the UNCITRAL Model Law on Enterprise Groups in Insolvency and the European Insolvency Regulation (Recast) 2015 (specifically in Chapter V.2) to address the group dimension. This is due to pending implementations of the relevant rules and because of limited cases in which they have been applied. In the context of bank insolvency, particular consideration can therefore be paid to the Key Attributes. The earlier facility to provide an extension to the SIFI framework – under the Key Attributes – to cover non-systemic banks in specified situations could be explored here, particularly in respect of how such procedures would be integrated within overall procedures in respect of groups. *Recommendation 7.1: For the purpose of furthering coordination of parallel bank insolvency cases opened for group members, the Guide could introduce that a bank liquidation framework could also be informed by the objective of cooperation and communication between the involved courts, liquidation authorities and liquidators so as to further the orderly and effective handling of liquidations of banks that are part of the same group.* *Recommendation 7.2: The Guide could explore how procedures in respect of non-systemic banks would be integrated within group procedures, particularly if the latter procedures are based on rules designed to comply with the Key Attributes.*	INSOL Europe
370.	**A. INTRODUCTION**	On a general note: the chapter focuses on group impediments to bank liquidation and the necessity of coordinated actions between administrative authorities. From an economic perspective it is however of critical importance to also focus on safeguards to ensure that the failure of a bank within a group is not infecting other group members. Accordingly, any measures taken in the context of a bank's failure (including its resolution or liquidation) shall also be measured against its impact on a group level (with	IBA

	Paragraphs 390-394	the measure reaching the legislative aims while having least impact on the overall group taking precedence).	
371.	**Paragraphs 390 - 392**	Clarify the definition of "group" and "banking group" to ensure consistency and understanding across jurisdictions. This could be done by explicitly defining these terms in the glossary section of the Legislative Guide. Rationale: The current text (paragraphs 390-392) discusses the importance of "banking groups" but does not provide a clear definition. A precise definition (or, certainly, additional guidance) will help in understanding the scope and applicability of the provisions. [*Secretariat: see definition of "banking group" in point 13(d) of the Glossary*]	INSOL International
B. NO GROUP IMPEDIMENTS TO BANK LIQUIDATION			
372.	**Paragraph 395**	Please provide examples.	Hernany Veytia (Mexico)
373.	**Paragraph 396**	In chapter 9, section B, recital 396 discusses whether claims of group entities, including those of an IPS, arising from liquidity assistance should be exempted from subordination rules. In this context, we would appreciate it if the Draft clearly distinguished between cases of liquidity assistance provided by an entity of a banking group, and such provided by an IPS. First, it should be emphasized that the IPS would normally provide liquidity support in order to fulfil its core function of preventing the failure of the bank. Second, the "*risk that the parents exploit opportunities to extend the support in the form of debt instead of equity or subordinated capital in which case they would have absorbed losses before unsecured creditors*", which is mentioned in the Draft in this discussion, does not apply to IPS. Therefore, there is no need for "*safeguards and conditions that ensure that they work for the benefit of the entity ultimately subject to liquidation*". Overall, we suggest splitting recital 396 into different paragraphs to distinguish between cases of liquidity support provided by an entity of a banking group and cases relating to an IPS. A welcomed recommendation to exempt the latter from the subordination rules does not need to be subject to safeguards, as the risks described in relation to banking groups do not exist.	National Association of German Cooperative Banks and the German Savings Banks Finance Group

374.	**Paragraphs 396 - 399**	The Legislative Guide could provide more detailed guidelines on the treatment of intra-group transactions and post-liquidation financing. This could include specifying the conditions under which such transactions are allowed and the safeguards to prevent abuse. Rationale: Paragraphs 396-399 discuss the implications of intra-group transactions but lack detailed guidelines. Clear rules and/or additional clarity may help in preventing conflicts of interest and ensuring fair treatment of all creditors.	INSOL International
375.	**Paragraph 400**	"*The liquidator may need to re-negotiate, where necessary, pre-existing intra-group service agreements or other operational arrangements.* ***Legal frameworks should include the possibility of entering into new service agreements or modifying existing ones to ensure the continuation of services that are crucial for an orderly liquidation, such as IT systems, payment processing, or other operational support.*** *On the one hand, there is the risk that if those were not concluded at arm's length, they may result in unfair treatment of the creditors of the liquidated bank.*"	IPAB
376.	**Recommendation 86**	No group impediments to bank liquidation: In order to ensure appropriate rescue attempts are pursued, the safeguards and conditions in regards to exemption need to be clear and concise, potentially with ability for pre-approval from the Court and/or banking authorities. If there is uncertainty then directors are unlikely to be comfortable in providing funding in order to try to rescue the bank and as a result there may be increased levels of bank failure.	INSOL International
377.	**Recommendation 88**	The continued provision of services may be challenging, particularly as the costs of maintaining services in a liquidation scenario may be significantly higher (e.g. supplier ransom payments, loss of other group companies that would also be recharged a proportion of shared costs, reduced contract length/volume discounts). The service provider may therefore need to be able to amend certain service agreement terms. We note that group services supplier entities may be located in a different jurisdiction to the bank and therefore an internationally recognised regime to ensure ongoing support may be necessary for this to be effective.	INSOL International
C. COORDINATED ACTIONS BETWEEN ADMINISTRATIVE AUTHORITIES AND COURTS			
378.	**Paragraphs 401 - 403**	Strengthen the provisions for coordination between liquidation authorities and liquidators of different group entities. This might include specifying the procedural rights and obligations of these authorities to ensure effective cooperation. Rationale: Paragraphs 401-403 highlight the need for cooperation but could benefit from more detailed guidance on how this cooperation should be structured and implemented.	INSOL International

