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ISSUES PAPER

1. This document provides a preliminary illustration of the issues identified by the UNIDROIT Secretariat for consideration by the UNIDROIT Working Group on the Insolvency of Insurance Enterprises (the Working Group or Working Group on Insurer Insolvency) at its first session, to be held at UNIDROIT's seat in Rome and online from 30 November to 2 December 2026.

2. The issues considered in this document are based on preliminary research conducted by the UNIDROIT Secretariat. The Secretariat wishes to thank Prof Pierpaolo Marano and the Italian insurance supervisor, *Istituto per la Vigilanza sulle Assicurazioni* (IVASS) for their input to this Issues Paper. This document does not intend to provide an exhaustive list of issues nor a full legal analysis of each one. Rather, the purpose of the document is to provide a starting point for the Working Group's deliberations and a structure for discussions at its first session.

3. The document is divided into three sections: (i) preliminary matters; (ii) scope of the future Guide; and (iii) content of the future Guide. It provides a number of questions and recommendations that the Working Group may wish to consider. This document also contains an annexe that provides links to relevant materials to assist the Working Group.

TABLE OF CONTENTS

I.	**PRELIMINARY MATTERS**	**3**
	A. Background of the project	3
	B. Format and title of the future Guide	4
	C. Target Audience	4
	D. Composition of the UNIDROIT Working Group	4
	E. Methodology and Timeline	6
	F. Relationship with existing international instruments	7
II.	**SCOPE OF THE GUIDE**	**11**
III.	**CONTENT OF THE GUIDE**	**13**
	A. Design of legal frameworks for managing failing insurers	13
	B. Definitions	14
	C. Objectives of a liquidation framework for insurers	15
	D. Institutional arrangements	16
	E. Procedural and operational aspects of the insolvency proceedings	17
	F. Preparation and cooperation	20
	G. Grounds for opening insolvency proceedings	22
	H. Liquidation Tools	25
	I. Funding	31
	J. Creditor Hierarchy	35
	K. Group Dimension	40
	L. Cross-Border Aspects	42
ANNEXE I	**Consulted sources**	**46**
ANNEXE II	**Tentative work plan 2026-2029**	**53**

I. PRELIMINARY MATTERS

A. Background of the project

4. Since the Global Financial Crisis of 2008, it has become increasingly clear that the failure of insurance enterprises (insurers) may generate systemic implications and significant negative externalities. Insurers perform activities of considerable public interest, often involving large numbers of policyholders, businesses, and counterparties, while their interconnectedness with the wider financial system may give rise to contagion effects in the event of insolvency. In response, the international community has developed frameworks to deal with the failure of large and cross-border insurers. In particular, in 2014, an insurance-specific annex was added to the Financial Stability Board's *Key Attributes of Effective Resolution Regimes for Financial Institutions* (FSB Key Attributes, Appendix II – Annex 2). In 2019, the International Association of Insurance Supervisors' (IAIS) *Insurance Core Principles* (IAIS ICPs) and the *Common Framework for the Supervision of Internationally Active Insurance Groups* (ComFrame) were expanded with resolution provisions to align with the *FSB Key Attributes*. At the regional level, in 2024 the European Union (EU) adopted the Insurance Recovery and Resolution Directive (IRRD),[1] inspired by the Bank Recovery and Resolution Directive.[2] Several other jurisdictions across the world have already adopted or are in the process of developing dedicated resolution frameworks for insurers.

5. However, these legislative efforts primarily concern resolution regimes for insurers that could be systemic when failure occurs. They do not address, in a comprehensive manner, the liquidation of insurers that are not placed under a resolution procedure or residual parts of insurers that may need to be liquidated following or in the context of resolution action. In this Issues Paper, such insurers are referred to as "non-systemic insurers".[3] In the absence of a common international standard or guidance specifically addressing the liquidation of insurers, insolvency proceedings continue to be governed by national insolvency laws. Such laws differ significantly in design and effectiveness, for instance, with regard to the institutional arrangements, liquidation tools and strategies, grounds for opening liquidation proceedings, as well as domestic and cross-border cooperation. This fragmentation may create problems in particular when dealing with the failure of small and medium-sized insurers, which, in some jurisdictions, fall outside the scope of the resolution frameworks. In addition, national insolvency laws still play a key role in the implementation of resolution tools in respect of systemic insurers. The fragmentation of national insolvency regimes for failing insurers may hinder cross-border cooperation, may constitute an obstacle to the effective implementation of liquidation tools and complicate the operation of resolution safeguards, including the "No Creditors Worse Off" principle.

6. Against this background, in the run-up to the drafting of the Work Programme for 2026-2028, the UNIDROIT Secretariat received a proposal to develop a Guide on the liquidation of insurance enterprises, from the Italian Institute for the Supervision of Insurance (IVASS) *(see UNIDROIT 2025 – C.D. (105) 4 rev., Annex II).* Referring to the successful completion of the UNIDROIT Legislative Guide on Bank Liquidation in 2025, IVASS proposed to commence a follow-up project addressing the liquidation of insurers.

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[1] Directive (EU) 2025/1 of the European Parliament and of the Council of 27 November 2024 establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 and Regulations (EU) No 1094/2010, (EU) No 648/2012, (EU) No 806/2014 and (EU) 2017/1129 [2025] OJ L 2025/1. The IRRD is expected to be fully transposed by EU Member States by 29 January 2027.

[2] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 [2014] OJ L 173/190.

[3] This Issues Paper thereby follows the approach taken in the UNIDROIT Legislative Guide on Bank Liquidation (see paras 5-7 of the latter).

7. The Governing Council at its 105th session (Rome, 20-23 May 2025) acknowledged the importance of the topic, recognised its complementarity with the Legislative Guide on Bank Liquidation, and recommended the inclusion of the project in the 2026-2028 Work Programme with high priority (*UNIDROIT 2025 – C.D. (105) 32 – Report,* para. 90). The General Assembly, at its 85th session (Remote, 11 December 2025) endorsed the Governing Council's recommendation and, accordingly, the project was included as a high-priority project in UNIDROIT's 2026-2028 Programme (*UNIDROIT 2025 – A.G (85) 3*; *UNIDROIT 2025 – A.G (85) 14*, para. 81).

B. Format and title of the future Guide

8. Concerning the form and title of the future Guide, the Working Group may wish to consider UNIDROIT's prior work on bank insolvency, in particular the *UNIDROIT Legislative Guide on Bank Liquidation* (LGBL). This Guide, adopted by the UNIDROIT Governing Council at its 105th session (Rome on 20-23 May 2025), aims to support legislators and policymakers in developing effective legal frameworks for liquidating banks whose failure does not raise systemic concerns.

9. It is therefore proposed that the future Guide would take the form of a Legislative Guide,[4] describing main issues, possible approaches, and, where possible, legislative recommendations. Depending on the nature of the instrument ultimately developed, a possible title could be the 'Legislative Guide on the Liquidation of Insurers'. Once the project has advanced sufficiently, the Governing Council's endorsement will be sought for an appropriate title.

C. Target audience

10. Should the Working Group and the Governing Council agree to the development of a Legislative Guide, the target audience would be legislators and policymakers wishing to introduce a tailored liquidation framework for insurers or to update their existing legislation in this area.

11. As consistent with all UNIDROIT instruments, the prospective Guide should be relevant for countries irrespective of their legal tradition and would aim to help countries make their insurance insolvency frameworks more effective.

12. In addition to legislators and policymakers, a Legislative Guide is also expected to be useful for authorities involved in the supervision and resolution of insurers – in particular, insurance supervisors, resolution authorities, and policyholder protection schemes – and for practitioners, adjudicators, and market participants.

D. Composition of the UNIDROIT Working Group

13. Consistent with UNIDROIT's established working method, the Working Group is composed of experts selected for their expertise in the field of insurance insolvency, resolution and policyholder protection. Individual experts participate in a personal capacity and represent different legal systems and geographical regions.

14. To date, the Working Group on Insurer Insolvency is composed of the following experts:

- Ms Stefania Bariatti (*Chair*), Professor, University of Milan (Italy), UNIDROIT Governing Council member;
- Mr Oliver Brand, Professor, University of Mannheim (Germany);

[4] The proposal submitted to the UNIDROIT Governing Council in 2025 referred to a "Legal Guide", but it follows from the proposal of IVASS and the accompanying text prepared by the UNIDROIT Secretariat that the aim would be to mirror the work done on bank liquidation.

- Ms Yan Li, Vice-President and Professor, Southwest University of Political Science and Law (China);
- Mr Pierpaolo Marano, Professor, Catholic University of the Sacred Heart Milan (Italy);
- Ms Irit Mevorach, Professor, University of Warwick (United Kingdom);
- Ms Kyriaki Noussia, Professor, University of Reading (Greece/United Kingdom);
- Mr David Ramos Muñoz, Professor, Universidad Carlos III de Madrid (Spain);
- Ms Janis Sarra, Professor Emerita, University of British Columbia (Canada);
- Mr Arthur Van Den Hurk, Fellow, Institute for Financial Law, Radboud University (Netherlands);
- Ms Virag Blazsek, Associate Professor, University of Leeds (Hungary/United Kingdom);
- Mr Robin Bowley, Senior Lecturer, University of Technology Sydney (Australia);
- Ms Concetta Brescia Morra, Professor, University Roma Tre and President, IVASS Insurance Arbitration Board (Italy);
- Mr Georgios Psaroudakis, Professor, Aristotle University of Thessaloniki (Greece);
- Mr Michele Siri, Professor, University of Genoa (Italy);
- Ms Chiara Zilioli, (Former) Director General Legal Services, European Central Bank.[5]

15. UNIDROIT has also invited a number of intergovernmental organisations and public sector stakeholders with expertise in the field of insurance insolvency, resolution and policyholder protection to participate as institutional observers in the Working Group. Participation of these organisations and stakeholders will ensure that different regional perspectives are taken into account in the development and adoption of the Guide. It is also anticipated that the observers will assist in the regional promotion, dissemination and implementation of the Guide once it has been adopted. To date, the following organisations and authorities participate as observers in the Working Group:

- Asociación de Supervisores de Seguros de América Latina (ASSAL);
- Association internationale de droit des assurances (AIDA);
- Bank of Greece;
- Bankowy Fundusz Gwarancyjny (BFG) (Poland);
- Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) (Germany);
- Deposit Insurance Corporation of Japan (DICJ);
- European Bank for Reconstruction and Development (EBRD);
- European Banking Institute (EBI);
- European Commission (DG-FISMA);
- European University Institute (EUI);
- Insolvency Law Academy (India);
- Insurance Authority (Hong Kong);
- Insurance State Supervision Service of Georgia (ISSSG);
- International Insolvency Institute (III);

[5] The last six experts participate in the Working Group as individual expert observers.

- Istituto per la vigilanza sulle assicurazioni (IVASS) (Italy);
- National Bank of Moldova;
- National Insurance Commission (NIC) (Ghana);
- Perbadanan Insurans Deposit Malaysia (PIDM);
- Queen Mary University London - Institute of Banking and Finance Law (United Kingdom);
- Single Resolution Board (SRB);
- Superintendência de Seguros Privados (SUSEP) (Brazil);
- Superintendencia Financiera de Colombia (SFC);
- Swedish National Debt Office (SNDO);
- United Nations Commission on International Trade Law (UNCITRAL).

E. Methodology and timeline

16. Under the guidance of its Chair, the Working Group will undertake its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, in principle the Working Group will not adopt any formal rules of procedure and seeks to make decisions through consensus. Working Group meetings will be conducted under the Chatham House Rule in order to encourage open discussion.

17. The Working Group will meet at least twice a year (for three days) in Rome, unless external funding is provided to hold a meeting in a different location. Meetings are held in English without translation. Remote participation is possible, although experts are expected to attend in person if circumstances permit.

18. The documents for the Working Group meetings will generally be distributed around ten days before each session. After each meeting of the Working Group, the Secretariat will share a summary report with all participants.

19. The preparation of a Guide on the insolvency of insurance enterprises is a high-priority project in the UNIDROIT Work Programme for the period 2026-2028. However, taking into account that the first Working Group session is held end-2026, it is unlikely that the work be completed in its entirety within the current Work Programme. The following sets out a tentative timetable for the project.

(a) Development of a Guide on insurer insolvency over six in-person sessions of the Working Group on Insurer Insolvency:

  (i) First session: 30 November - 2 December 2026;

  (ii) Second session: April 2027;

  (iii) Third session: Autumn 2027;

  (iv) Fourth session: Early 2028;

  (v) Fifth session: Summer 2028;

  (vi) Sixth session: Winter 2028.

  Remote meetings may be convened when deemed necessary and intensive inter-sessional work is envisaged, possibly through the establishment of subgroups.

(b) Consultations and finalisation: Second half of 2028.

(c) Submission of the complete draft to the UNIDROIT Governing Council for adoption in 2029.

20. For a schematic overview of the proposed work plan for the period 2026-2029, please see Annexe II.

21. With regard to the methodology, an important element in the development of the UNIDROIT LGBL has been to conduct surveys within the Working Group on the nature, scope, and content of domestic bank liquidation frameworks, as well as the experience with such frameworks. The responses to such surveys have usefully informed the guidance offered in the LGBL, even if the approach ultimately adopted was to limit references to domestic frameworks in the Guide. It is proposed to follow a similar approach in this project. In particular, it is proposed to conduct a first survey as soon as possible after the first Working Group session to collect information on national frameworks that could help inform the discussions going forward.

Question for the Working Group:

- *Does the Working Group agree to conducting a survey on existing liquidation regimes for insurers directly after its first session, to inform the discussions from the second session onwards?*

F. Relationship with existing international instruments

22. The prospective Guide will focus on the key aspects of insolvency proceedings applicable to insurers (see in detail on the scope Section II below), an area where international guidance remains limited. However, a number of existing international instruments are relevant when developing the future Guide. To the extent possible, it is suggested that the terminology and concepts used in the Guide be harmonised with those of existing instruments,[6] such that there is uniformity and consistency with their provisions, while avoiding overlap in scope.

23. The *FSB Key Attributes* (adopted in 2011 and last revised in 2024) were developed after the 2008 Global Financial Crisis and aim at allowing authorities to resolve financial institutions that are systemic in failure in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions. The *FSB Key Attributes* constitute an 'umbrella' standard for resolution regimes for all types of financial institutions. However, not all attributes are equally relevant for all sectors. Some Key Attributes require adaptation and sector-specific interpretation. In October 2014, the Key Attributes were supplemented with annexes containing sector-specific guidance, among which Annex II, setting out how they should be applied to insurers.). The *FSB Key Attributes Assessment Methodology for the Insurance Sector* (FSB KAAM, adopted in 2020, revised in 2026) is designed to promote consistent assessments across jurisdictions and to provide guidance to jurisdictions when adopting or amending their resolution regimes to implement the Key Attributes.

24. The *FSB Principles for Cross-border Effectiveness of Resolution Actions* (2015) set out statutory and contractual mechanisms to facilitate the cross-border effectiveness of resolution actions consistent with the *FSB Key Attributes*. The latter were developed with a focus on the resolution of banks. However, many of the legal issues and principles discussed therein may be relevant to other types of financial institutions as well.[7] Therefore, they could serve as a useful reference in this project.

25. The *Insurance Core Principles and the Common Framework for the Supervision of Internationally Active Insurance Groups* (ICPs and ComFrame, last revised 2024) of IAIS provide a global benchmark for effective insurance supervision, with the aim of supporting the protection of policyholders and promoting the stability of the global financial system. The ICPs were first adopted in 2011, building on earlier principles developed in the early 2000s, and are updated regularly to

[6] See the overview of definitions in relevant existing instruments, which is shared with the Working Group separately.

[7] FSB, *Principles for Cross-border Effectiveness of Resolution Actions* (2015), Overview, p. 5.

reflect insurance market trends and developments, changes to standards and guidance developed by other standard-setting bodies, outcomes of IAIS implementation assessment activities, recommendations by the G20, as well as other developments in the global financial system relevant to the supervision of the insurance sector. The ComFrame builds upon the ICPs and establishes supervisory standards and guidance specifically focused on the effective group-wide supervision of internationally active insurance groups (IAIGs). ComFrame is a comprehensive and outcome-oriented framework that provides both qualitative and quantitative supervisory requirements tailored to the international activities and size of IAIGs.[8]

26. The *Holistic Framework for Systemic Risk in the Insurance Sector* (Holistic Framework, 2019) of the IAIS is a comprehensive framework for assessing and mitigating systemic risk in the insurance sector. It is underpinned by three key elements, namely, the Global Monitoring Exercise (GME), an integrated set of enhanced macroprudential supervisory policy measures, and robust implementation assessment. It targets systemic risk arising both from the distress or disorderly failure of individual insurers and from sector-wide distress. The Holistic framework is supplemented by an explanatory note and a global monitoring exercise document to assess global insurance market trends and developments and to detect the possible build-up of systemic risk in the global insurance sector.