379.	**Paragraphs 403**	Clarify the role of administrative authorities in the liquidation process of group entities. This includes specifying their procedural rights and the extent of their involvement in the decision-making process. Rationale: Paragraph 403 mentions the need for administrative authorities to have procedural rights but does not specify what these rights should be. Further details (including examples) will ensure that the administrative authorities can effectively participate in the liquidation process.	INSOL International
380.	**Paragraph 406**	Past practice has shown that a lot of time and money is spent in year-long litigation among liquidators of various entities of a banking group. It might be useful to provide a mediation panel for disputes among liquidators set up with the support of the regulators and Courts involved to avoid litigation where possible and thereby speed up the liquidation process.	IBA
381.	**Recommendation 90**	Does this recommendation intend to include cross border groups?	INSOL International
382.	**Recommendation 92**	There may be benefits in pooling multiple entities in liquidation, particularly where pooling is used in the broader insolvency framework within that jurisdiction.	INSOL International

K. CHAPTER 10. CROSS-BORDER ASPECTS

#	Paragraph	Comment	Submitted by
383.		Regarding the territorial scope of the 'Draft Legislative Guide on Bank Liquidation,' the incorporation of criteria pertaining to cross-border bank insolvency is regarded as a noteworthy advancement. It is important to note that the presence of cross-border banking conglomerates at the global level is a tangible reality. For this reason, the establishment of a set of uniform rules on this matter would facilitate the resolution of issues related to legal risks, particularly regarding the utilization of public policy rules by a state that may result in the undermining of creditors rights within the cross-border insolvency process of a bank. Firstly, we concur with the proposition that liquidation authorities and liquidators may approve and implement cross-border bank liquidation agreements. Such cooperation is essential for prompt action and the preservation of value during the liquidation of cross-border banking groups. The objective is to enhance the efficiency of liquidation procedures on a cross-border scale, guaranteeing synchronized and legally sound administration of cross-border banking concerns.	Luis Fernando Lopez Roca (Colombia)
384.		**Case Studies of International Cooperation**: Including concrete examples of successful cross-border liquidations would help illustrate international cooperation more effectively. **Challenges in Cross-Border Cooperation**: The guide should address potential legal and operational challenges in cross-border cooperation, offering specific strategies to overcome them. **Recognition of Foreign Proceedings**: Although the need for recognition is mentioned, there is a lack of information on the specific criteria for this process. Including examples of successful recognition agreements would be beneficial	Asobancaria
385.		Cross-Border Insolvency Extending the discussion on groups, the Guide also has a very comprehensive chapter dealing with the extension of procedures across borders, commonly where a group of related entities are experiencing financial distress and may need the opening of one or more resolution procedures. The Guide stresses positively the need for communication and cooperation between stakeholders in the process, chiefly regulators, office-holders, courts etc. The Guide rightly emphasises the importance of cooperation and communication in the context cross-border cases, but does not recognise this as a basic principle and objective for a cross-border regime. This may undermine the design of an orderly cross-border bank liquidation process within the overall objectives formulated by the Guide. Furthermore, the	INSOL Europe

		recommendations in the Guide are largely targeted to the principles behind the provision and exchange of information as well as the purpose of communication and cooperation. In this context, the Guide could also recommend modalities of or methodologies for communication and cooperation, perhaps by recommending approaches consonant with principles adopted by professional bodies in the restructuring and insolvency sector.[43] In particular, there has been extensive consideration of using (cross-border insolvency) protocols (also referred to as cross-border insolvency agreements) to further communication and cooperation. *Recommendation 8.1: For the purpose of furthering cross-border bank insolvency cases, the Guide could introduce that a bank liquidation framework could also be informed by the objective of cooperation and communication between the courts, liquidation authorities and liquidators so as to further the orderly and effective handling of cross-border bank insolvency cases.* *Recommendation 8.2: The Guide could extend its recommendations to flesh out its promotion of communication and cooperation in cross-border instances by providing modalities or methodologies for cooperation and communication.*	
386.		There appears to be a need for a similar universal document to the 1997 UNCITRAL Model Law on Cross Border Insolvency tailored to banks and banking groups. This would greatly assist states to amend their cross border insolvency provisions as it is not entirely straight-forward to address the role of national banking regulators in the process. Would they qualify as foreign representatives under the current Model Law (assuming a state has not excluded banks)?	EBRD LTP
A. INTRODUCTION			
387.		While the overall project is confined to non-systemic bank liquidation (e.g. see paragraph 34 of the Guide), the cross-border section (i.e. Section 10) seems to suggest that it may apply to the liquidation of a single subsidiary of a systemically important banking group (see for example para. 424). It might be useful to clarify whether this project is intended to apply to individual subsidiaries of systemically important banking groups as those raise additional considerations beyond the issues raised by distress of a subsidiary of a non-systemic banking group. The systemic/non systemic distinction is generally not as easy to apply as it sounds. Para. 51 et seq discusses that one of the objectives in addressing liquidation of non-systemic banks is financial stability, which is a systemic consideration. In fact, sometimes the failure of small banks which are not systemically important presages trouble at systemically important banks (which might be already known to the supervisory authorities, but not to the markets), and hence the failure of the non-systemic bank can itself be a systemic threat. In the cross-border context, the failure of a subsidiary of a banking group	IBA

[43] Consider, for instance, the European Communication and Cooperation Guidelines for Cross-Border Insolvency, developed by Bob Wessels and Miguel Virgós, under the aegis of INSOL Europe. The Guidelines are available at: <https://www.insol-europe.org/download/documents/1113>.

		might be a non-systemic event in the subsidiary jurisdiction and a systemic event in the jurisdiction whether the group is headquartered. Some complications arising from that scenario are further discussed below. Chapter 10 imports the principles espoused by the Financial Stability Board in the two following documents: • Principles for Cross-border Effectiveness of Resolution Actions (fsb.org) • Key Attributes of Effective Resolution Regimes for Financial Institutions (fsb.org) as the foundation of its recommendations on cross border issues. Those documents are high level guides which do not provide granular assistance in the development of legislation, but rather serve as a philosophical framework for the rest of the recommendations in the Guide. Chapter 10 only fleshes out those ideas in the cross-border context to a limited extent, and some additional granular work on the cross-border issues might be considered as a second phase to the project (e.g. a guide to enactment of legislation could offer more granular advice on cross border issues). The overall thrust of the approach to cross border issues affecting bank liquidation is based on the universality principle, and envisages the host state cooperating with recognizing and supporting the liquidation process initiated in the home state of the bank. The limits in the cross-border context that are discussed below. Chapter 6 indicates that the preferred liquidation option for non-systemic banks is a going concern sale of assets. While a liquidation can be effected by selling off the bank's business or portfolios of its assets, it can also be done by a sale of the bank's shares with appropriate credit support from a government related entity which provides some form of credit support to offset the weakened parts of the troubled bank's portfolio, or acquires impaired assets at face), or acquisition of some or all of its business as a going concern (as well as by selling/auctioning off specific assets portfolios). In some jurisdictions, it can also be done by transferring the impaired assets into a resolution vehicle, leaving the existing bank with only its good assets, allowing other market players to acquire the shares of the existing bank. As paragraph 234 excludes the sale of shares of the bank as a liquidation tool from the scope of the guide, the Guide does not deal with the cross-border aspects of bank liquidation accomplished by a share sale. It might be worth considering the share sale as a liquidation technique for non-systemic banks, and then address the cross-border implications. For example, where a single foreign subsidiary of a banking group is in trouble, but not the whole group, a share sale rather than a liquidation might be a useful tool to consider. Chapter 10 deals with the insolvency of cross-border groups and the insolvency of a single subsidiary of a cross-border group together. However, those are quite different problems, and it might be worth treating them a little more distinctly. The single subsidiary situation has more in common with the respect of the discussion in Chapter 10, than the insolvency of a non-systemic cross-border group does, which is mentioned, but not really fleshed out in any detail in Chapter 10.	