27. Furthermore, UNCITRAL has developed a number of international instruments in the area of insolvency law. The *UNCITRAL Model law on Cross-Border Insolvency* (UNCITRAL MLCBI, 1997) is designed to assist States to more effectively address cross-border corporate insolvency proceedings. It focuses on authorising and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. In particular, it focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

28. The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) provides guidance for practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. Further, the *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2011, revised in 2013 and 2022), offers general guidance for judges on the application of the *MLCBI*, specifically on issues that may arise in the context of an application for recognition.

29. The *UNCITRAL Legislative Guide on Insolvency Law* (UNCITRAL Legislative Guide, consisting of five parts adopted at different times between 2004 and 2021) provides a comprehensive statement of the key objectives and principles that should be reflected in a State's business insolvency law. It is intended to inform and assist insolvency law reform around the world. The *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (UNCITRAL MLIJ, 2018) was adopted to assist States in establishing a framework of provisions for recognising and enforcing insolvency-related judgments, with the Guide to Enactment providing background and explanatory information. The *UNCITRAL Model Law on Enterprise Group Insolvency* (UNCITRAL MLEGI, 2019) was designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the *MLCBI* and part three of the UNCITRAL Legislative Guide on Insolvency Law. The *MLEGI* focuses on insolvency proceedings relating to multiple debtors that are members of the same enterprise group, which may be located in one or more jurisdictions.

30. The UNCITRAL Legislative Guide and Model Laws explicitly allow jurisdictions to exclude highly-regulated organisations such as banks and insurers from their scope, acknowledging that they may require specialised treatment that can be provided in a separate insolvency regime or through special

[8] See https://www.iais.org/activities-topics/standard-setting/icps-and-comframe/.

provisions in the general insolvency law, and do not specifically address the special considerations arising from their insolvency.[9]

31. *Asset Tracing and Recovery in Insolvency Proceedings: UNCITRAL Toolkit and Background Notes* (2025) is a guidance document addressing asset tracking and recovery mechanisms in insolvency proceedings in general, without being directed specifically to financial institutions such as banks or insurers.

32. The *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes* (ICR Principles, originally developed in 2001, and last revised in 2021) are a distillation of international best practice on design aspects of corporate insolvency and creditor/debtor systems, focusing primarily on general business insolvency systems. The *Insolvency and Creditor Rights Standard* (ICR Standard, 2011), based on the ICR Principles and the UNCITRAL Legislative Guide, is designed as a tool to assist countries in their efforts to evaluate and improve insolvency and creditor/debtor regimes. Furthermore, the *World Bank Study on Out-of-Court Debt Restructuring* (2011) offers an overview of out-of-court restructuring techniques as forming a continuum to address the problem of corporate distress and the *World Bank Toolkit for Corporate Workouts* (2022) describes matters relevant to the adoption of frameworks for a broad range of types of corporate restructuring procedures.

33. The publication *Orderly and Effective Insolvency Procedures: Key Issues* (1999) of the International Monetary Fund (IMF)'s Legal Department outlines the key issues that arise in the design and application of orderly and effective insolvency proceedings, including an analysis of the major policy choices that countries need to address when designing an insolvency system, a discussion of the advantages and disadvantages of these choices, and a number of specific recommendations.

34. In addition to the UNIDROIT LGBL, a relevant UNIDROIT instrument would be the *UNIDROIT Principles on the Operation of Close-Out Netting Provisions* (2013), which aims at ensuring the effective operation of contractual close-out netting clauses, particularly in the event of a party's insolvency. By securing the enforceability of close-out netting, the Principles aim at supporting the modern financial architecture. Their goal is to facilitate economically useful transactions, reduce systemic risk, and enhance the stability of financial markets. At the same time, the Principles aim at safeguarding special public interests in the context of the resolution of financial institutions, which could be undermined by the automatic operation of the netting mechanism.

35. The Working Group may also wish to consider UNIDROIT's work in reinsurance consisting in its partnership with the PRICL Project Group on the *Principles of Reinsurance Contract Law* (PRICL 2025). The PRICL are a non-binding set of principles and rules that parties can either choose as the law governing their contract or incorporate into their contract. While the PRICL do not establish a specific insolvency or liquidation regime for reinsurers, they refer to insolvency as one of several possible trigger events for contractual special termination clauses.[10]

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[9] See, *e.g.*, UNCITRAL *MLCBI* (1997), Art. 1 and para. 56; UNCITRAL *Legislative Guide on Insolvency Law*, Part One & Two (2005), p. 44, footnote 6; UNCITRAL *Legislative Guide on Insolvency Law*, Part Three (2012), p. 2, footnote 3; UNCITRAL *MLEGI* (2019), Art. 1(2); UNCITRAL *MLIJ* (2018), UNCITRAL *MLCBI, with Guide to Enactment and Interpretation* (2013), para. 47.

[10] See *Principles of Reinsurance Contract Law (PRICL 2025),* Art 7.2, comments C9 and C12: "Reinsured and reinsurer are free to stipulate contractual rights to terminate the contract in specific circumstances that materially impair one or both parties' ability to perform their obligations under the contract of reinsurance. The continued performance of the contract of reinsurance may be called into question by internal or external events such as insolvency, loss of license, change of control, war, embargoes, sanctions, or similar restrictions. […] The content, scope and consequences of special termination clauses may differ considerably, as the clauses must take into account the regulatory environment of the relevant jurisdictions, *e.g.*, with regard to insolvency proceedings and creditor rights. With no universally accepted market standard, special termination clauses remain highly individualized and subject to negotiations. The principles therefore do not provide a model rule but instead leave it to the parties to draft a special termination clause that meets their individual needs."

Question for the Working Group:

- *Are there additional international instruments, standards, or initiatives that need to be considered when developing the Guide?*

II. SCOPE OF THE GUIDE

36. The UNIDROIT Secretariat received a mandate from its governing bodies to undertake work on the liquidation of insurers, as a follow-up to the UNIDROIT LGBL. The latter's structure and contents may provide a useful point of reference for the present project, while recognising the distinct features of insurance insolvency. The LGBL is organised around ten chapters: (1) Introduction, (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, (10) Cross-Border Aspects. The proposal from IVASS and the Secretariat's accompanying text (*UNIDROIT 2025 – C.D. (105) 4 rev.*) identified key topics that were aligned with the areas covered in the LGBL, as well as possible rules on the establishment and functioning of policyholder protection schemes (PPSs), for which – unlike for banks' deposit insurance schemes – there is no detailed harmonised international standard.

37. It is proposed that the Guide would cover insurers, irrespective of the type of insurance products they offer. This would include both life insurers (*e.g.*, providing life assurance, annuities or pension-type products) and non-life insurers (covering risks other than life, such as property and casualty insurance), as well as insurers authorised to provide both types of insurance (commonly referred to as composite insurers). Furthermore, the Guide would cover insurers irrespective of their role or function, including insurers that insure other insurers (reinsurers) and insurers owned by a corporate group to insure its own risks (captive insurers); irrespective of their business model (*e.g.*, direct-writing and intermediated insurers); and irrespective of their legal form (*e.g.*, mutual insurers and stock insurers). At the same time, the Guide may need to account for the specific characteristics of different types of insurers where appropriate.

38. The Guide should reflect the particular characteristics of the insurance business that distinguish it from ordinary business insolvency, such as the public-interest dimension of insurance activity, the existence of large numbers of ongoing executory contracts, the existence of mandatory insurance coverages, the special position of policyholders, and the strong cross-border component of the insurance market, particularly in the case of reinsurance.

39. Like the LGBL, it is anticipated that the future Guide focus on liquidation as a form of market exit. This does not mean that all activities of the failing insurer must necessarily cease immediately. On the contrary, in order to preserve value and protect policyholders, the legal framework may need to permit the continuation of operations for a limited period and to facilitate transfer-based solutions, including full or partial portfolio or asset transfers.

40. Accordingly, it is proposed that the Guide cover the key features of liquidation proceedings of insurers, including:

- design of legal frameworks for managing failing insurers;
- objectives;
- institutional arrangements;
- procedural and operational aspects;
- preparation, coordination and cooperation;
- grounds for opening liquidation proceedings;
- liquidation tools;
- funding arrangements, including the role of policyholder protection schemes;
- creditor hierarchy;
- group dimension;

- cross-border aspects.

41. The Guide should seek to identify a comprehensive set of recommendations for the design of effective liquidation frameworks for insurers, focusing on the orderly liquidation of (i) insurers that are not placed under a resolution procedure compatible with the FSB Key Attributes, and (ii) parts of an insurer following, or in the context of, a resolution action, in a manner complementary to, and consistent with, existing international standards on exit from the market and resolution (see Section I above).

Questions for the Working Group:

- *How should the future Guide delineate its subjective scope? Should it provide explanations on the various types of insurers (e.g., life insurers, non-life insurers, reinsurers, captive insurers)?*
- *Should the Guide distinguish between different types of insurers depending on (i) the products they offer, (ii) their role or function, (iii) their business model, and/or (iv) their legal form when formulating its recommendations? If so, to what extent should tailored guidance be developed?*

  It is proposed that, for each of the substantive topics outlined in Section III below, the Working Group considers to what extent specific guidance may be warranted for different types of insurers.
- *Does the Working Group agree with addressing the key features outlined in paragraph 40? Should any additional topics be added, or other modifications be made to the list?*
- *Should the Guide address the establishment and functioning of PPSs as a separate matter or would inclusion under the topic of funding suffice?*
- *Should the treatment of insurance contracts and claims following the opening of liquidation proceedings and the valuation of insurance liabilities and claims be addressed under liquidation tools, like the approach followed in the LGBL, or would these topics require a more distinct treatment in the context of insurer insolvency?*

  When reviewing Section III below, the Working Group is invited to identify possible additional aspects that should be included in the scope of the Guide.

III. CONTENT OF THE GUIDE

42. This Section describes several topics that the Working Group may wish to address in the future Guide. As mentioned above, these topics only provide a starting point for the Working Group's consideration based on initial comparative research. The Working Group is invited to identify possible additional topics that should be included in the scope of the Guide. Furthermore, it is suggested that, for each of the substantive topics, the Working Group considers to what extent specific guidance may be warranted for different types of insurers.

A. Design of legal frameworks for managing failing insurers

43. The LGBL explains how jurisdictions may have either a 'single-track' or a 'dual-track' framework for dealing with bank failures. The same distinction can be made for legal frameworks to manage failing insurers, although it is less sharp than for banks since many jurisdictions historically relied primarily on ordinary insolvency law and insurer resolution frameworks are relatively recent. At the same time, some jurisdictions historically operated closer to a functional 'single-track' model, where rehabilitation, portfolio transfer, and piecemeal liquidation powers existed within a single insurance framework rather than through a clear conceptual separation between resolution and insolvency.

44. In a single-track framework, the failure of any insurer is managed under a single regime – typically a specialised framework that includes various failure-management options administered by the same authority. In such a system, the terminology used in domestic law may not sharply distinguish between "resolution", "insolvency", and "liquidation" ("resolution" may rather be an umbrella term), even though different powers and procedures may still be available depending on the circumstances of the case. For example, Canada,[11] Colombia,[12] and Singapore[13] operate regimes that exhibit features of integrated or functionally single-track frameworks, where restructuring and liquidation powers are exercised within a specialised framework rather than through a sharp conceptual separation between resolution and insolvency proceedings.

45. A dual-track framework, by contrast, distinguishes between "resolution", on the one hand, and "liquidation" or "insolvency proceedings", on the other. These may be governed by separate legal frameworks and may involve different authorities. In the insurance sector, this distinction is particularly relevant because a growing number of jurisdictions are developing specific insurance resolution regimes, while the liquidation of insurers often remains subject to ordinary insolvency law. For instance, the EU's framework for insurance resolution, set out in the IRRD, distinguishes between "resolution" and "normal insolvency proceedings", and national implementation by EU Member States takes the form of a dual-track regime.[14] Under the EU framework, resolution action may be taken

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[11] In Canada, insurer failure management combines supervisory intervention powers under the *Insurance Companies Act* (Canada) with restructuring and winding-up proceedings under the *Winding-up and Restructuring Act (WURA)*. Where a federally-regulated life insurance company becomes non-viable, the Office of the Superintendent of Financial Institutions (OSFI) may request the Attorney General of Canada to apply for a winding-up order under the *WURA*, with Assuris closely collaborating with the court-appointed liquidator to protect policyholders. Alternatively, policies may be quickly transferred to a solvent life insurance company as part of a restructuring plan coordinated by Assuris. Winding-up measures and restructuring measures are thus addressed within a unified statutory framework.

[12] In Colombia, restructuring-type measures, transfers, and piecemeal liquidation are all governed by the same statutory framework; the *Estatuto Orgánico del Sistema Financiero* (EOSF).

[13] In Singapore, supervisory intervention, statutory management, portfolio transfers, and winding-up are governed within an integrated framework under the *Insurance Act*, administered by the Monetary Authority of Singapore (MAS), with the *Insolvency, Restructuring and Dissolution Act 2018* (*IRDA*) providing a general insolvency back-stop for court-supervised winding-up proceedings.

[14] The *IRRD* distinguishes between "resolution", applicable only where the conditions under Art. 19(1) are cumulatively met, and "normal insolvency proceedings", defined in Art. 2(38) as "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to insurance and reinsurance undertakings under national law […]." Although the *IRRD* applies from 30 January 2027, EIOPA had identified France, the Netherlands and Romania as

only if it is "necessary in the public interest", and if there is no reasonable prospect that supervisory or private sector measures would prevent the insurer's failure within a reasonable timeframe. If that threshold is not met, the failing institution will be dealt with under the applicable national insolvency law using whatever procedures and tools are available under that law. The applicable national insolvency law also applies when a residual entity is wound up following a resolution transfer of the institution's viable activities.

46. The LGBL adopted a neutral approach, not describing or assuming the existence of a specific type of bank failure management framework – although it explains that not all parts of the Guide are equally relevant for single-track and dual-track regimes.[15] The Working Group may wish to consider adopting the same strategy for the future Guide.

47. Furthermore, jurisdictions with a dual-track regime may either have: (i) an insurance-specific insolvency regime; (ii) an ordinary business insolvency regime; or (iii) a modified business insolvency regime – *i.e.*, a regime where the business insolvency law is applicable to insurers but with adaptations reflecting the special nature and characteristics of insurers (*e.g.*, special tools, involvement of the insurance supervisor and/or PPSs in specific steps, preferred ranking for policyholders).

48. In light of the special nature of insurance activities and their role in the financial markets and real economy, general business insolvency laws may not adequately address the particular characteristics of insurer failure unless supplemented by insurance-specific provisions. It may therefore be considered to advise jurisdictions to adopt an insurance-specific liquidation law or to modify the generally applicable insolvency law.

49. For banks, the LGBL advises jurisdictions to include bank liquidation provisions in a dedicated bank liquidation law, noting that a *lex specialis* contributes to legal certainty and procedural clarity. Alternatively, bank-specific provisions could be integrated in the banking law or general business insolvency law, provided they are clearly demarcated and readily identifiable.[16]

Questions for the Working Group:

- *Should the future Guide provide explanations on the design of legal frameworks for managing failing insurers? If so, does the Working Group agree to adopt a neutral approach vis-à-vis single-track and dual-track frameworks?*
- *Should the Guide recommend a dedicated insurer-liquidation law, insurance-specific provisions within general insolvency or insurance legislation, or remain neutral between these approaches? To what extent should the guidance differ between single-track and dual-track frameworks??*

B. Definitions

50. The use of terms such as "insolvency", "liquidation", "winding-up", "run-off", "restructuring/reorganisation" and "resolution" varies across jurisdictions. These differences are often connected to the existence of different legislative frameworks for dealing with failing insurers among jurisdictions.

jurisdictions introducing resolution-like elements prior to its entry into force; see EIOPA, *Opinion to Institutions of the European Union on the Harmonisation of Recovery and Resolution Frameworks for (Re)Insurers across the Member States* (2017), p. 56. The French *Code des assurances* establishes a distinct insurer-resolution procedure conducted by the ACPR's resolution college alongside judicial liquidation, with provisions governing the interaction between the two procedures (Arts. L.311-18–L.311-55 and L.326-1–L.326-2).