388.	**Paragraph 407**	Chapter 10 deals with two separate issues: • the liquidation of banks that have a branch in a State other than their home State; • the liquidation of banking groups with subsidiaries in different States (essentially but not exclusively sub-chapter E). The Guide might be easier to follow if the parts relating to groups with subsidiaries in various States could be moved to Chapter 9.	IBA
389.	**Paragraph 409**	"Several international standards have addressed cross-border insolvency, including the 1997 *UNCITRAL Model Law on Cross-border Insolvency* (MLCBI) and the *UNCITRAL MLEGI*. However, neither addresses the specificities of banks. …" Also while they have focused on cooperation between courts and insolvency practitioners, they have not considered the role of regulators which would play a much more prominent role in any bank insolvency.	EBRD LTP
390.	**Paragraph 410**	"… The UNCITRAL framework for recognition is one possible approach to achieve cross-border effectiveness, but it is primarily designed for cross-border insolvency of businesses. …" and offers member states the option of opting out for banks in its model law provisions.	EBRD LTP
391.	**Paragraph 412**	The Guide advocates the norm of "modified universalism" which within a legal entity rather broadly supports the idea of the appointment of separate liquidators at home and host State level. This solution makes sense if the legislation of the home State provides for a discriminatory treatment of creditors in the home State. If this is not the case, appointing separate liquidators in the home and the host State will almost invariably lead to tensions among liquidators: who can give instructions to correspondent banks and to securities custodians, which insolvency law applies in dealing with contracting parties and third parties, which liquidation is entitled to what part of the assets in the liquidation, etc. A "universalism" model could thus be favoured, unless it would lead to discriminations.	IBA
B. COOPERATION AND ALLOCATION OF COMPETENCES BETWEEN HOME AND HOST AUTHORITIES			
392.		The Guide mentions 4 types of actors in the bank liquidation process who might be involved in cooperation communications in the course of a bank liquidation – Supervisory Authorities, Liquidating Authorities, Liquidators/Provisional Liquidators, and Courts. That list does not mention Government Finance/Treasury Departments involved in providing credit support for sale transactions to be effected through bank liquidations. As credit support is often key to	IBA

		making these transactions happen quickly, it may be useful to include them in the list of parties with whom communication should be facilitated. There can be other governmental/quasi-governmental authorities with whom communication needs to occur as well, such as central banks. One of the types of communication not discussed is court to court communication to coordinate proceedings between jurisdictions. That can help coordinate liquidation related proceedings between jurisdictions. Another issue not discussed is sharing information with the potential buyer of the troubled bank or its assets. That should be facilitated as in order to do the sort of accelerated due diligence needed in bank acquisitions, they may need to access data about bank asset quality collected by the regulators. In the cross-border context, this can be complicated as different jurisdictions may have different standards for what they can release. Consideration might be given to recommending that jurisdictions adopt legislation which encourages information sharing reasonably necessary to facilitate buyer due diligence in cross border bank liquidations. Moreover, a buyer may wish to access data on asset quality which the bank auditors may have obtained in the course of their functions. A consistent cross-border approach on this would be useful as well. It might be useful to develop a more detailed list of who is to be authorized to cooperate and communicate in this chapter, and the appropriate confidentiality limitations for each sort of communication.	
393.	1. Introduction **Paragraph 414**	The legal framework's emphasis on clear distribution of competences and smooth cooperation among liquidation authorities is crucial for effective bank liquidation across jurisdictions, and it can help streamline processes and enhance accountability, making it easier to manage crises when they arise. However, achieving this may be challenging due to differing legal standards and confidentiality concerns in various jurisdictions, therefore, a well-coordinated approach is essential to ensure that these frameworks align with international guidelines, fostering better cooperation during cross-border liquidations.	Miguel Gallardo Guerra (Mexico)
394.	2. General principle: achieving cooperative solutions **Paragraph 415**	The legal framework should allow authorities to establish comprehensive protocols for cooperation in cases of liquidation of banking groups with cross-border operations to facilitate joint decision-making processes, ensure consistent communication strategies, and address potential conflicts between home and host country interests, taking into account the specific structure and operations of each banking group. Such mechanisms may include: a) Early communication and coordination between home and host authorities when a cross-border banking group faces financial difficulties; b) Joint assessment of the group's financial situation and potential impact of liquidation on different jurisdictions; c) Participation in crisis management groups or similar coordination bodies for significant cross-border banking groups;	IPAB

		d) Regular exchanges of information on group structures, interconnections, and potential obstacles to orderly liquidation, and e) Coordination of public communications to maintain market confidence and minimize potential systemic impacts.	
395.	**Paragraph 415**	But what about closing the circle where the courts are involved?	EBRD LTP
396.	**Paragraph 415**	It is considered that encouraging jurisdictions to provide transparent and expedited processes helps ensure that measures taken in one country can effectively influence others. However, practical challenges may arise, such as diverse legal systems and varying mandates among authorities. Therefore, it is suggested to establish guidelines of strong communication channels and collaborative agreements to overcome these obstacles, ensuring a coordinated response to bank failures that may have international implications.	Miguel Gallardo Guerra (Mexico)
397.	5. Coordination of proceedings **Paragraphs 424-425**	Paragraphs 424 and 425 enhance the importance of ex-ante cooperation arrangements between liquidation authorities with their peers in foreign countries. FROB is fully aware of the importance of maintaining ex-ante cooperation agreements to ensure a smooth and successful execution of resolution powers in a banking crisis with cross-border elements. However, as the conclusion of new agreements with foreign liquidation or banking authorities may be a burden in both operational and resources terms, we suggest that the Legislative Guide (in line with recommendation 38) expressly indicates that the general principle of proportionality should be always observed. Therefore, we would suggest making an express reference to that principle in paragraph 424, as well as a drafting proposal at the end of paragraph 425: *"The legal framework should not impede administrative authorities from benefitting from existing cross-border cooperation arrangements with foreign authorities (e.g., extending resolution cooperation agreements or MoUs to liquidation), and could allow liquidation authorities to conclude new agreements for mutual assistance and information sharing with other liquidation or banking authorities, subject to appropriate confidentiality assurances. Where the conclusion of such agreements is contemplated as part of the legal framework for regulation and supervision of financial institutions, it should be sufficiently broad to include agreements with foreign liquidation authorities and/or concerning matters of bank liquidation. The legal framework for such agreements should not result in undue restrictions to access to information by, or cooperation with, foreign courts.* ***Any mandatory obligation to conclude liquidation cooperation agreements should observe the principle of proportionality****."*	FROB