15 UNIDROIT LGBL, Chapter 1, Section E. Neutrality of the Guide.

16 *Ibid.*, Recommendation 1.

51. A functional approach to legal concepts may be most appropriate in order to ensure that the future instrument is not jurisdiction-specific, but capable of being applied and adapted in any legal system or culture. The future Guide could enable jurisdictions to take a common approach to legal issues arising out of the failure of insurers.

52. For banks, the LGBL uses the term "liquidation", interpreting it in a broad manner as covering both piecemeal liquidation and sales as a going concern.[17] The LGBL contains a glossary that explains the intended meaning of terms that frequently appear in the Legislative Guide, several of which may also be relevant for the future Guide on the liquidation of insurers (*e.g.*, home and host jurisdiction, liquidation authority, liquidator, etc.). More generally, as mentioned above, it suggested that the terminology used in the Guide be harmonised with those of existing instruments to the extent possible.[18] To this end, the Working Group may wish to consider the overview of definitions in relevant existing instruments, which is shared separately (confidential work in progress).

53. It should be noted that this Issues Paper tentatively uses the term "insurer" since it seems to be the most neutral global term – it is used in the *FSB Key Attributes* and the *IAIS ICPs* – but other terms used at domestic, regional, and international levels include "insurance company", "insurance enterprise", and "insurance undertaking".

Questions for the Working Group:

- *Should the future Guide use "liquidation" as main concept to cover piecemeal liquidation and other liquidation tools, similar to the approach taken in the LGBL, or would a different approach be preferable for insurers?*
- *Does the Working Group agree to use the term "insurer" rather than alternatives such as "insurance undertaking", "insurance enterprise", or "insurance company"?*
- *Should the Guide provide a definition of "insurer" (or any alternative considered more appropriate)? If so, what should the definition be?*
- *Which other terms are key for the liquidation of insurers and might therefore warrant to be defined in the future Guide (e.g., "run-off", "portfolio transfer")?*

C. Objectives of a liquidation framework for insurers

54. The main objective of business insolvency laws is to maximise the value of the insolvency estate.[19] For banks, the LGBL identifies five key objectives of an effective bank liquidation framework: (i) value preservation and maximisation; (ii) depositor protection; (iii) financial stability; (iv) avoiding loss to public funds; and (v) certainty and predictability. It explains that the identification of objectives is primarily meant to inform the design of the legal framework. It does not prescribe how each objective should be incorporated in the legal framework, since that may depend on the broader policy choices and design features of the bank liquidation framework at hand, but it does recognise that some objectives are more in the nature of a guiding design principle while others might be more appropriate as an explicit objective for the liquidator. Furthermore, the LGBL recommends that the legal framework provides guidance on how to weigh objectives should friction

[17] UNIDROIT LGBL, Chapter 1, Glossary point (7) "(Bank) liquidation proceeding: a collective judicial or administrative proceeding, in which the assets and affairs of a bank are subject to control or supervision by a court or administrative authority for the purpose of a piecemeal liquidation or a sale as a going concern, and in any case ending with the exit of the bank from the market".

[18] Where definitions differ, it might be considered to choose as reference the instrument whose scope and function most closely corresponds to the context in which the term is used (*e.g.*, IAIS materials for insurance-specific concepts, FSB instruments for concepts relating to systemic relevance and resolution, and UNCITRAL instruments for general insolvency concepts).

[19] See, *e.g.*, UNIDROIT LGBL, para. 45; EIOPA, Staff Paper on the Proposal for an Insurance Recovery and Resolution Directive (2022), pp. 5-6: "Whereas a liquidator typically has an optimal (financial) result for all creditors as the objective, the RA will look at the bigger picture for both policyholders and society as a whole."

arise between them. As a general principle, it advocates that value maximisation should not compromise public policy objectives (financial stability and depositor protection).[20] These considerations may provide a useful analytical starting point for identifying the key objectives of liquidation regimes for insurers, while taking into account the specific features of insurance business and the different interests affected by insurer failure.

55. Resolution frameworks for insurers, where they exist, typically pursue public-interest objectives in light of the specific nature of insurance business. In particular, the *FSB Key Attributes* refer to (i) financial stability, both domestically and the impact of resolution actions on financial stability in other jurisdictions; (ii) ensuring continuity of systemically important financial services; (iii) protection of insurance policy holders, beneficiaries and claimants; (iv) avoiding unnecessary destruction of value and seeking to minimise the overall costs of resolution and losses to creditors.[21] They also highlight that taxpayers should not be exposed to loss. The *IAIS ICPs* also expressly refer policyholder protection as a key objective.[22] In addition, it recognises broader public-interest objectives such as minimising reliance on public funding and financial stability.[23] Neither the *FSB Key Attributes* nor the *IAIS CPs* provide an explicit ranking of the various objectives.[24]

56. The protection of policyholders is a common objective of insurer liquidation frameworks, which may be reflected in the mandate of the relevant authority or embedded indirectly in statutory priority rules or dedicated PPSs.

Questions for the Working Group:

- *Should the future Guide outline key objectives of an effective insurer liquidation framework? If so, what should the objectives be and should they be ranked, or should guidance on possible frictions between different objectives be provided?*

  The Working Group may wish to follow a holistic approach when identifying the main objectives of insurer liquidation proceedings, considering that they may have an impact on the design of key aspects of these proceedings, such as the type of tools and powers that are available to deal with failing insurers, the institutional model and management of the process (see the next subsections).

D. Institutional arrangements

57. In the UNIDROIT LGBL, institutional arrangements are broadly grouped into two main models: (i) an administrative model, wherein the liquidation proceeding is managed by an administrative authority with only a limited role for the courts (judicial scrutiny or legal challenges, without being involved in the general oversight of the process);[25] and (ii) a court-based model with administrative involvement, whereby a court is primarily in charge of opening and overseeing the proceeding but within which the relevant banking authorities retain an important role.[26] The Guide further recognises that, in practice, many jurisdictions combine elements of both models, resulting in "hybrid" institutional designs.[27] The LGBL emphasises the advantages of an administrative model for bank

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20 UNIDROIT LGBL, Chapter 1, Section H.6 and Recommendation 2.

21 *FSB Key Attributes* (2024), KA 2.3 and II-Annex 2, 1.1.

22 IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 12.2.

23 *Ibid*., ICP 12.2.1: "[…] A jurisdiction may have additional resolution objectives in the legislation, such as contributing to financial stability" and ICP 12.2.3: "Resolution should seek to minimise reliance on public funding."

24 *Ibid*., CF 12.2.a.1: "A jurisdiction may, at its discretion, choose to rank these resolution objectives with respect to IAIGs." The *FSB Key Attributes* (2024) do indicate that the objective of avoiding unnecessary destruction of value and seeking to minimise the overall costs of resolution should be pursued "where that is consistent with the other statutory objectives".

25 *Ibid*., Chapter 2, paras 71 and 75.

26 *Ibid*., Chapter 2, para. 76.

27 *Ibid*., Chapter 2, para. 69.

liquidation.[28] The Guide's preference for the administrative model is driven mainly by four considerations: objectives, preparation, expertise/efficiency/access to information, and cooperation, where it highlights the typical comparative advantages of administrative compared to court-based models. By contrast, independence, accountability, and transparency are generally considered achievable under both models, although it notes with respect to transparency that the legal framework should ensure, especially for court-based models, that part of the process can be conducted confidentially.[29]

58. Similar to banks, there are significant divergences among jurisdictions in the institutional set-up for the liquidation of insurers. For instance, Italy [30] and Switzerland [31] have a predominantly administrative-led model, while the court plays a larger role, for instance, in Canada [32] and the United States. [33]

59. The choice between primarily administrative and court-based models entails trade-offs in terms of speed and flexibility, specialist expertise, institutional coordination, and procedural safeguards for affected policyholders. In the insurance context, these trade-offs are shaped in particular by the need for prompt action in relation to ongoing insurance and reinsurance contracts and policyholder rights, as well as by the institutional capacity of authorities and courts to carry out complex valuations and portfolio transfers without jeopardising the timely and orderly implementation of liquidation measures.

Questions for the Working Group:

- *Should the Guide follow the main institutional models identified in the LGBL or does the insurance context requires a different typology of institutional arrangements?*
- *Which arrangements may be appropriate in 'hybrid' models to facilitate smooth cooperation between courts and administrative authorities whilst ensuring a swift process?*
- *Should the Guide cover judicial review mechanisms?*

E. Procedural and operational aspects

60. Chapter 3 of the LGBL addresses the procedural and operational dimension of bank liquidation through five main issues: (1) the notification duties of the bank's management in the period approaching liquidation, including the consequences of non-compliance and coordination among banking authorities; (2) the initiation of bank liquidation proceedings, in particular who should be entitled to open the process and what safeguards are needed where actors other than a banking authority may be entitled to do so; (3) aspects concerning the liquidator, including qualifications,

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28 *Ibid*., Chapter 2, para. 67.

29 *Ibid*., Chapter 2, paras 110-111.

30 In Italy, liquidation proceedings for insurers are governed by the *Italian Code of Private Insurers*, which provides for administrative liquidation (*liquidazione coatta amministrativa*) initiated and supervised by IVASS.

31 In Switzerland, the Swiss Financial Market Supervisory Authority (FINMA) is empowered under the *Insurance Supervision Act* to initiate and conduct insurance insolvency proceedings, including the imposition of protective measures and the initiation of restructuring or liquidation proceedings.

32 In Canada, insurer liquidation proceedings are court-supervised under the *WURA* (Canada), under which a court issues a winding-up order (upon application by the Attorney General) and appoints a liquidator.

33 In the United States, insurer liquidation and rehabilitation proceedings are court-supervised receiverships. The process is formally initiated by court order, which appoints the State insurance commissioner as receiver or liquidator, who then administers the insurer's estate under judicial oversight pursuant to State receivership statutes and National Association of Insurance Commissioners (NAIC) model legislation. See NAIC, *Receivers' Handbook for Insurance Company Insolvencies* (2024), p. 5: "A receivership is a court proceeding, and the judicial process is governed by the state's court system and rules of procedure." NAIC, *Insurer Receivership Model Act* (2007), Section 501(A): "An order to liquidate the business of an insurer shall appoint the commissioner and any successor in office as the liquidator and shall direct the liquidator to take possession of the property of the insurer and to administer it subject to this Act."

appointment, remuneration, oversight, accountability, and legal protection; (4) the role of creditors in the liquidation process, which is more limited than in regular business insolvency proceedings due to the special nature of banks and the role of banking authorities; and (5) the termination of the proceedings, including the final accounts, final report, and the formal closing of the process.

61. Depending on the institutional design, insurer liquidation may be primarily judicial or administrative (see Section D above). In some jurisdictions, such as Germany, the court opens the proceedings and appoints the insolvency administrator, but only the supervising authority may apply for the opening of insolvency proceedings.[34] In judicial liquidation, the court typically opens and supervises the proceedings, but the liquidator need not necessarily be a private insolvency practitioner: in some legal systems, the insurance supervisor or resolution authority may act on behalf of the court or be appointed as a receiver/liquidator under court supervision.[35]

62. Where insurer liquidation proceedings are administrative, an administrative authority may place the insurer into compulsory liquidation, appoint one or more liquidators and, in some jurisdictions, establish a supervisory committee.[36] In administrative models, insurer liquidation may be managed either by the insurance supervisor, acting directly or through liquidators appointed and supervised by it, or by the entity administering the PPS acting as liquidator or insolvency administrator. The involvement of the supervisor (which may also be the resolution authority) may create institutional synergies because the supervisor retains responsibility for prudential oversight and therefore has a good understanding of the insurer and the broader sector, and it benefits from coordination arrangements with supervisors in other jurisdictions. The involvement of a PPS body may create different synergies, given its statutory role in protecting policyholders and, in some jurisdictions, facilitating the satisfaction of their claims.[37] Even in court-based systems, similar synergies may exist where supervisory or PPS authorities are appointed to act under court supervision.

63. Jurisdictions also differ significantly in the design of the person in charge of insurer liquidation, as well as in the procedural position of the affected parties. Depending on the jurisdiction, the liquidator may be the supervisor/resolution authority itself, one or more supervisor-appointed liquidators, a court-appointed insolvency practitioner, or a combination of actors with distinct functions and responsibilities.[38] Legal frameworks also vary with respect to qualifications, reporting obligations, committee support, remuneration, accountability, liability standards, and legal protection of the liquidator.

64. Comparative practice suggests that policyholders are generally not the actors responsible for opening or administering the proceedings but are instead treated as a specially protected class of

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[34] See, *e.g.*, *Versicherungsaufsichtsgesetz* (VAG) (Germany), §§ 311–312, under which management must notify the supervisory authority of insolvency or asset insufficiency, and only the supervisory authority may apply for the opening of insolvency proceedings. The proceedings are opened by the insolvency court and administered by a court-appointed insolvency administrator under the *Insolvenzordnung* (InsO), §§ 27, 56.

[35] IAIS, *Insurance Core Principles and ComFrame* (2024), CF 12.8.i.2: "In some jurisdictions with judicial liquidation, the resolution authority is appointed to act on behalf of the court." For the United States, see NAIC, *Receivers' Handbook for Insurance Company Insolvencies* (2024), p. 8: "The NAIC Model Acts require that the chief insurance regulator of the insurer's domiciliary state be appointed receiver of the insurer to administer the receivership under court supervision. The chief insurance regulator in the individual state may be referred to as commissioner, treasurer, superintendent, or director. For purposes of this Handbook, the term 'regulator' is used to encompass all such officials."

[36] See, *e.g.*, *Code of Private Insurance* (Italy), Art. 246: "IVASS shall appoint one or more liquidators and a supervisory committee made up of from three to five members, with the chairman designated in the deed of appointment."

[37] See, *e.g.*, *Ley 20/2015, de 14 de julio, de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras* (Spain), Arts. 183 and 186.

[38] See, *e.g.*, *Code des assurances* (France), Art. L.326-1, under which the ACPR appoints a liquidator responsible for verifying insurance claims and inventorying assets directly linked to insurance liabilities, while the court appoints one or more liquidators responsible for inventorying the other assets and conducting the liquidation operations.

creditors. Their protection is commonly secured through the preferential ranking of insurance claims[39] (see Section J below) and, in some systems, through ring-fenced or tied assets that support insurance liabilities [40]. Procedurally, policyholders are typically granted rights to receive notice, lodge claims and be kept informed,[41] while the process itself is conducted by the liquidation authority (administrative or judicial), liquidator or receiver. Even where some form of creditor participation exists (*e.g.*, in the form of a creditor committee), it is usually limited or indirect.[42] In some systems, transfers of insurance portfolios or reinsurance arrangements may be implemented without policyholder consent, subject to court approval and fairness and equity standards (see Section H below).[43] Where PPSs operate, they commonly compensate policyholders and then subrogate to the latter's' rights against the insolvency estate, thereby shifting the recovery role from policyholders to a collective protection body.[44]

Recommendations for the Working Group:

- *Should the Guide recommend which specific administrative authorities should be involved in (certain parts of) the insurer liquidation process.*
- *What approaches should the Guide consider regarding:*
  - *i. the selection, appointment, supervision, remuneration, accountability, and legal protection of the person or body responsible for administering and executing the insurer liquidation proceedings;*
  - *ii. the opening of the liquidation process and legal standing to file for an insurer's insolvency; and*
  - *iii. the role of creditors, and particularly policyholders, in the proceedings?*

  For instance, should standing to apply for the opening of insurer liquidation proceedings be reserved exclusively to relevant administrative authorities (e.g., insurance supervisor, resolution authority, or a PPS authority) or should applications also be permitted from the insurer itself, its management, shareholders, policyholders, and/or other creditors? Where other applicants have standing, what role should the insurance supervisor have?
- *Should the Guide address management notification duties before liquidation and the requirements for terminating proceedings, including final accounts, reporting and the treatment of outstanding claims?*

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39 See, *e.g.*, *Solvency II*, Art. 275(1).

40 See IAIS, *Issues Paper on Policyholder Protection Schemes* (2013), p. 4: "Some jurisdictions provide added protection for policyholders and ensure the priority of policyholder claims in the event of an insolvency through additional mechanisms within the supervisory framework such as the ring-fencing of assets (*e.g.*, tied assets) that support insurance liabilities."

41 See *Solvency II*, Arts. 281, 282, 284.

42 NAIC, *Insurer Receivership Model Act* (2007), Section 209.C: "If the receiver, in his or her sole discretion, deems it necessary to the proper performance of the receiver's duties under this Act, the receiver may appoint an advisory committee of policyholders, claimants or other creditors including guaranty associations. The committee shall serve at the pleasure of the receiver and shall serve without compensation and without reimbursement for expenses."

43 See, *e.g.*, *WURA* (Canada), Section 162: "The liquidator may, with the approval of the court and without the consent of the policyholders, arrange for the transfer or reinsurance of [...] if the terms of the transfer or reinsurance are, in the opinion of the court having regard to the priorities set out in this Part, fair and equitable to (c) the policyholders whose policies are being transferred or reinsured, (d) the estate of the company as a whole, and (e) the remaining policyholders of the company."

44 See IAIS, *Issues Paper on roles and functioning of Policyholder Protection Schemes* (2023), p. 13: "Most PPSs, after they have (totally or partially) compensated policyholders, are "subrogated to the rights of the policyholders" up to the amounts they have compensated."

F. Preparation and cooperation

65. Chapter 4 of the LGBL explains that, unlike resolution planning, liquidation planning in normal times is usually limited. However, contingency planning in the period preceding a bank's non-viability is often critical to the success of a bank's liquidation.[45] Preparation is particularly important because a sale as a going concern or the swift payout of insured depositors may fail or be delayed in the absence of advance work.[46] The Chapter therefore emphasises that the legal framework should enable banking authorities to prepare liquidation strategies, secure the bank's cooperation, and become involved in a timely manner in predominantly court-based models. Where appropriate, prospective liquidators or third-party experts should be involved. It further notes that, where court approval is required for the formal opening of liquidation, banking authorities should take such process into consideration in contingency planning.[47] It also stresses that effective liquidation depends on close coordination among all relevant actors, including the liquidation authority, the bank, the banking supervisor, the deposit insurer, the resolution authority, courts, and, where relevant, market authorities.[48] Overall, the Chapter considers preparation and cooperation as essential preconditions for a timely, orderly, and effective bank liquidation in both administrative and predominantly court-based systems.

66. Similar considerations may arise in the context of an insurer's insolvency. In several jurisdictions, as the insurer's condition deteriorates, contingency planning is undertaken before a petition for liquidation is filed.[49] Such planning may start at an early stage and become progressively more detailed as the insurer moves closer to non-viability. In some jurisdictions, the planning includes the preservation of sufficient assets and the preparation of electronic policyholder and claims data before the liquidation order is entered.[50]

67. Before the opening of a liquidation proceeding, effective preparation may require ensuring that the insurer's data and records can be secured, accessed and used by the liquidation authority. In several jurisdictions, this is supported by powers allowing the relevant authority to inspect books and documents, preserve physical and electronic data, and secure systems and records before the

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45 UNIDROIT LGBL, Chapter 4, para. 163: "Conversely, planning for liquidation purposes in normal times is typically limited. […] Liquidation planning as part of business-as-usual activities is, however, different from the preparation of a liquidation strategy and plan in the run-up to a bank's non-viability (so-called "contingency plans"). Contingency plans are often crucial for the success of a bank's liquidation."

46 *Ibid*.

47 *Ibid.*, Recommendation 11(b) and Chapter 4, para. 178.

48 *Ibid*., Chapter 4, Section D.

49 See, *e.g.*, OSFI, *Guide to Intervention for Federally Regulated Life Insurance Companies* (Canada, webpage) "Developing a contingency plan to enable OSFI to be ready to take control of the assets of the company or the company itself in case of rapid deterioration." See also NAIC, *Insurer Receivership Model Act* (2007), Section 303: "The conservator shall begin appropriate contingency planning and organizing so that an orderly transition to liquidation occurs, if liquidation is necessary."

50 NAIC, *Insurer Receivership Model Act* (2007), Section 303: "the conservator to the fullest extent possible reserve sufficient assets to continue to meet obligations under insurance policies of the insolvent insurer until the guaranty associations are triggered [...] In the case of a property and casualty insurer, the conservator, in cooperation with the guaranty associations, shall make all reasonable efforts to prepare the insurer's electronic policy and claims data so that, upon the entry of an order of liquidation the data will be ready for transmission using the Uniform Data Standards as promulgated by the National Association of Insurance Commissioners."

formal commencement of insolvency proceedings.[51] Such preparation seeks to ensure that, once liquidation grounds are met, the relevant authority can rapidly identify policyholders and creditors.[52]

68. Preparation may need to include structured coordination with other relevant authorities. Existing international standards require that the roles and responsibilities of relevant authorities be clearly defined and that those authorities share information, cooperate and coordinate through appropriate confidential information-sharing arrangements.[53] Comparative practice reflects this approach. In the European Union, the Solvency II framework requires competent authorities of the home Member State to inform supervisory authorities of that Member State of a decision to open winding-up proceedings as a matter of urgency, where possible before the proceedings are opened.[54] In Canada, OSFI's intervention framework provides for contingency planning with compensation body Assuris before a winding-up order for a life or health insurer.[55] In the United States, the NAIC Insurer Receivership Model Act requires conservators to begin contingency planning by cooperating with policyholder protection bodies, and provide them with appropriate information, periodic updates and a reasonable period of time to plan and organise.[56]

Recommendation and questions for the Working Group:

- *To what extent prior preparation may be required for insurer liquidation proceedings, and how this can be facilitated? For instance:*
- *Should guidance be provided on contingency planning and cooperation among different actors in the run-up to the non-viability of an insurer? What powers and arrangements may be needed to preserve and obtain timely access to policyholder data, claims records and operational systems before and during liquidation, subject to appropriate confidentiality safeguards?*
- *Could a prospective liquidator play a role in court-based systems?*
- *Should the future Guide provide guidance on the valuation of assets and liabilities of a failing insurer, considering the complexity of contingent and long-term insurance obligations, especially under ongoing insurance contracts? In which chapter or section of the future Guide should such guidance be provided?*

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[51] OSFI, *A general guide to OSFI's intervention process*, The agent's role involves making decisions about and taking action regarding the ongoing operation of the DTI, including: "Creating a full backup of the DTI's financial information and any other important information and safeguarding all important physical and electronic data, systems and records" (https://www.osfi-bsif.gc.ca/sites/default/files/2023-06/intervention-intervention.pdf); Japan, *Insurance Business Act* (1995), Arts. 128–129, concerning supervisory monitoring prior to formal proceedings, authorising the regulatory authority to require the submission of reports or materials, ask questions, and inspect books, documents, and other relevant items."

[52] NAIC, *Receivers' Handbook for Insurance Company Insolvencies* (2024), p. 154: "The first step in this process is to develop a master mailing list of creditors from the insurer's books and records and other interested parties."

[53] IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 12.5: "The roles and responsibilities of relevant authorities within a jurisdiction that are involved in exit of insurers from the market or their resolution are clearly defined." ICP 12.6: "The supervisor and/or resolution authority shares information, cooperates and coordinates with other relevant authorities for the exit of insurers from the market or their resolution." See also IAIS, *Issues Paper on roles and functioning of Policyholder Protection Schemes* (2023), para. 126: "It can be useful to have MoUs in place between the PPS and the supervisor, and also between the PPS and the resolution authority [...] to spell out the terms under which confidential information is shared and the duties and expectations of the parties."

[54] *Solvency II*, Art. 273.

[55] OSFI, *Guide to Intervention for Federally Regulated Life Insurance Companies* (Canada, webpage), "OSFI commencing contingency planning in consultation with Assuris."

[56] NAIC, *Insurer Receivership Model Act* (2007), Section 303: "the conservator shall conduct affairs in such a way and cooperate as necessary with the guaranty associations that may become liable as a result of the insolvency of the insurer to ensure that the guaranty associations are provided with appropriate information, along with necessary updates at reasonable intervals, and a reasonable period of time to plan and organize so that the guaranty associations are able to properly discharge statutory responsibilities upon being triggered."

G. Grounds for opening insolvency proceedings

69. Chapter 5 of the LGBL focuses on the grounds for opening bank liquidation proceedings, explaining that these must be clearly specified in the bank failure management framework. This is particularly important in dual-track regimes, where a decision between resolution and liquidation must be made upon finding a bank's non-viability.[57] In line with the *FSB Key Attributes*, the concept of "non-viability or likely non-viability" is recommended as a reference point in designing the grounds for opening bank liquidation proceedings.[58] The Guide discusses how grounds may include both financial and non-financial elements,[59] and that they should not be confined to traditional business insolvency tests.[60] Because of the special nature of banks, in particular the maturity mismatch between their assets and liabilities, their heavy reliance on on-demand deposits, the opacity of their assets, and their particular exposure to rapidly escalating liquidity stress, the LGBL recommends grounds should contain forward-looking elements that allow intervention before balance-sheet insolvency or an actual cessation of payments occurs.[61] As liquidation is a procedure that leads to the exit of the bank from the market, it should operate as an *ultima ratio*; the LGBL therefore explains that liquidation should only be triggered where other measures have no reasonable prospect of success in addressing the bank's problems.[62] Finally, the Chapter stresses that the liquidation grounds should be aligned both with licence revocation and – in dual-track regimes – with resolution triggers, so as to avoid "limbo" situations and to ensure the smooth transition to liquidation of a residual entity after resolution.[63]

70. Drawing on the LGBL, the Working Group may wish to consider whether grounds for opening insurer liquidation proceedings should include financial grounds, non-financial grounds and a recovery-related condition, and to what extent forward-looking elements would be appropriate. At the international level, the *FSB Key Attributes* refer to the concept of (likely) non-viability standard also for insurers. Appendix II-Annex 2 provides three main examples of suitable standards or indicators.[64] The *Assessment Methodology* provides further illustrative indicators of (likely) non-viability.[65] On the basis of the FSB's guidance, financial grounds cover the inability to pay liabilities, breaches of minimum capital or assets backing technical provisions, and serious impairment of access to market-based funding. Although the FSB does not separately catalogue a standalone non-financial limb, its references to breaches of "other prudential requirements", and to "quantitative or qualitative criteria" leave room for domestic law to include non-financial indicators. Forward-looking elements are present because the FSB framework requires entry when non-viability is actual or likely, before

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57 UNIDROIT LGBL, Chapter 5, para. 196.

58 *Ibid.*, Recommendation 42 and para. 205.

59 *Ibid.*, paras 198-200.

60 *Ibid.*, paras 201-207.

61 *Ibid.*, Recommendation 42 and Key Considerations.

62 *Ibid.*, para. 208.

63 *Ibid.*, Chapter 5, Sections C and D, Recommendations 43 and 44.

64 *FSB Key Attributes* (2024), Appendix II-Annex 2, para. 4.1: "[…] Suitable standards or indicators may include a determination by the supervisory authority, in consultation with the resolution authority (where the supervisory authority is not also the resolution authority) that, for example: (i) The insurer is in breach of minimum capital, assets backing technical provisions, or other prudential requirements and there are not reasonable prospects of restoring compliance with these requirements; (ii) there is a strong likelihood that policyholders or creditors will not receive payments as they fall due; and (iii) recovery measures have failed, or there is a strong likelihood that proposed recovery measures will not be sufficient, to return the insurer to viability or cannot be implemented in a timely manner."

65 *FSB KAAM* (2026), EN 3(c): "[…] General examples of non-viability could include (i) regulatory capital, assets backing technical provisions, or other prudential requirements fall below specified minimum levels; (ii) the insurer is expected to be unable to pay liabilities as they fall due; (iii) there is a serious impairment of the insurer's access to market-based funding sources; (iv) the insurer depends on official sector financial assistance to sustain operations or would be dependent in the absence of resolution; (v) recovery measures have failed, or there is a strong likelihood that proposed recovery measures will not be sufficient, to return the insurer to viability or cannot be implemented in a timely manner."

balance-sheet insolvency.[66] Finally, the negative condition is satisfied when there is a strong likelihood that recovery measures would not be sufficient return to viability or cannot be implemented in a timely manner.

71. In national insurance insolvency frameworks, the protection of policyholders' interests is typically used as an important reference point in formulating the grounds for opening liquidation proceedings: such grounds, whether financial or non-financial, often identify situations in which the insurer can no longer, or is likely no longer to be able to, meet its obligations to policyholders, or in which its assets are no longer sufficient to protect the interests of policyholders.[67] Financial grounds may also include the inability to meet liabilities as they fall due, asset insufficiency, serious capital deterioration, and other financial requirements such as the insolvency of statutory insurance funds.[68] Under the non-financial limb, serious failures of authorisation, registration, governance, compliance, or record-keeping requirements may justify compulsory liquidation, either independently or together with financial deterioration.[69] In some legal systems, it may also be justified in case of non-

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[66] *FSB Key Attributes* (2024), KA 4.1: "Such standards or indicators should allow for timely and early entry into resolution when the insurer is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so, and before it is balance-sheet insolvent."

[67] See, *e.g.,* NAIC, *Insurer Receivership Model Act* (2007)*,* Section 207(H): "At any time after the issuance of an order under Section […], or at the time of instituting any proceeding under this Act, it appears to the commissioner that upon good cause shown, it would not be in the best interest of the policyholders, creditors or the public to proceed with the conduct of the business of the insurer". See also, *e.g.*, in South Africa, the *Insurance Act No.18 of 2017,* Section 58(1): "The Prudential Authority may make an application under the Companies Act for the winding-up of an insurer or a controlling company, if the Prudential Authority reasonably believes that it is in the interests of the policyholders of that insurer or, in the case of a controlling company, it is in the interests of policyholders of the insurers that are part of the insurance group to do so"; and in Australia, the *Insurance Act 1973*, Section 62ZU (1) - (2): "After the investigation of a general insurer has been made under Part V, APRA may apply to the Federal Court for an order that the general insurer be wound up. The Federal Court may make an order if satisfied that it is in the interests of the general insurer's policyholders."

[68] See, *e.g., IRRD*, Art. 19(4): "An insurance or reinsurance undertaking shall be deemed to be failing or likely to fail in any of the following circumstances: (a) the insurance or reinsurance undertaking is in breach or likely to be in breach of the Minimum Capital Requirement referred to in Title I, Chapter VI, Section 5, of Directive 2009/138/EC and there is no reasonable prospect of compliance being restored; […] (c) the assets of the insurance or reinsurance undertaking are or there are objective elements to support a determination that the assets of the undertaking will, in the near future, be less than its liabilities; (d) the insurance or reinsurance undertaking is unable to pay its debts or other liabilities, including payments to policy holders or beneficiaries, as they fall due, or there are objective elements to support a determination that the undertaking will, in the near future, be in such a situation". While these are the conditions for resolution action, it follows from Art. 21 of *IRRD* that the same conditions require an insurer to be made subject to winding-up or other national proceedings ensuring an orderly market exit if no resolution action is taken.

Insurance Companies Act (Canada), Section 679(1.1) provides for control by the Superintendent *inter alia* where "(a) the company, society or provincial company has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable"; "(c) the assets of the company, society or provincial company are not, in the opinion of the Superintendent, sufficient to give adequate protection to its policyholders and creditors"; "(e) the regulatory capital of the company, society or provincial company has, in the opinion of the Superintendent, reached a level or is eroding in a manner that may detrimentally affect its policyholders or creditors."

Insurance Act 1966 (Singapore), Section 121(1): "Where the Authority gives an insurer a direction under section 102(2)(a)(v) by reason of the insolvency of the fund maintained by the insurer under this Act for either class of insurance business, the affairs of the insurer may be wound up by the Court under the *IRDA* (Singapore) as if it had suspended its business for a whole year or, in the case of a winding up under Part 10 of that Act, as if it had ceased to carry on business." Section 17(1)-(5): "Every licensed insurer must satisfy –(a) such fund solvency requirements in respect of each insurance fund established by the insurer under this Act; and (b) such capital adequacy requirements, as may be prescribed or specified in directions for the purposes of this section."; "Without limiting section 102, the failure of a licensed insurer to comply with subsection (1) […] is sufficient cause for the Authority to be satisfied that the affairs of the insurer are being conducted in a manner likely to be detrimental to the public interest or the interests of the policy owners and to issue such directions under section 102(1) as the Authority may consider necessary."