398.	**Recommendation 95-98**	Secondly, the principles outlined in Recommendations 95 to 98 are considered sound. These state that 'mechanisms or agreements to achieve cooperative cross-border liquidation must be adapted to the specific institutional model (administrative or judicial).' The objective is thus to develop the cross-border liquidation process in accordance with the timeframe and specific institutional model in which it is to be implemented. Thirdly, cooperation and information-sharing agreements between deposit insurance administrators (Recommendation 98)—in Colombia, managed by FOGAFIN—facilitate the consolidation of coordinated and efficient work between authorities, especially to ensure the timely payment of deposit insurance to depositors affected by the cross-border bank liquidation process. Fourthly, the cooperation mechanisms established in Recommendation 95 are endorsed. These mechanisms encourage the liquidator authority and appointed liquidators to actively promote cooperation with foreign authorities and liquidators, seeking joint solutions whenever possible. Additionally, early communication and coordination between liquidation authorities, liquidators, and banking authorities across different jurisdictions are encouraged. These communications should cover aspects such as decision-making. The determination of rights and the development of pathways for orderly liquidation are also key elements. Furthermore, it is essential to ensure that authorities in the host jurisdictions are adequately informed about the liquidation process in the home jurisdiction, participate in decision-making, and receive the relevant information. Perhaps most importantly, the exchange of information between authorities and liquidators from different jurisdictions is authorized, always safeguarding confidentiality. It would be prudent for UNIDROIT, in accordance with the recommendations set forth by the Bank for International Settlements in its document on cross-border bank insolvency issues, to include within its recommendations that this framework of cooperation be adopted through a binding instrument, such as an international treaty, with the objective of establishing a uniform system for cooperation frameworks in cross-border bank liquidation cases. Similarly, it may be advisable for UNIDROIT, in accordance with the key attributes of effective resolution regimes for financial institutions as outlined by the FSB, to include in its recommendations for the adoption of a cooperation framework in cross-border insolvency cases provisions regarding the implementation of a harmonized and mutually compatible deposit insurance level that guarantees equal treatment of all depositors of the entities in question. This would aim to prevent resolution authorities from refusing to recognize the payment of deposit insurance ordered by a foreign authority on the grounds that such coverage is only provided for domestic depositors.	Luis Fernando Lopez Roca (Colombia)

C. RECOGNITION OF FOREIGN PROCEEDINGS AND SUPPORT MEASURES			
399.		The thrust of this section is that a liquidation proceeding in the home jurisdiction should be swiftly and automatically recognized in the host jurisdiction in all cases unless the safeguards in section D are triggered. This approach rests on a distinction between the "home" state and the "host" state. Conceptually, the idea is that the home state is the jurisdiction where the bank is formed and chartered, and the host state is another jurisdiction where the bank may have operations or assets. However, the definitions in the glossary in section 10 Part A of the home and host might need to be refined to give better effect to this. For example, the definition of home state includes a place where the bank is authorized and has a branch, but a bank is likely to be authorized to operate and have branches both where it is formed and in a foreign jurisdiction whether a foreign branch is located. Chapter 10 notes that if the jurisdictions involved have adopted MLCBI and MLEGI, that those provisions could be adapted to provide for cross-border recognition in the host state of the home state proceeding. However, the MLCBI is not intended to apply to financial institutions and uses the COMI concept to determine which is the main proceeding, which would be analogous to a proceeding in the home jurisdiction in the guide. It's not clear if the guide is recommending importing the COMI concept as the minimum standard for a jurisdiction to be considered a home state. It might be useful to clarify this. The concept of a proceeding in the guide is wider than court proceedings and hence the proposal for recognition of a home state proceeding in the host state includes bank liquidation processes run by regulators in the home state rather than just court liquidation process initiated in the home state. It might be useful to consider whether the test for when a home state regulatory action should be recognized in the host state might need to be different than when a court proceeding should be recognized. Furthermore, the test for when host state regulatory actions may need to be recognized in the home state might need some consideration as well. There is little discussion of what choice of law rules should apply in a cross-border liquidation - i.e. what law should be applied by a court running a bank liquidation - a question that can vary by the type of issue. This is presently something that Working Group V is addressing in the context of non-bank business corporations. The approach there is to apply the *lex fori concursus* to most issues except in certain cases where exceptions have been proposed. Some thought may need to be given to whether a similar approach would work for choice of law in bank liquidation. For example, should home jurisdiction law be applied in a home state liquidation proceeding to determine the priority rights of depositors and deposit insurers of both the home and host jurisdictions, or should the home state court apply host state priority rules to host state depositors and host state deposit insurers? There will be other similar choice of law questions to resolve, and it may be useful to work through them systematically to come up with a choice	IBA

		of law system that works for bank liquidations in a way that balances the desire for universality with the desire for fairness in the treatment of host state-based claimants. The discussion of support measures may also need some clarification. What seems to be contemplated is that whether or not recognition of the home proceeding is granted, the host jurisdiction can be asked to implement support measures that facilitate the liquidation. It also includes the concept of a host jurisdiction refraining from taking any steps. Chapter 10 is not that clear on whether the host jurisdiction is to be merely encouraged or mandated to adopt support measures.	
400.	**Paragraph 426**	The emphasis on swift recognition and support measures is crucial because it can prevent disruptions in the banking system during cross-border liquidations. Delays can lead to uncertainty, which may decrease depositor confidence and intensify financial instability. By ensuring that measures are transparent and expedited, jurisdictions can foster a more reliable environment for financial operations, reassuring both depositors and investors that their interests are being protected even in the event of a bank failure. Additionally, the principle of equitable treatment for creditors is considered as an essential safeguard in cross-border liquidations, as it ensures that all stakeholders are treated fairly, regardless of where they are located. This principle not only promotes fairness but also helps maintain trust in the financial system, since if creditors perceive that they might be treated unfairly, it could discourage investment and destabilize the market. Therefore, a clear legal framework that outlines the conditions for recognition and support is vital for maintaining confidence among all parties involved.	Miguel Gallardo Guerra (Mexico)
401.	**Paragraph 426**	As outlined in para. 426 of the Guide, the swift recognition of resolution and/or insolvency measures in the context of banking insolvency proceedings is an integral aspect of ensuring a swift and value preserving liquidation and/or insolvent restructuring of a bank. In our experience, the recognition procedures for insolvency related measures are often tailored to constellations in which the insolvent bank has assets in another jurisdiction, and the insolvency measures for which a recognition is being applied for relate to the foreign assets of the insolvent bank (i.e. a request by the liquidation authority for a transfer of assets booked at a foreign branch of the insolvent bank). In contrast, the respective recognition proceedings do not always provide for clear rules for the recognition of insolvency measures that do not directly relate to assets located in the relevant jurisdiction. The lack of clear rules may lead to legal uncertainties regarding the procedure and/or requirements for the recognition of measures that do not directly relate to the assets of an insolvent bank, such as a bail-in of liabilities, stay on early termination and/or netting rights or a statutory deferral on payments. In light of these constellations, we would suggest adding clarifying wording in para. 426 of the Guide that the swift recognition procedures should cover all kinds of insolvency or resolution measures, including a bail-in, stay on early termination and/or netting rights, and such proceedings should not be exclusively tailored to measures directed at the transfer of assets.	IBA

402.	**Paragraph 428**	"Where the host or an affected jurisdiction has a system of cross-border recognition, e.g., based on the UNCITRAL MLCBI, the legal framework may apply it with appropriate adjustments for bank liquidation. …" Is a further UNCITRAL Model Law needed to modify the 1997 Model Law for banks and incorporate features of the Model Law on Enterprise Groups?	EBRD LTP
403.	**Paragraph 430, Recommendation 101 (c)**	These paragraphs recommend that it should be possible for a home country liquidator to request a stay of enforcement proceedings in a host country, "including of the exercise of early termination rights". Not all countries provide for a stay on early termination rights in their liquidations, and it would be odd if their insolvency laws provided for a stay of early termination rights if a foreign liquidator requested it but not if a local liquidator requested it. Accordingly, should these paragraphs add at the end some language along the lines of, "if and to the extent such a stay would be available in a liquidation in the host jurisdiction"?	INSOL International
404.	**Recommendation 99**	With regard to the recognition of foreign bank liquidation proceedings, it is important to distinguish whether - the countries concerned are bound by international treaties, such as the Member States of the European Union, and whether the national law of the countries concerned is based on the same principles and interpreted by the same court, such as the Court of Justice of the European Union, or - recognition is sought from a third country without such a basis. The desirability and justification of recognising bank liquidation proceedings from third countries must be carefully considered. In my view, *automatic* recognition without a prior exequatur procedure is difficult to justify without at least the same legal basis and a uniform interpretation of the law by the same court. However, I agree with Recommendation No. 99 that the legal framework should provide for a prompt decision. Therefore, national legislators should regulate the conditions under which the country is willing to recognise foreign bank liquidation proceedings.	Dominik Skauradszun (Germany)
405.	**Recommendations 99 – 102**	Similarly, we underscore Recommendations 99 to 102 regarding the recognition of foreign liquidation procedures and resolution mechanisms within the local jurisdiction. These recommendations are particularly crucial for the establishment of a comprehensive cross-border insolvency cooperation system for banking institutions. In this regard, the system adopted by UNCITRAL on the Model Law on Cross-Border Insolvency has demonstrated considerable success. It is our contention that the capacity of a liquidator to petition for the commencement of a bank liquidation procedure in a foreign jurisdiction, or for orders issued by a resolution authority to have effect in another jurisdiction, while awaiting recognition by the local supervisor in the jurisdiction where such measures	Luis Fernando Lopez Roca (Colombia)