[69] See, *e.g.*, NAIC, *Insurer Receivership Model Act* (2007)*,* Section 207*:* The commissioner may file a petition for an order of conservation, rehabilitation or liquidation if, for example: (G) "The insurer […] [has] concealed, removed, altered, destroyed or failed to establish and maintain books, records, documents, accounts, vouchers, and other pertinent material adequate for the determination of the financial condition of the insurer […] or has failed to properly administer claims or maintain claims records that are adequate for the determination of its outstanding claims liability"; (I) "The insurer is in such condition that the further transaction of business would be hazardous financially […] or otherwise, to its policyholders, creditors or the public"; (J) "There is

compliance with supervisory intervention orders designed to stabilise the insurer before winding-up becomes necessary.[70] Forward-looking elements allow for entry into liquidation once objective indicators show that an insurer is no longer viable, or likely to be no longer viable, and there is no realistic path back to compliance or viability.[71]

72. The Working Group may wish to consider whether the future Guide should recommend aligning the grounds for opening liquidation proceedings with the rules on licence revocation, as done in the LGBL. Within the EU, for example, the Solvency II framework distinguishes licence revocation from the opening of winding-up proceedings. The Court of Justice of the European Union has held that the withdrawal of the authorisation together with the appointment of a provisional liquidator does not by itself amount to such a decision unless domestic law gives that measure automatic winding-up effect or empowers the provisional liquidator to realise assets and distribute proceeds.[72] However, under the IRRD, non-compliance with licence requirements or serious failure of obligations in a way that would justify licence revocation is a ground for starting resolution or insolvency proceedings.

73. In some jurisdictions, the revocation of the licence and the opening of a liquidation proceeding take place in parallel, each based on distinct legal grounds.[73] A total separation of the two processes is undesirable because it may lead to inconsistent assessments and limbo situations where an insurer continues to operate on the market while no longer having a licence or no longer being viable. It may also be the case that one procedure precedes and is a ground for the other. Similar as for banks, the relationship may be structured in two principal ways: withdrawal of the licence may be a trigger for compulsory liquidation, or it may follow as a consequence of liquidation. For example, in the EU, authorisation-related failures are part of the "failing or likely to fail" assessment, and where those conditions are met, but resolution is not justified in the public interest, the insurer should be made

reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's property, forgery or fraud affecting the insurer, or other illegal conduct […] that if established would endanger assets in amount threatening the solvency of the insurer"; (K) "Control of the insurer is in a person who is dishonest, untrustworthy or so lacking in insurance company managerial experience or capability as to be hazardous to policyholders, creditors or the public"; (P) "Within the previous five (5) years the insurer has wilfully and continuously violated its charter or articles of incorporation, its bylaws, any insurance law of this state, or any valid order of the commissioner"; (U) "The insurer does not comply with its domiciliary state's requirements for issuance to it of a certificate of authority, or its certificate of authority has been revoked by its state of domicile."

[70] *Insurance Companies Act* (Canada), Section 679 (1.1): Control by the Superintendent may be taken where "the company, society or provincial company has failed to comply with an order of the Superintendent made under subsection 515(3) to increase its capital or with an order of the Superintendent made under subsection 678.5(1)." Under 678.5(1), "If the circumstances described in any of paragraphs 679(1.1)(a) to (e) or (f.1) to (i) exist […] the Superintendent may, by order […] direct [the insurer] to transfer all or any portion of its policies to, or cause itself to be reinsured […] by any company, society, foreign company or body corporate […] that is authorized to transact the classes of insurance to be so transferred or reinsured."

[71] See, *e.g.*, IAIS, *Insurance Core Principles and ComFrame,* ICP 12.0.9: "Insurers that are no longer viable or likely to be no longer viable and have no reasonable prospect of becoming so through their recovery action or supervisory measures, should be resolved." See also *IRRD,* Art 19(4), referring to "no reasonable prospect of compliance being restored" and circumstances "in the near future"; NAIC, *Insurer Receivership Model Act* (2007), Section 207(C), which provides *inter alia* that the Commissioner may petition for an order of liquidation if "the insurer is about to become insolvent" defined as a situation where "grounds where the insurer "it is reasonably anticipated that the insurer will not have liquid assets to meet its next ninety (90) days' current obligations".

[72] CJEU, *Case C-427/19, Bulstrad v Olympic Insurance*, para. 36: "a decision of the competent authority to withdraw the authorisation of the insurance undertaking concerned and to appoint a provisional liquidator cannot constitute a 'decision to open winding-up proceedings with regard to an insurance undertaking' within the meaning of that article, unless the law of the home Member State of that insurance undertaking provides either that that provisional liquidator is empowered to realise the assets of that insurance undertaking and distribute the proceeds among its creditors or that the withdrawal of the authorisation of that insurance undertaking has the effect of opening automatically the winding-up proceedings, without a separate authority being required to adopt a formal decision to that end."

[73] For example, in Singapore, withdrawal of the licence and liquidation are different procedures conducted separately by MAS and the court, and the grounds for both procedures overlap in part, but do not fully coincide. However, they are not completely parallel procedures, as licence revocation is also a consequence of liquidation. See *Insurance Act 1966* (Singapore), Section 13.

subject to a national exit procedure.[74] Also in the United States, the failure to satisfy domiciliary certificate-of-authority requirements or revocation of the certificate is a ground for receivership, and once such a ground is established in a petition filed by the commissioner, the court shall grant the order for conservation, rehabilitation, or liquidation.[75] As to licence revocation as a consequence of liquidation, EU law provides an example: under Solvency II, the opening of winding-up proceedings entails the withdrawal of the insurer's licence.[76] Also in Canada, liquidation may indirectly result in the revocation of an authorisation order in the case of a foreign insurer.[77]

74. In jurisdictions with a dual-track insurance failure-management framework, the interaction between liquidation and resolution triggers should be addressed expressly, in order to avoid situations in which an insurer is failing but neither resolution nor liquidation is triggered.[78]

Recommendation and questions for the Working Group:

The Working Group is invited to consider how traditional insolvency grounds may need to be adapted to the specific characteristics of insurers.

For instance, the Working Group is invited to consider identifying forward-looking and regulatory grounds. For jurisdictions with a dual-track framework, it is also invited to consider providing advice on the relationship with the conditions for resolution.

- *Should the grounds include forward-looking or regulatory elements and, if so, how should these relate to traditional insolvency tests? Should a separate condition concerning the prospects of recovery be required?*
- *Should guidance be provided on the interaction between the opening of liquidation proceedings and the revocation of an insurer's licence and, if so, how? For instance, should meeting the grounds for liquidation automatically lead to the revocation of the insurer's licence? Should the licence be withdrawn within a specific timeframe?*

H. Liquidation Tools

75. Chapter 6 of the UNIDROIT LGBL discusses bank liquidation tools and powers. It indicates that the liquidation authority and/or the liquidator should have discretion to select the most appropriate tool in order to permit the design of the liquidation strategy best suited to the circumstances of the case.[79] The Guide considers piecemeal liquidation, the default approach under general business insolvency law, to be typically suboptimal for banks, as the cessation of banking operations and the resulting inability to service assets within ongoing client relationships may materially depress their realisable value, to the detriment of creditors.[80] It accordingly recommends that legal frameworks provide for a "sale as a going concern", *i.e.*, the power to transfer, in whole or in part, a failed bank's

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74 See *IRRD,* Arts. 19 and 21.

75 NAIC, *Insurer Receivership Model Act* (2007), Sections 207-208: "The commissioner may file […] for an order of conservation, rehabilitation or liquidation on any one or more of the following grounds: […] U. The insurer does not comply with its domiciliary state's requirements for issuance to it of a certificate of authority, or its certificate of authority has been revoked by its state of domicile"; "if the commissioner establishes any of the grounds provided in Section 207, then the receivership court shall grant the petition and issue the order of conservation, rehabilitation or liquidation requested in the petition."

76 *Solvency II*, Recital 128: The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless this has already occurred.

77 *Insurance Companies Act* (Canada), Section 654: "An order made under subsection 574(1) in respect of a foreign company is deemed to be revoked when an order is made under section 651 or 652 authorizing the release of its assets in Canada [to the liquidator]."

78 See, *e.g.*, *IRRD*, Art. 21, which requires insurers that meet the first two conditions for resolution, but resolution action is not deemed in the public interest, to be made subject to winding-up or other national proceedings ensuring an orderly exit from the market.

79 UNIDROIT LGBL, Chapter 6, Recommendation 45 and para. 242.

80 *Ibid*., Chapter 6, paras 230-233.

assets and liabilities as a going concern to a healthy bank, which enables the continuation of banking operations and preserves the franchise value inherent in a bank's depositor base and client relationships.[81] Where only a partial transfer is effected, the residual estate should be liquidated on a piecemeal basis.[82] The Guide recommends that the sale as a going concern tool be accompanied by adequate safeguards, ensuring that it is pursued where doing so benefits creditors as a whole or enhances depositor protection, with no creditor suffering a less favourable outcome than under a piecemeal liquidation.[83]

Piecemeal liquidation

76. The UNIDROIT LGBL finds that liquidation pursuant to ordinary business insolvency law generally entails a piecemeal liquidation.[84] The same basic logic often applies in the insurance context, as is evident in dual-track regimes, in which resolution and liquidation operate under functionally distinct legal frameworks. In the jurisdictions examined, where ordinary business insolvency law applies to insurers, it does so subject to insurance-specific modifications that derogate from, or supplement, the relevant legal framework.[85] Even where such modifications apply, a piecemeal liquidation involves the discontinuation of the insurer's operations, the appointment of a liquidator with authority to realise its assets individually or in lots – whether by auction or private sale – and the distribution of the proceeds in satisfaction of creditors' claims in accordance with the applicable creditor hierarchy (see Section J below).

77. Piecemeal liquidation may be ill-suited as a tool for the market exit of insurers especially where their balance sheet includes a significant proportion of long-term liabilities.[86] A fire sale of illiquid or long-duration assets held to match long-term liabilities may result in materially lower recoveries for creditors where such assets lack an established secondary market and are realised at a time dictated by the estate's liquidity needs rather than by the maturity profile of the liabilities they support.[87] Furthermore, the late and unpredictable emergence of claims over time from long-tail liabilities may make a piecemeal liquidation a lengthy process, which may undermine confidence in the insurance sector and generate contagion effects.

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81 *Ibid*., para. 233, Recommendation 46. See also Section D and Recommendations 49-53 on sale as a going concern.

82 *Ibid*., paras 230, 233 and Section F.

83 *Ibid*., para. 269, explain that, in quantitative terms, this means that "the net value realised from the sale as a going concern and the liquidation of a possible residual entity should exceed the estimated net proceeds of a piecemeal liquidation of the whole estate."

84 *Ibid.,* para. 226. See also ESRB, *Recovery and Resolution for the EU insurance sector: a macroprudential perspective* (2017), Art. 4.4.1.1: "Liquidation [meaning piecemeal liquidation in this context] constitutes the main part of ordinary insolvency proceedings."

85 In France, *the liquidation judiciaire* of insurers is governed by the *Code de commerce* (general commercial insolvency law) with insurance-specific modifications contained in Chapter VI of the *Code des assurances* (Arts. L326-1 – L326-30). In the Netherlands, the insolvency of insurers is governed by the *Faillissementswet* (general bankruptcy law) with insurance-specific modifications under Section 11B thereof (Arts. 213 – 213kka). In Romania, the insolvency of insurers is governed by *Law no.85/2014* (general insolvency law) with insurance-specific modifications contained in Chapter IV thereof (Arts. 243 - 272). In South Africa, *The Companies Act No.71 of 2008* (Sections 79 – 81 and item 9 of Schedule 5) applies to the liquidation of insurers subject to the insurance-specific modifications in Chapter 9 of the *Insurance Act No.18 of 2017* (Sections 57 – 58). In Australia, the "winding-up process" of general insurers is largely governed by the corporate insolvency provisions of Chapter 5 of the *Corporations Act 2001* with insurance specific modifications contained in Section 116A of the *Insurance Act 1973.*

86 See, at the international level, FSB, *Developing Effective Resolution Strategies and Plans for Systemically Important Insurers* (2026) p. 9, distinguishing between exit tools by reference to liability duration: "liquidation proceedings may be more suitable for a property insurer with insurance liabilities of generally short duration [..]." See also, at the domestic level, *Financial Services and Markets Act 2000* (United Kingdom), Section 376(2), under which, for insurers carrying on long-term insurance business, piecemeal liquidation is not the statutorily preferred option: "unless the court otherwise orders, the liquidator must carry on the insurer's business so far as it consists of carrying out the insurer's contracts of long-term insurance with a view to its being transferred as a going concern to a person who may lawfully carry out those contracts."

87 IAIS, *Issues Paper on structural shifts in the life insurance sector* (2025), Sections 3.5.3 and 5.1.

Run-off and schemes of arrangement

78. The limitations of piecemeal liquidation may in part be addressed through run-off, which generally entails that the insurer ceases to write new business while continuing to administer its existing contractual policy obligations.[88] The continuation of in-force insurance policies enables assets to be realised progressively as claims emerge, including those arising from long-tail liabilities. This may reduce the need for fire sales, improve recoveries for creditors and ensure the continued payment of policyholder claims, even following the insurer's failure.[89] This is of particular significance for policyholders, for whom the termination would result in financial losses or difficulties in obtaining equivalent replacement cover, including under long-term insurance contracts.[90] When used in the context of insurer failure management, run-off may be imposed by a liquidation authority as part of a broader strategy aimed at an orderly market exit. It is to be distinguished from a voluntary run-off, in which an insurer itself elects to cease writing new business for commercial or strategic reasons.[91] A run-off may be on a solvent or insolvent basis, depending on whether the insurer is expected to be able to pay all claims in full.[92]

79. Insurer failure management regimes differ as to whether a run-off is recognised as a distinct failure-management tool. In some jurisdictions, run-off is not expressly codified as an autonomous tool, but may be one possible means of administering an insurer within an existing failure-management proceeding. This is the case in the United States, where rehabilitation proceedings may provide for the run-off of the insurer's liabilities.[93] In South Africa, run-off may form part of curatorship proceedings.[94] By contrast, other jurisdictions expressly recognise run-off as a distinct

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88 IAIS, *Glossary* (2024), definition of 'Run-off': "A process under which an insurer ceases to write new business and administers existing contractual obligations […]." See also IAIS, *Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups* (2024), ICP 12, para. 12.0.2, which recognises run-off as one of the measures available in the context of a resolution of an insurer; and *FSB Key Attributes* (2024), Appendix II-Annex 2, p. 72: "The general assumption is that traditional insurance activities and even some non-traditional insurance activities that are no longer viable will typically be resolved through run-off and portfolio transfer procedures." While recognising run-off as a common mechanism for managing insurer failure outside resolution, the *FSB Key Attributes* (2024) also envisage run-off as a resolution power (KA 3.7).

89 On the protection of policyholders through the continuation of policies in run-off, see EIOPA*, Failures and Near Misses in Insurance – Overview of Recovery and Resolution actions and Cross-Border Issues* (2021) p.26: "In many cases, it is possible to avoid such losses, particularly if continuation of the policies can be ensured during resolution (*e.g.*, via portfolio transfer or run-off), so that the insurance policies can still be paid to the policyholders even after the insurer has failed."

90 ESRB*, Recovery and resolution for the EU insurance sector: a macroprudential perspective* (2017), para. 91.

91 IAIS, *Draft revised Application Paper on resolution powers, preparation and plans* (2025), para. 19: "An insurer may also decide to exit the market on a voluntary basis for business and/or strategic reasons, even when that insurer is still viable and meets regulatory requirements." See also, at the domestic level, *e.g.*, United Kingdom Prudential Regulation Authority, *Supervision Statement SS11/24 – Solvent Exit Planning for Insurers* (2024), para. 1.3. and Box A: a "solvent-exit", which may be achieved by way of run-off, may be executed in "non-stressed circumstances, *e.g.*, where a firm has made a strategic decision to cease insurance business due to insufficient returns, or to better enable it to develop business opportunities in other sectors." Hong Kong Insurance Authority*, Conduct in Focus Issue 11 – Licensing Approach to Run-off Insurance Agencies* (2025): "an insurer may go into full-run off by ceasing to write new insurance policies altogether. More commonly, an insurer may run-off particular portfolios of insurance policies when it exits a specific line of business due to a restructuring or a change in business strategy."

92 IAIS, *Glossary* (2024), definition of 'Run-off': "A 'solvent run-off' is the process initiated for an insurer who is still able to pay debts to its creditors when the debts fall due. An 'insolvent run-off' is a run-off in which the insurer is no longer expected to be able to pay all of its debts when due."

93 NAIC*, Receivers' Handbook for Insurance Company Insolvencies* (2024), pp. 12 and 299: "A rehabilitation proceeding is a formal proceeding, commencing with a complaint filed by the regulator. Rehabilitation can be used as a mechanism […] to run off its liabilities to avoid liquidation […]."; "The receivership act may allow or require the rehabilitator to file a plan of rehabilitation by a specified date. […] it should be noted that the Model Acts do not require that the plan provide for the emergence of the insurer from rehabilitation as a going concern. Thus, a plan for a run-off may be permissible."

94 *Insurance Act 18 of 2017* (South Africa), Section 54(2)(f): "in the case of an insurer [the curator], must

tool. In the EU, for example, the *IRRD* contemplates solvent run-off as a resolution tool.[95] Where the insurer's financial position deteriorates during run-off such that its net asset value becomes negative, the resolution authority must determine whether to liquidate it under normal insolvency proceedings or apply another resolution tool.[96] These differing approaches reflect differing legislative conceptions of run-off: in some regimes it is an operational strategy implemented within a failure management proceeding, while in others it is a distinct legal tool. The Working Group may therefore wish to consider both whether run-off should be framed as a separate tool and, if it may proceed on an insolvent basis, how any shortfall should be allocated across creditors in accordance with the applicable creditor hierarchy (see Section J below).[97]

80. In certain common law jurisdictions, including the Australia, Bermuda, Singapore and United Kingdom, the run-off of an insurer's liabilities may be facilitated through a scheme of arrangement, which is a statutory procedure under general company law by which a compromise or arrangement is proposed between a company and its creditors, or any class of them.[98] As the statutory basis tends to be general, the scope and use of such schemes have been developed through case law, allowing schemes to be employed in a wide variety of corporate restructurings.[99] In the insurance context, one such use that has emerged is the management of contingent and unliquidated claims arising from long-tail business. Run-off schemes of arrangement are generally pursued on a solvent basis, under which interim distributions are made to creditors with matured claims, while reserves are set aside for creditors whose claims are unliquidated or contingent.[100] The level of distributions is usually determined on the basis of an actuarial estimate of the insurer's assets and expected future liabilities, including claims that have not yet been incurred or notified under existing policies.[101] Since the reserves for contingent claims are based on actuarial estimates, estimation risk is allocated among different classes of creditors.[102]

81. Schemes of arrangement may also seek to achieve finality by introducing a cut-off date by which creditors must submit their claims. Such "cut-off" mechanism may also be pursued on an

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continue to conduct the insurance business for which the insurer is licensed, but may not enter into new insurance policies without the approval of the Prudential Authority".

95 *IRRD,* Art. 2(50) defining "solvent run-off tool" as "the mechanism for prohibiting an undertaking under resolution to conclude new insurance or reinsurance contracts and for limiting its activity to the exclusive administration of its existing portfolio until termination of its activities and winding-up under normal insolvency proceedings"; see also Art. 26(3)(a) listing solvent run-off as one of the five "resolution tools".

96 *Ibid.,* Art. 27(9).

97 FSB, *Developing Effective Resolution Strategies and Plans for Systemically Important Insurers* (2016), p. 6: "A managed run-off of existing claims (without writing new business) could be completed while the entity in resolution is insolvent. Authorities or the courts would need to determine how a potential shortfall is allocated over time and across creditors and policyholders, subject to respect of the creditor hierarchy."

98 For provisions defining scheme of arrangement see, *Companies Act 2006* (United Kingdom), Section 895(1): "a compromise or arrangement is proposed between a company and its creditors, or any class of them, or its members, or any class of them". *Corporations Act 2001* (Australia), Section 411: "a compromise or arrangement is proposed between a Part 5.1 body and its creditors or any class of them or between a Part 5.1 body and its members or any class of them". *IRDA* (Singapore), Section 63(1): "a compromise or an arrangement between a company and its creditor or any class of those creditors". *Companies Act 1981* (Bermuda), Section 99(1): "a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them".

99 In defining "arrangement", the courts have required that the scheme involve some element of give and take, and not simply amount to surrender or confiscation of creditors' right without compensating advantage. See, *e.g.*, *Re Savoy Hotel Ltd* [1981] Ch 351, 359 per Nourse J: "[..] there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of "arrangement"."

100 Payne J, *Schemes of Arrangement: Theory, Structure and* Operations (2021), *Cambridge University Press 2nd ed*, pp. 330–331.

101 Allen & Overy, *Enhancing the Insolvency tools for insurance companies* (2023), p. 2.

102 Payne J (2021), p. 333. See also, *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), para. 89-90, per Lewison J: "Policyholders with outstanding losses are in a slightly different position. […] Under the scheme they will receive cash up front. It may be an amount that is greater than or smaller than the liabilities that eventually materialise, but it will not be the same. The risk of inadequate resources to meet such liabilities is transferred from the insurers to them. So, the scheme may well disadvantage them."

insolvent basis within liquidation proceedings, allowing the liquidator to estimate and settle the claims of creditors, including contingent claims, against the insurer's estate and thereby bring the liquidation to a conclusion in a more timely manner. The use of cut-off dates may, however, raise creditor protection concerns, as certain creditors may be unable to identify and submit their claims by the cut-off date where the contingent event giving rise to those claims has not yet materialised, thus risking exclusion from distributions under the scheme.[103] These creditors remain bound by the scheme if approved by the required majority of creditors and sanctioned by the court.[104] Unlike statutory liquidation powers that may be exercised unilaterally by the liquidation authority without creditor approval, schemes of arrangement generally depend upon creditor approval and judicial sanction. Their use in insurer liquidation therefore raises broader questions regarding the appropriate role of creditor consent. In addition, the actuarial estimation of contingent liabilities and the operation of cut-off provisions require safeguards to ensure that creditors are treated fairly and do not receive less than they would have obtained in an ordinary liquidation. Whether schemes of arrangement should form part of the legal framework for the liquidation of failed insurers, and, if so, the safeguards that should govern their use, are questions which the Working Group may wish to consider.

Portfolio transfer

82. Another commonly used mechanism is the transfer of all or part of a failed insurer's portfolio to a viable private-sector transferee. Portfolio transfer may complement a scheme of arrangement[105] or a run-off.[106] It may, however, also be used as a stand-alone failure-management tool, where it

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[103] For examples of schemes of arrangement providing for the exclusion of creditors who fail to submit their claims by the cut-off date, see, *e.g.*, *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), per Lewison J, paras 21-22: "the scheme will bind all Scheme Creditors of the Company in respect of any claim against the Company arising under or out of an insurance contract written by the Company as part of Scheme Business. This includes liquidated and unliquidated claims; both present and future. […] Scheme Creditors must notify their claims within 120 days after the scheme comes into operation […]. If they do not, their claims will be valued at nil; and will be deemed to have been paid in full." *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18, para. 9(b): "In the event that any Scheme Creditor fails to submit Proof of Debt […] by the Claims Cut-Off Date, that Scheme Creditor shall not be entitled to any payment of his Scheme Claim with effect from the Claims Cut-Off Date."

[104] *Companies Act 2006* (United Kingdom), Section 899(1), (3):" If a majority in number representing 75% in value of the creditors or class of creditors [..] present and voting either in person or by proxy at the meeting […] agree a compromise or arrangement […] the court may, on an application under this section, sanction the compromise or arrangement. A compromise or arrangement sanctioned by the court is binding on (a) all creditors or the class of creditors […] and (b) the company). *Corporations Act 2001* (Australia), Section 411(4): "A compromise or arrangement is binding on creditors, or on a class of creditors […] if the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, […] being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting". *IRDA* (Singapore), Section 64(3)(a),(b): "The Court may not make an order under subsection (2) unless – (a) a majority in number of the creditors meant to be bound by the compromise or arrangement and who were present and voting […] at the relevant meeting, have agreed to the compromise or arrangement; (b) the majority of creditors mentioned in paragraph (a) represent three-fourth in value of the creditor meant to be bound by the compromise or arrangement". *Companies Act 1981* (Bermuda), Section 99(2): "if a majority in number representing three-fourths in value of creditors or class of creditors […], as the case may be, present and voting […] at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the Court, be binding on all the creditors or the class of creditors […] and also on the company or, in the case of a company in the course of being wound-up, on the liquidator and contributories of the company."

[105] R Bowley, Insurance procedures in corporate insolvency: a comparison of the arrangements in the United Kingdom, Australia and New Zealand' in Omar P and Gant J (eds), *Research Handbook on corporate restructuring* (2021), p. 302, noting that a scheme of arrangement "may involve the transfer of the failed insurer's liabilities to another authorised insurer"; see also The Actuary, *Part VII transfers* (2012), which confirms that portfolio transfers "can be used before or after a solvent scheme of arrangement, for example, to remove employers' liability business or other policies that cannot be schemed", https://www.theactuary.com/archive/old-articles/part-5/2012/09/21/part-vii-transfers.

[106] IAIS, *Draft revised Application Paper on resolution powers, preparation and plans* (2025), para. 76: "As the insurance portfolio runs off over time, the profitability of the insurer would decrease, but fixed costs (*e.g.*, administration costs) would not decrease proportionately, and this could cause potential liquidity or solvency issues as the insurance portfolio matures. As the run-off tails off, there may be benefit in the transfer of the small remaining insurance portfolio to a private sector purchaser, or even to liquidating the insurer."

generally may be effected without the individual consent of policyholders or creditors.[107] While almost all analysed jurisdictions provide for a portfolio transfer in statutory form, they differ in the legal procedure through which the transfer is given binding effect against policyholders. In some jurisdictions, including Belgium,[108] Brazil,[109] Colombia,[110] Ghana,[111] Mexico,[112] and Switzerland,[113] the transfer becomes binding upon approval of the competent authority alone. In the EU, portfolio transfer as a resolution tool is similarly exercisable by the resolution authority alone.[114] In other jurisdictions, including Australia,[115] Canada,[116] and the United Kingdom,[117] a portfolio transfer requires court sanction, which the court grants only upon being satisfied as to the adequate protection of the interests of policyholders of both the transferring and accepting insurer.[118]

Questions for the Working Group:

- *Should the future Guide discuss (i) piecemeal liquidation, (ii) run-off, (iii) portfolio transfer and/or (iv) schemes of arrangement or comparable compromise procedures? If so, which legal and operational aspects of each mechanism should the future Guide*

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107 IAIS, *Glossary* (2024), definition of 'Portfolio Transfer': "Transfer of one or more policies together with, when relevant, the assets backing those liabilities." See also IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 6, para. 6.4; and *FSB Key Attributes* (2024), KA 3.7(i), which provides that the resolution authority should have the power to "undertake a portfolio transfer moving all or part of the insurance business to another insurer without the consent of each and every policyholder".

108 *Law of 13 March 2016 on the status and supervision of insurance and reinsurance undertakings* (Belgium), Arts. 102–106, under which portfolio transfers require NBB approval and, following approval and publication, become enforceable against third parties, including policyholders, insured persons and beneficiaries.

109 *Lei N° 15.040, de 9 de Dezembro de 2024* (Brazil), Art. 3, §1, under which partial or total portfolio transfer ("*cessão parcial ou total de carteira*") initiated by the insurer must be authorised by SUSEP.

110 *Estatuto Organico del Sistema Financiero Drecreto 663 de 1993* (Colombia), Art.70, which provides for total or partial portfolio transfer ("*cesión de cartera*"), requiring prior approval of the *Superintendencia Bancaria* where the transfer involves 25% percent or more of the portfolio of a single line of business prior.

111 *Insurance Act 1061 of 2021* (Ghana), Art. 85(1): "a licensed insurer […] shall not (a) transfer the insurance business, or any part of the insurance business, to another person […] without the prior written approval of the [National Insurance] Commission".

112 *Ley de Instituciones de Seguros y de Fianzas* (Mexico), Art. 270, under which the transfer of the portfolio ("*cesión de cartera")* from one insurer to another requires prior authorisation of the *Comisión Nacional de Seguros y Fianzas*, with the agreement of its governing board (*"Junta de Gobierno").*

113 *Insurance Supervision Act* (2004) (Switzerland), Art.62(1), under which the transfer of an insurer's Swiss insurance portfolio ("*schweizerischen Versicherungsbestand*"), in full or in part, to another insurer requires approval ("*Bewilligung*") of FINMA.

114 *IRRD,* Art. 26(3)(b), which lists the "sale of business tool" among the resolution tools available to the resolution authority, exercisable where the conditions for resolution under Art.19 are met; and Art.31(1)(b) under which "Member States shall ensure that resolution authorities have the power to transfer to a purchaser other than a bridge undertaking […] all or any assets, rights or liabilities of an undertaking under resolution."

115 *Insurance Act 1973* (Australia), Section 17B: "no part of the insurance business of a general insurer may be: (a) transferred to another general insurer; or (b) amalgamated with the business of another general insurer; except under a scheme confirmed by the Federal Court" with Section 17E providing for an application for the confirm to the Federal Court for confirmation of the scheme.

116 *WURA* (Canada), Section 162(1), under which the liquidator may, with the approval of the court and without the consent of policyholders, arrange for the transfer of "(a) all or a portion of the policies of the company, in the case of a company other than a foreign company, or (b) all or a portion of the policies in respect of a foreign company's insurance business in Canada".

117 *Financial Services and Markets Act 2000* (United Kingdom), Section 105(1)-(2) defines an insurance business transfer scheme as one under which "the whole or the part of the business carries on in the United Kingdom by an authorised person who has permission to effect or carry out contracts of insurance ('the transferor concerned') is to be transferred to another body ('the transferee')"; and Section 107 provides that "an application may be made to the court for an order sanctioning an insurance business transfer scheme".

118 For the requirement that the court have regard to the interests of policyholders see *Insurance Act 1973* (Australia), Section 17F(1A): "in deciding whether to confirm a scheme (with or without modifications), the Federal Court must have regard to: (a) the interests of the policyholders of a body corporate affected by the scheme"; and *WURA* (Canada), Section 162(1), under which the terms of the transfer must be "in the opinion of the court having regard to the priorities set out in this Part, fair and equitable to [...] (c) the policyholders whose policies are being transferred or reinsured, (d) the estate of the company as a whole [and] (e) the remaining policyholders of the company."

address and should run-off be treated as a distinct tool or as a strategy within existing proceedings?

- *Should the Guide recommend the inclusion of any other tools and/or powers for the liquidation authority or liquidator?*
- *Should the Guide provide guidance on the treatment and continuity of existing insurance contracts and claims?*
- *To what extent and how should the Guide address creditor safeguards? What safeguards should apply to the use of these mechanisms, particularly regarding creditor consent, independent valuation, the estimation of contingent liabilities, claims cut-off dates and court or supervisory approval?*

I. Funding

83. Chapter 7 of the UNIDROIT LGBL takes as its starting point that the primary source of funding in liquidation should be the bank's own resources. However, it acknowledges that in some cases external funding may be required to achieve liquidation objectives.[119] In particular, the feasibility of a sale as a going concern may depend on the availability of external funding, since there may be few or no willing acquirers without it to bridge a potential gap between the value of deposits to be transferred and that of available bank assets.[120] The Guide identifies industry-sourced deposit insurance funds (DIFs) as the principal potential source of external funding, and recommends their use for "non-payout measures", notably the sale as a going concern, as an alternative to the reimbursement of insured deposits in a piecemeal liquidation.[121] Such use is subject to the conditions of the *IADI Core Principles*, in particular that the deposit insurer be appropriately informed and involved in the process, and that DIF contributions not exceed the "payout counterfactual".[122] The Guide further notes that, where DIF resources are insufficient, jurisdictions should ensure that backstop funding arrangements are in place, while emphasising that public funds should not be available for the liquidation of non-systemic banks.[123] Accordingly, it recommends that the legal framework expressly authorise the use of DIF resources as an external source of funding and specify the applicable conditions.[124]

84. When considering the source of funding for insurer failure management, the same starting point may be applied. The primary source of funding for policyholder claims should be the insurer's own resources, which in many jurisdictions are subject to specific investment restrictions, segregation, or priority rules precisely to preserve their availability to policyholders in the event of failure (see Section J below). External funding, where available, is best understood as a complement to these internal resources rather than a substitute for them. Unlike the banking sector, no international framework governs funding arrangements in the context of insurer liquidation.[125]

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119 UNIDROIT LGBL, Chapter 7, para. 317.