		are to be enforced, is of paramount importance. It is also noteworthy that the possibility of maintaining parallel resolution procedures exists. It is only through this approach that a truly applicable framework for cross-border cooperation can be established. Lastly, it is fitting that, in addition to the possibility of requesting the recognition or initiation of liquidation processes or the application of resolution mechanisms ordered by foreign authorities, these authorities should also be empowered to reject such orders when they may violate domestic public policy, particularly when they involve inequitable treatment of creditors or the use of public resources without proper justification.	
406.	**D. SAFEGUARDS (GROUNDS TO REFUSE RECOGNITION, SUPPORT, OR COOPERATION)**	The main safeguard is public policy, which is a standard carve out to the obligation to extend recognition in most cross-border. The proposed public policy exception includes the right to deny recognition if recognition would affect the financial stability of the financial system in the host state. As the premise of the project is that the bank being liquidated is non-systemic, this seems odd at first glance. But it is possible that a bank could be non-systemic in its home state and yet its liquidation could have systemic consequences in the host state - for example, if the host state is dealing with undisclosed systemic banking issues in other institutions at the same time. The same is true of liquidating a foreign subsidiary of a cross-border group – i.e. it might be non-systemic in the state where the foreign subsidiary operates, but it could be a systemic issue for the state in which the banking group is domiciled. As this exception may arise more frequently than the Guide seems to contemplate, some additional consideration as to scope of the financial stability exception to recognition may be useful. The equitable treatment of host state creditors is also proposed to be an aspect of the public policy exception. The scope of this is something that might usefully be considered in connection with the question of what choice of law rules should apply (see comment on Section C above).	IBA
407.	**Paragraph 432 and seq. plus footnote 246**	Consider moving footnote 246 to the main document what is the "Support of foreign measures" and include a diagram on how it will interact with Section "D" safeguards. Include also references to what will happen if basic standards of fairness are manifestly breached.	Hernany Veytia (Mexico)
408.	**Recommendation 104**	Does this envisage enactment of model law provisions and reciprocity in both home and host jurisdictions? Should this guidance deal with a scenario where one jurisdiction does not have cross-border insolvency rules in place?	EBRD LTP

E. LIQUIDATION OF CROSS-BORDER GROUPS			
409.		Two issues are discussed here – insolvent non-systemic cross-border banking groups, and an insolvent subsidiary of a cross-border group. As noted, those are two different things and are best treated separately. Most of the comments in the cross-border section really apply to the cross-border liquidation of a single subsidiary of a cross-border group. The cross-border liquidation of a banking group raises additional considerations, and it might be useful to consider that topic separately. In addition, the focus of the project is on regulated deposit taking institutions. Banking groups often have subsidiaries and holding companies that do not engage in deposit taking activities. It might be useful to clarify how a liquidation proceeding in the home state will apply to subsidiaries not engaged in deposit taking activities in home and / or host state. If universality is the aim, ensuring a liquidation proceeding in the home state can be broad enough to apply to all parts of the group whether located in the home or host state. However, the recognition principles applying to subsidiaries of a group not engaged in deposit taking activities may need to be different in some respects than those being proposed for deposit taking institutions, and that question may be worth considering further.	IBA
410.	**Paragraph 437**	Considering the neutral approach taken by the Legislative Guide, we would propose to amend paragraph 437 to specifically include a reference to the resolution authorities: *"The administrative authorities that are responsible for the supervision,* ***resolution*** *and liquidation of entities belonging to a single group in different jurisdictions should be allowed to and strongly encouraged to cooperate in advance to prepare for the liquidation […]".*	FROB
411.	**Paragraph 437**	International cooperation with regard to banks in groups is important especially with regard to large entities, which particularly are not covered by the Draft (since it focuses on non-systemic banks), however even smaller banks are frequently linked and networked within groups of companies. This require some rules regarding cooperation not only on the pre-declaration stage, but also within the particular insolvency proceedings. In our view, this cooperation should be based in access to information, as well as – when possible – to appoint the same person (it may be also legal person, when appropriate jurisdiction allows so) as a trustee/ administrator. *[Secretariat: This comment also cross-refers to Chapter 4, paragraph 176]*	INSO Section, Allerhand Institute