120 *Ibid.,* para. 322.

121 *Ibid.,* paras 324 and 326. On the form of DIF support, the Guide notes in para. 331: "In the simplest case, the DI may contribute cash to help fund a transfer. More complex forms of support could include providing a guaranteed floor on the value of transferred assets, entering into loss-sharing agreements with acquirers, or undertaking other forms of contingent commitment."

122 *Ibid.,* paras 325-327: "[DIF] contributions should be restricted to the costs the DI would otherwise have incurred in a payout of insured depositors net of expected recoveries. This 'payout counterfactual' constitutes a quantitative constraint on the contribution of DIF resources for non-payout measures." These conditions are notably set to "ensure accountability and to protect the DIF against excessive depletion."

123 *Ibid.,* paras 333-335.

124 *Ibid.,* Recommendation 67.

125 World Bank, *Establishing Efficient and Effective Insurance Guarantee Schemes* (2023), p. 10: "In most cases, urgent access to funds is not necessary for insurance consumers. Contrary to the strong motivation for developing deposit insurance for the banking sector, the need for immediate availability of the consumer funds held by an insurance company, although desirable, is not as critical as is in the case of a bank failure. This difference might explain the reason why the development of guarantee schemes for the insurance sector has

Comparative analysis nonetheless reveals recurring structural choices in the design of a PPS, which the Working Group may wish to consider when discussing whether, and how, the future Guide should address funding arrangements. These choices concern, in particular: the public or private nature of the scheme, the compulsory or voluntary character of membership, the form of protection it offers, and the timing of its funding.[126]

85. The first distinguishing feature concerns whether a PPS is constituted as a public body or as a privately-administered entity. Some jurisdictions entrust the administration of the scheme to an existing public authority or to a dedicated public entity, as in China,[127]Ireland,[128] and Spain.[129] Other jurisdictions rely on privately-administered entities established or mandated by statute, as in the France,[130] Germany,[131] Italy, the United Kingdom,[132] and the United States.[133] A third category comprises jurisdictions that have not established any dedicated external scheme, such as Hong

been delayed. Even today, they are not as widespread as the deposit insurance practices for banks, which are present in almost all Organisation for Economic Co-operation and Development (OECD) countries".

126 *Ibid.,* pp. 18-26; see also María García de Andrés, Policyholder protection schemes in situations of insolvency. Comparative study between states and jurisdictions. New perspectives (2017), *Consorseguros Digital Magazine No.6*, p. 1: "Far from the existence of a universal solution, the countries with policyholder protection schemes in situations of insurer insolvency –and not all countries have them, not even in the European context– address this issue with a heterogeneous range of solutions."

127 In China, the Insurance Protection Fund is managed by the wholly State-owned China Insurance Security Fund Co., Ltd., whose Board members are recommended by public authorities. See *Administrative Measures for the Insurance Security Fund* (2022), Arts. 6-9.

128 In Ireland, the Insurance Compensation Fund was originally maintained and administered under the control of the President of the High Court, acting through the Accountant. Since 2018, it is administered by the Central Bank of Ireland. *Insurance Act 1964* (Ireland), as amended by *Insurance (Amendment) Act 2018*, Section 2.

129 In Spain, the *Consorcio de Compensación de Seguros* (CCS) is a public business entity (*entidad pública empresarial*) attached to the Ministry of Economy, with its own legal personality and assets separate from those of the State, and subject to private law in the conduct of its activity. *Estatutos Legales del Consorcio de Compensación de Seguros*, Art. 1.

130 In France, the *Fonds de Garantie des Assurances de Personnes* (FGAP) is a *"personne morale de droit privé"* (legal person under private law). Although privately constituted and managed, it is subject to public oversight: its approved annual accounts are submitted to the minister of economy, and they are subject to review by the *Inspection générale des finances*. See *Code des assurances*, Art. L.423-4.

131 In Germany, life and health policyholder protection is provided respectively by *Protektor Lebensversicherungs-AG* and *Medicator AG*. These are private-law legal entities entrusted with administering the protection schems under the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*). The Federal Ministry of Finance may transfer the functions of a Sicherungsfonds to a *"juristische Person des Privatrechts"* (a legal entity under private law) willing to assume them and offering sufficient guarantee of performance. *Versicherungsaufsichtsgesetz* (VAG) (Germany), §224(1).

132 In the United Kingdom, an independent statutory body administers the Financial Services Compensation Scheme (FSCS). *Financial Services and Markets Act 2000* (United Kingdom), Sections 212-213. The Financial Conduct Authority and the Prudential Regulation Authority appoint the scheme's directors, and the Chair and Chief Executive Officer's appointment (and removal) are subject to Treasury approval but the FSCS is run independently of these UK regulators.

133 In the United States, guaranty associations for life and health insurance and for property and casualty insurance are, for the most part, private entities created under state law, coordinated nationally through the National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) and the National Conference of Insurance Guaranty Funds (NCIGF) respectively. See *NAIC Life and Health Insurance Guaranty Association Model Act (#520)*, Section 6(A): "There is created a nonprofit legal entity to be known as the [State] Life and Health Insurance Guaranty Association. All member insurers shall be and remain members of the Association as a condition of their authority to transact insurance or a health maintenance organization business in this State." See similarly NAIC, *Property and Casualty Insurance Guaranty Association Model Act (#540)*, Section 6: "There is created a nonprofit unincorporated legal entity to be known as the [State] Insurance Guaranty Association. All insurers defined as member insurers in Section 5J shall be and remain members of the association as a condition of their authority to transact insurance in this State."

Kong [134] and Switzerland.[135] The choice of whether to establish a scheme at all, and, if so, whether to constitute it as a public or private body, may have direct consequences for policyholders. It affects the degree of governmental oversight and accountability to which the scheme is subject and the scope of its intervention (if only payout or also prevention of liquidation). In jurisdictions without any scheme, it also determines whether protection beyond the insurer's own estate depends on a standing legal entitlement or on *ad hoc* governmental intervention, and whether any external funds exist to support a transfer of the failed insurer's portfolio to a solvent acquirer rather than relying on the estate alone to attract one.

86. The second distinguishing feature concerns the compulsory or voluntary character of membership. Mandatory membership is close to universal among existing schemes.[136] Only a small number of schemes formally retain voluntary membership, while others operate on a mandatory basis even within the same jurisdiction, as illustrated by the coexistence of both models in Germany.[137]

87. A third distinguishing feature concerns the timing of contributions to the PPS, which may be organised on an *ex-ante*, *ex-post*, or hybrid basis. Under an *ex-ante* funding mechanism, member insurers make regular contributions that accumulate into a standing fund in advance of any insolvency.[138] Under an *ex-post* funding mechanism, members do not provide funding in normal times, but only when there is a need to use the fund.[139] Both mechanisms are used in practice, and examples also exist of hybrid or mixed mechanisms.[140] Examples of *ex-ante* funding include Ecuador, France, Hong Kong (under its proposed design), Italy, Korea, Malaysia, Romania, Singapore, and Spain.[141] Examples of *ex-post* funding include Australia, Canada, Norway, the United Kingdom, and the United States.[142] Germany illustrates a hybrid design, combining *ex-ante* funding for its life

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134 In Hong Kong, no general PPS has yet been adopted, notwithstanding successive public consultations since the early 2000s. Compensation arrangements currently exist for two specific lines of compulsory insurance. Hong Kong Legislative Council Secretariat, *Information Note: Policyholders' Protection Schemes in Selected Places*, IN05/2023 (2023), para.1.1: "compensation schemes are only in place for a small subset of insurance policies, *i.e.*, those covering employees' work-related injury compensation and motor vehicle third party claims. On the other hand, there are no compensation funds for long term insurance (*e.g.*, life insurance) and other general insurance (*e.g.*, health policies)."

135 In Switzerland, policyholder protection in insolvency rests on the internal segregation of tied assets (*"fortune liée"*) that each insurer must maintain to secure the claims arising from the insurance contracts it has concluded, rather than on an industry-wide fund. *Versicherungsaufsichtsgesetz* (VAG/ISA) (Switzerland), Arts.17-20.

136 World Bank (2023), pp. 21-22: "Mandatory membership in IGSs is the norm. In theory, they can be designed with either compulsory or voluntary membership. However, most, if not all, of the existing schemes have mandatory membership."

137 In Germany, membership of a security fund (Sicherungsfonds) is compulsory (*"Pflichtmitgliedschaft"*) for insurers licensed in the relevant insurance classes, but pension funds (Pensionskassen) are excluded from this obligation and may instead join on a voluntary basis (*"freiwillig"*). *Versicherungsaufsichtsgesetz* (VAG), §221(1)-(2). See also World Bank (2023), Table 4.2, describing Protektor's membership as "Compulsory except for specific pension funds; voluntary if the business is comparable to life insurers".

138 World Bank (2023), pp. 23-24.

139 *Ibid*.

140 *Ibid.,* "A look across practices in countries where such funds are established reveals that both pre-funding and post-funding are equally used, and some combine pre- and post-funding"

141 World Bank (2023), Table 4.3. In France, the *Fonds de Garantie des Assurances de Personnes* in France is funded by a levy of 0.05 per cent of the mathematical provisions of participating life insurers. María García de Andrés (2017), Section 3.6. In Spain, the *Consorcio de Compensación de Seguros* is funded, among other resources, through a surcharge (*"recargo"*) of 1.5 per thousand on the premiums of most policies covering risks located in Spain. *Estatuto Legal del Consorcio de Compensación de Seguros* (Real Decreto Legislativo 7/2004), Art. 23.4. The Policy Owners' Protection Scheme proposed in Hong Kong would be funded by an initial levy of 0.07 per cent of premium income. Hong Kong Legislative Council Secretariat, *Information Note: Policyholders' Protection Schemes in Selected Places*, IN05/2023 (2023), para. 3.3(e) and Table 1 ("Option 1"): levy rate 0.07%; Long Term Fund target HK$1.48 billion, expected to take six years to accumulate; General Fund target HK$78 million, expected to take nine years to accumulate.

142 The guaranty associations of the United States levy assessments on surviving insurers writing the relevant line of business in the relevant state. NAIC*, Life and Health Insurance Guaranty Association Model Act*

insurance scheme with *ex-post* funding for its health insurance scheme.[143] Each approach carries distinct implications for policyholders. *Ex-ante* funding provides certainty that resources will be available at the moment an insurer fails, and may be considered to be more equitable.[144] *Ex-post* funding avoids this cost but exposes policyholders to timing risk, since assessments can typically only be levied, collected and, in some jurisdictions, subjected to court approval after an insurer has already been placed into liquidation.[145]

88. A fourth distinguishing feature concerns the form of protection the PPS offers. Protection may take the form of paying covered claims, providing continued insurance protection until a specified time or coverage limit (allowing policyholders to obtain replacement cover), funding the transfer of insurance policies to another insurer, refunding premiums for protection for policies that have ceased running, or paying benefits under life insurance policies.[146] A PPS should have the necessary powers to meet insurers' obligations to policyholders and other eligible claimants promptly, up to the applicable coverage limits, whether through direct payments or measures that ensure continuity of cover.[147]

89. While PPSs generally have powers to provide different forms of protection, they differ in the relative emphasis placed on those forms. For example, Japan and Canada[148] place particular emphasis on the continuation of insurance contracts through portfolio transfers where feasible. Also in the proposed scheme for Hong Kong, direct compensation is regarded as a secondary measure where a transfer cannot practicably be achieved.[149] This choice of emphasis has implications for

(#520), Sections 9(A) and 9(B)(2): "A. For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the board of directors shall assess the member insurers, separately for each account, at such time and for such amounts as the board finds necessary […] B. There shall be two (2) classes of assessments, as follows […] (2) Class B assessments shall be authorized and called to the extent necessary to carry out the powers and duties of the Association under Section 8 with regard to an impaired or an insolvent insurer." NAIC, *Property and Casualty Insurance Guaranty Association Model Act (#540)*, Section 8(A)(3): "[the association shall] assess insurers amounts necessary to pay the obligations of the association […] subsequent to an insolvency".

143 In Germany, Protektor, the life insurance scheme, is funded *ex ante*, while Medicator, its health insurance counterpart, is funded *ex post*. *Versicherungsaufsichtsgesetz* (VAG), §226(5)-(6): annual life-insurer contributions of "0,2 *Promille*" of net technical provisions, with special contributions ("*Sonderbeiträge*") up to a ceiling of "1 *Promille*"; Medicator special contributions of up to "2 *Promille*" are triggered only "nach der *Übernahme* der *Versicherungsverträge*", *i.e.*, after the fund has taken over the failed insurer's contracts.

144 World Bank (2023), pp. 23-24: "All members contribute, including those that may go into liquidation in the future, which seems more equitable."

145 Hartley D, Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders (2024), *Economic Perspectives* No.3, Federal Reserve Bank of Chicago: "The guaranty associations are typically activated only after an insurer has been found to be insolvent and has been placed under an order of liquidation by a court." "The guaranty association may also, subject to approval by a court, impose permanent policy or contract liens […] if the amount that can be assessed (in one year) is less than the amount needed to fulfil its duties or if the economic and financial conditions are bad enough that permanent policy or contract liens are in 'the public interest.'"

146 World Bank (2023), p. 17.

147 IFIGS, *Framework Guidance for Insurance Guarantee Schemes* (2020), Principle 13 ("Protecting Policyholders and Fulfilling Obligations"); World Bank (2023), p. 43.

148 In Japan, the Life Insurance Policyholders Protection Corporation and the Non-Life Insurance Policyholders Protection Corporation are principally designed to facilitate continuation of insurance contracts by providing financial assistance for the transfer ("succession") of a failed insurer's contracts to a private transferee insurer. See *Insurance Business Act (Act No. 105, 1995)*, Arts. 270-3-2 to 270-3-14. In Canada, Assuris similarly arranges for the transfer of a failed life or health insurer's policies to a solvent assuming insurer, guaranteeing continuity of benefits at a specified minimum percentage of their value rather than making a cash payout. In Germany, the supervisory authority may, subject to the statutory conditions, order the transfer of the covered insurer's insurance portfolio and supporting assets to the competent guarantee fund. The fund administers the transferred contracts and may subsequently transfer all or part of the portfolio to another authorised insurer. See *Versicherungsaufsichtsgesetz* (VAG) (Germany), § 222.

149 Hong Kong Legislative Council Secretariat, *Information Note: Policyholders' Protection Schemes in Selected Places*, IN05/2023 (2023), para. 3.3(g): "Arrangements in the event of insurer insolvency: An arrangement would first be made to transfer the long-term policies to a replacement insurer wherever possible. The fine-tuned proposal further adds that if such transfer cannot be arranged, PPS may set up a dedicated insurance company to run off the business of the insolvent, providing coverage for the policies concerned until

policyholders. A transfer-oriented model can preserve uninterrupted coverage and avoid the need to obtain replacement cover, whereas a compensation-oriented model provides certainty of a defined payment but may not preserve the policy or its associated coverage.

Questions for the Working Group:

- *Should the future Guide address the use of PPS funding in liquidation?*
- *Under what conditions, if any, should PPS resources support portfolio transfers or other non-payout measures, and what safeguards should govern their use?*
- *To what extent should the future Guide address other features of PPSs? What guidance would be appropriate where no PPS exists?*

J. Creditor Hierarchy

90. Chapter 8 of the UNIDROIT LGBL discusses the creditor hierarchy in insolvency, which establishes the order in which creditors are paid from a failed entity's assets and how losses are allocated among them.[150] Highlighting its important role and the need for transparency, the Guide recommends that the creditor hierarchy applicable in bank liquidation proceedings be clearly set out either in a dedicated bank liquidation law or through clear bank-specific modifications to the general insolvency rules on ranking and priority.[151] The Guide cautions against proliferating priority classes without clear justification,[152] and stresses that loss allocation should not differ materially between resolution and liquidation.[153]

91. Rather than recommending a specific absolute ranking of claims, the LGBL focuses on the relative ranking of certain types of claims. It provides extensive guidance on the ranking of depositors, highlighting the importance of depositor protection and the impact of different options of depositor ranking on the feasibility of transfer strategies in liquidation. It recommends introducing some form of depositor preference,[154] and explains that general depositor preference (whereby all deposit claims are granted the same higher ranking than ordinary unsecured claims) facilitates the transfer of both insured and uninsured deposits. Chapter 8 of the LGBL also provides guidance on the subordination of claims, the ranking of shareholders, resolution financing arrangements and post-liquidation financing, as well as the treatment of secured creditors, including covered bondholders and central banks.