412.	**Paragraph 400 and 438, Recommendation 108**	Specify that the legal framework will not require further certifications, or national authorisations to foreign liquidators. More guidance and examples to host (and affected) authorities is needed on how to manage cases where there are different proceedings in different jurisdictions for the liquidation of individual entities, joint venture and which rules will be applied to subsidiaries with minority interest of the same group.	Hernany Veytia (Mexico)
413.	**Paragraph 439**	Provide examples on how cooperation can be managed without considering it a subordination to the foreign authority or granting concessions under the national legal system.	Hernany Veytia (Mexico)
414.	**Paragraph 440, Recommendations 104, 105, 108 (b)**	These paragraphs discuss safeguards with respect to cross-border cooperation and the facilitation of cooperation and centralisation between jurisdictions. Please see the comments above with respect to Para 349 and Recommendation 74: It may be desirable for a home country's laws to permit a home country liquidator to apply a host country's rules regarding creditor priorities and similar issues with respect to the wind-down of a local branch or subsidiary. There may well be circumstances in which the liquidation process could be simplified if the home country liquidator could agree to follow the host country's rules with respect to the branch or subsidiary and its creditors, potentially avoiding the need for a local proceeding. While not in the financial services context, the ability to do this was helpful in the UK/EU Collins & Aikman insolvencies – Re Collins & Aikman Europe SA [2006] EWHC 1343 (Ch).	INSOL International

ANNEXE

Proposal by IPAB concerning Chapter 2: Overview of Administrative, Court-Based, and Hybrid Models for Managing Bank Failures

Stages of Liquidation Process	Fully-Administrative Model	Hybrid Model	Court-Based Model
1. Preparation and Planning	Administrative authorities access information and draft contingency plans and prepare liquidation strategies, which they can freely share with other authorities.	Administrative authorities make use of the technical knowledge to draft contingency plans and prepare liquidation strategies, but court approval is needed for accessing information or sharing it with other authorities.	Relying in technical knowledge and assessments of administrative authorities, courts review, and/or approve access to information for contingency plans and acts to share information.
2. Initiation of procedures towards a failing bank	Administrative authorities formally initiate procedures with no need of court involvement to revoke a bank's license, declare it in liquidation, appoint a liquidator, and notify stakeholders.	Administrative authorities initiate procedures but require court approval or oversight to revoke a bank's license, declare it in liquidation, appoint a liquidator, or notify stakeholders.	Administrative authorities initiate procedures with a petition to the courts, which review, approve and/or declare bank's license revokal, liquidation, liquidator appointment, and notifications to stakeholders.
3. Asset and Liability Valuation	Administrative authorities conduct valuations, with no need of court involvement to ensure accuracy and transparency.	Administrative authorities manage the valuation processes, but courts may be involved in approvals, reviews, or disputes.	Courts appoint a specialist (liquidator or receiver) to perform asset valuations and they oversee and approve procedures and results to ensure fairness and legal compliance.
4. Marketing, Bidding, and Transfer or Sale of Assets	Marketing, bidding, and transfers/sales are initiated, managed (directly performed or delegated), and overseen by administrative authorities with no need of court approval. Administrative authorities calculate a funding gap and provide operational and financial support to promote transfers/sales with no involvement of judiciary authorities.	Administrative authorities initiate and/or manage (directly perform or delegate) marketing, bidding, and transfers/sales, but court reviews and/or approval are required with reports on these procedures.	Courts initiate, oversee, and approve marketing, bidding, and transfers/sales procedures and results to ensure fairness and legal compliance.

5. Management of Claims and Payment of Creditors	Administrative authorities directly handle collections, claims, disputes, and payments.	Administrative authorities directly handle collections, claims, and payments, but courts may be involved in approvals, reviews, or disputes.	Collections, claims, and payments are managed by a court-appointed liquidator. Judiciary authorities resolve any disputes or contested claims.
6. Winding Down of Operations	Administrative authorities manage and oversee the dissolvement and closure of operations.	Administrative authorities manage and oversee the initial dissolvement of operations, but require court reviews and/or approvals for final winding down actions.	Courts appoint and supervise liquidators, ensuring that operations are wound down according to the legal framework.
7. Declaration of End of Liquidation	Administrative authorities declare the end of the liquidation process and remove the bank from the business register with no involvement of judiciary authorities.	Administrative authorities submit final reports to courts, which then declare the end of liquidation and approve or request removal of the bank from the business register.	Court formally declares liquidation completed, based on reports from the liquidator.