92. A parallel may be drawn between depositors in bank insolvency and policyholders in insurer insolvency. Although both are creditors, they differ from ordinary commercial creditors because they constitute the primary class of customers and are typically accorded specific attention and protection.[155] Just as depositor protection is a defining objective of bank liquidation, the protection

expiry. In case that neither of the arrangements is achievable, the policies will have to be terminated, and the policyholders concerned would be paid an "ex-gratia payment"."

150 UNIDROIT LGBL, Chapter 8, paras 336-337: "Clear rules on ranking in liquidation allow creditors to price in and manage risks when entering into a relationship with a bank, which creates certainty in the market and facilitates the provision of credit."

151 *Ibid*., Recommendation 68 and paras 340-343.

152 *Ibid*., Recommendation 69 and para. 344.

153 *Ibid*., Chapter 8, para. 345

154 *Ibid*., Recommendation 72 and paras 347-358.

155 Although both are creditors who warrant special attention, policyholders differ from depositors in that their claims are often contingent, long-term, and tied to personal or social protection interests. These features may strengthen the case, in the insurance context, for mechanisms such as asset segregation, run-off, portfolio transfer, and policyholder protection schemes, alongside priority rules.

of policyholders is a defining feature of insurance insolvency regimes. In both cases, one way of pursuing such protection is by granting these claims a preferred ranking.[156]

93. Unlike ordinary commercial creditors, policyholders often purchase insurance products to protect against risks affecting health, life, property, retirement income or economic security. Policyholders are generally unable to monitor the financial condition of insurers in the same manner as sophisticated financial counterparties and may be particularly vulnerable to insurer failure.[157] Moreover, insurance obligations frequently arise many years after premiums are paid, creating long-term reliance interests that may justify enhanced protection.[158] For these reasons, numerous jurisdictions provide policyholders with preferential treatment in insolvency proceedings, either through statutory priority rules, dedicated asset pools supporting technical provisions, PPSs or combinations thereof.

94. The *IAIS ICPs* indicate that a high legal priority should be granted to policyholders' claims so that policyholders rank above ordinary unsecured creditors.[159] It recognises that jurisdictions often accord an even higher ranking to a limited number of other types of claims (*e.g.*, claims related to liquidation expenses, claims of employees, fiscal authorities, social security systems or claims on assets subject to rights *in rem*). It further recognises that, in some jurisdictions, policyholders receive higher priority but only on a certain part of the insurance legal entity's assets (*e.g.*, the assets covering technical provisions).[160]

95. Comparative analysis reveals different approaches to the protection of policyholders in insurer insolvency. Several jurisdictions protect policyholders through statutory priority rules that rank policyholder claims ahead of ordinary unsecured creditors. This is the case, for instance, in Canada, Singapore, and many jurisdictions in the United States.[161] By contrast, other jurisdictions protect insurance claims primarily through dedicated assets representing technical provisions, which may themselves be subject to insurance-specific statutory priority rules. Under these frameworks, assets representing technical provisions are identified, earmarked or ring-fenced for the benefit of policyholders. Policyholder protection therefore operates primarily through preferential access to an identified pool of assets, rather than through a general preference against the insurer's entire estate. These approaches may also be combined, including where insurance claims retain a preference against the remaining estate if the dedicated assets are insufficient. In the European Union, the *Solvency II Directive* requires Member States to ensure that insurance claims receive special protection in winding-up proceedings either through preferential ranking or through the earmarking of assets covering technical provisions for the priority satisfaction of insurance liabilities. The

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156 IAIS, *Insurance Core Principles and ComFrame* (2024), para. 63: "In general, deciding on the appropriate level of policyholder protection is a policy question to be addressed by each jurisdiction. Protection mechanisms could include, for example, a hierarchy of claims or a policyholder protection scheme."

157 IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 12 and ICP 16. The IAIS recognises that policyholders, beneficiaries and claimants require appropriate protection in situations of insurer distress and failure. Unlike many commercial creditors, policyholders often rely on insurance contracts to provide protection against personal and economic risks and may have limited ability to assess the financial condition of insurers.

158 Van Hulle, Solvency requirements for EU insurers: Solvency II is good for you (2019), *Cambridge Intersentia 1st ed.*, pp. 439–442.

159 IAIS, *Insurance Core Principles* and *ComFrame* (2024), ICP 12.10-12.10.1.

160 *Ibid*., ICP 12.10.2.

161 See, *e.g.*, *WURA* (Canada), Section 161; *Code des assurances* (France), Art. L.327-2, granting insurance claims a general privilege over the insurer's movable and immovable assets, subject to specified higher-ranking privileges; *Insurance Act 1966* (Singapore), Section 123; NAIC, *Insurer Receivership Model Act* (2007), Art. VIII, Section 801 (establishing a priority-of-distribution scheme under which policyholder and beneficiary claims are accorded priority over general creditor claims and serving as the model for many U.S. state insurer receivership statutes).

Directive therefore recognises that policyholder protection may be achieved through different legal mechanisms while pursuing the same underlying objective.[162]

96. Certain jurisdictions, including Australia, Bermuda, China, and the United States, utilise specialised statutory structures to protect assets supporting insurance liabilities from the claims of general creditors. In Australia, life insurers are required to maintain "statutory funds", the assets of which are dedicated to meeting the liabilities attributable to the relevant fund; in a winding-up procedure, such assets are to be used as a priority in discharge of insurance policy liabilities referable to the fund.[163] Bermuda allows insurers to register as a "segregated accounts company", *i.e.*, a company with segregated accounts whereby the assets linked to a particular segregated account may not be used for liabilities linked to any other segregated account or the company's general funds.[164] These asset segregation mechanisms may operate as an alternative to, or alongside, formal priority rules by reserving specific assets exclusively for the satisfaction of insurance liabilities. China protects life insurance policyholders through mandatory technical reserves and the statutory transfer of life insurance portfolios together with the corresponding reserves.[165] In the United States, life insurers offering variable insurance products may maintain separate accounts whose assets are legally segregated from the insurer's general account and are generally unavailable to satisfy the claims of ordinary unsecured creditors.[166]

97. Priority rules and/or asset-segregation mechanisms may be complemented by PPSs (see Section I above). This is the case in several European jurisdictions.[167] In case of insolvency, policyholders may receive compensation from a PPS, while the PPS becomes subrogated to the rights of compensated policyholders.[168] This raises important questions concerning the ranking of subrogated claims and the extent to which PPSs should inherit any preferential treatment enjoyed by policyholders.[169]

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[162] *Solvency II*, Art. 275. Since *Solvency II* allows Member States to choose between different mechanisms for protecting insurance claims, significant differences continue to exist across European insurance insolvency regimes regarding the treatment of policyholder claims and other creditors.

[163] Australia, *Life Insurance Act 1995*, Sections 31, 38, 187(3).

[164] Bermuda, *Segregated Accounts Companies Act 2000* (SAC Act), Art. 25. Pursuant to the SAC Act the assets and liabilities of individual segregated accounts are legally independent, and the insolvency of one segregated account cannot affect the assets of another account.

[165] China, *Enterprise Bankruptcy Law of the PRC*, Art. 38, read in conjunction with regulatory frameworks for investment-linked products, may result in specific assets – such as entrusted discrete investment accounts – being excluded from the debtor's bankruptcy estate.

[166] See, *e.g.*, United States, *New York Insurance Law,* Art. 42, § 4240(a)(12) (establishing that assets in separate accounts shall not be chargeable with liabilities arising out of any other business).

[167] See European Commission, *Commission Staff Working Document – Impact Assessment Report,* SWD (2021) 260 final, Annexe 5, from which it follows that, at the time, 17 EU Member States operated one or more PPSs. Joint Research Centre (European Commission), *Insurance Guarantee Schemes: quantitative impact of different policy options*, EUR 30823 EN (2021).

[168] IFIGS, *Framework Guidance for Insurance Guarantee Schemes* (2020), Principle 14 (which indicates that the insurance guarantee scheme (IGS) "should have, by law, the right to recover its claim in accordance with the statutory creditor hierarchy". The accompanying indicators further provide that the IGS should be recognised as a creditor, whether automatically or by subrogation, and should enjoy at least the same creditor rights or status as a policyholder (or other payee or beneficiary) in the treatment of the estate of the failed insurer; IAIS, *Issues Paper on Roles and Functioning of Policyholder Protection Schemes* (2023), para. 23: "Most PPSs, after they have (totally or partially) compensated policyholders, are "subrogated to the rights of the policyholders" up to the amounts they have compensated."

[169] The treatment and ranking of subrogated PPS claims may have significant implications for distributions to other creditors during the liquidation proceeding. Different approaches exist regarding whether a PPS that has compensated policyholders should also succeed to their preferential ranking. Under *Solvency II*, EU Member States may provide for subrogation without according the PPS the same preferential treatment as insurance claims; see *Solvency II*, Arts. 275 and 277. IAIS, on the other hand, assumes that subrogated PPSs fully acquire the preferential ranking of compensated policyholders; see IAIS, *Issues Paper on roles and functioning of Policyholder Protection Schemes* (2023), para. 23: "In addition, the preferential ranking of insurance claims over most other creditors in a liquidation means that the subrogated PPS has a better chance of recovering claims payments (since "subrogation" in this context means that the PPS has fully acquired the preferential ranking of the compensated policyholder), thus reducing the cost to the industry through levies needed to recover the

98. Additional complexity arises from the diversity of claims potentially associated with insurance relationships. Insurance insolvency proceedings may involve not only policyholders, but also beneficiaries, injured third parties, reinsurers, intermediaries, service providers, employees, tax authorities and financial counterparties. These diverse roles frequently give rise to significant inter-creditor priority conflicts that require legislators to make difficult social policy choices. Jurisdictions adopt different approaches regarding the ranking of these categories of claims. For instance, a fundamental tension exists between protecting policyholders and satisfying sovereign or social *(e.g.*, employee and social-security) claims. While some jurisdictions, such as the United States, elevate policyholder claims above state taxes and employee wages,[170] other regimes preserve higher-ranking privileges for certain employee, tax, or other statutory claims.[171]

99. Furthermore, regarding injured third parties in liability insurance, jurisdictions diverge on whether victims are granted a direct action against the insurer and, where such a right exists, the priority afforded to such claims in the event of the insurer's insolvency.[172]

100. Questions may also arise regarding the treatment of reinsurance recoverables and the position of reinsurers in insolvency proceedings. Reinsurance recoverables may constitute a significant asset of an insolvent insurer's estate and may materially affect the recoveries available to policyholders and other creditors. Their treatment, however, raises specific legal issues because reinsurers may occupy multiple roles simultaneously: they may be debtors of the insolvent insurer in respect of outstanding indemnity payments, creditors in respect of unpaid premiums by the insurer, and contractual counterparties of the insolvent insurer that may be entitled to rely on contractual defences or conditions that may limit or delay payment.

101. This overlapping position may give rise, in particular, to questions concerning set-off rights. Reinsurers may seek to offset amounts owed by the insolvent insurer, such as unpaid premiums, against reinsurance recoverables. The permissibility and scope of such set-off depend on the applicable insolvency and reinsurance law.

102. Another issue concerns contractual mechanisms that affect the allocation of reinsurance proceeds. For instance, "cut-through" clauses affect the collective distribution of assets by granting underlying policyholders direct access to reinsurance proceeds. Furthermore, jurisdictions differ in their treatment of insolvency-related payment conditions, claims control provisions, and other contractual provisions that reinsurers may invoke to limit or delay recoveries by the insolvent insurer.

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shortfall (*i.e.*, the difference between the amount the PPS has compensated to policyholders, and the amount the PPS can recover from the insurer's assets). Reasonable expectation of recovery against the estate of the failed insurer for funds advanced to protect policyholders is important in order to maintain the confidence in the PPS' financial capacity."

170 NAIC, *Insurer Receivership Model Act* (2007), Section 801. Under the NAIC model, which forms the basis for state receivership laws, policyholder claims and guaranty association subrogation claims are classified as Class 3 priorities. While preceded by administrative expenses (Class 1) and guaranty association administrative expenses (Class 2), they explicitly rank ahead of claims of the federal government (Class 5), employee wages (Class 6), and general unsecured creditors or state/local taxes (Class 7/8).

171 See, *e.g.*, France, *Code des Assurances*, Art. L-327, which grants policyholders a general statutory preference but provides that it ranks after the higher-ranking statutory privileges recognised in Arts. 2331 and 2377 of the Civil Code. France therefore preserves the existing hierarchy of preferential claims, under which certain employee and other statutory preferential claims rank ahead of policyholder claims.

172 *Solvency II*, Arts. 268(1)(g), 275. Art. 268(1)(g) includes within the definition of "insurance claims" amounts owed to injured parties having a direct right of action against an insurer; the existence of such direct-action rights remains a matter of national law. Art. 275(1)(b) permits Member States to rank claims by employees, public tax bodies, and social security systems ahead of insurance claims. Directive 2009/103/EC (*Motor Insurance Directive*) requires Member States to establish compensation bodies that provide injured parties of motor accidents compensation directly in case of insurer insolvency, enabling victims to obtain compensation without relying solely on distributions from the insolvent insurer's estate (Arts. 10a, 25a).

103. Jurisdictions differ considerably in their treatment of reinsurance recoverables. Some systems treat such recoverables as part of the general insolvency estate available for distribution among creditors; others provide mechanisms that protect reinsurance assets for the benefit of policyholders, such as segregation or preferential allocation arrangements; and some recognise contractual or statutory mechanisms allowing direct access to reinsurance proceeds. These differences affect the extent to which reinsurance arrangements enhance policyholder protection in insurer insolvency.[173]

104. The creditor hierarchy in insolvency also plays an important role in insurer resolution frameworks. Resolution authorities may apply loss-allocation measures, including the write down or conversion of certain liabilities while protecting policyholder claims or other liabilities to preserve financial stability. The resulting allocation of losses is constrained by the "No Creditor Worse Off" (NCWO) safeguard, under which creditors have a right to compensation where they do not receive at a minimum what they would have received in a liquidation of the entity under the applicable insolvency regime.[174] The liquidation hierarchy thus provides the counterfactual benchmark against which creditor treatment in resolution is assessed. In the insurance context, the design of the creditor hierarchy consequently affects not only distributions in liquidation proceedings but also the operation and feasibility of resolution measures.

105. Cross-border insurance insolvencies may further complicate matters. Differences in national creditor hierarchies can generate uncertainty regarding expected recoveries and may create incentives for local authorities to ring-fence assets for the protection of domestic policyholders. Such differences may also complicate the cross-border recognition of foreign insolvency proceedings and the application of supportive measures, especially where the applicable priority rules or policyholder protections differ significantly.[175]

Questions for the Working Group:

- *Should the future Guide merely describe the different mechanisms used across jurisdictions for the protection of policyholders or should it also identify preferred approaches?*

  For instance, should policyholder protection be achieved primarily through priority rules, dedicated assets supporting technical provisions, PPSs, or a combination of these mechanisms?

- *Should the Guide address the ranking of PPSs when they become subrogated to policyholder claims?*

- *Should the Guide provide recommendations concerning the treatment of contingent and long-tail insurance claims?*

- *Should the Guide address the distinction between the ranking of reinsurance claims and the treatment of reinsurance recoverables, including set-off, payment conditions and arrangements permitting direct access to reinsurance proceeds?*

- *Are there any other types of creditor claims whose ranking should specifically be addressed?*

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173 IAIS, *Application Paper on Recovery Planning* (2026).

174 *FSB Key Attributes* (2024) , KA 5.2 and Appendix II-Annex 2, 5.2.

175 *HIH Casualty and General Insurance Ltd* [2008] UKHL 21 illustrates how differences in national priority rules may complicate cross border insurance insolvencies and how courts applying the principle of modified universalism may facilitate coordination between proceedings in different jurisdictions. See also, Townsend, J. International Co-operation in Cross-Border Insolvency: HIH Insurance (2008), *The Modern Law Review*, Vol 71, No 5, pp.811-822.

- *To what extent should the order of loss absorption in insurance resolution frameworks be considered in the development of guidance on creditor ranking in insolvency?*

- *How should the Guide address possible conflicts arising from divergent creditor hierarchies in cross-border insurance insolvencies (see Section L below)?*

K. Group Dimension

106. Chapter 9 of the UNIDROIT LGBL recognises that the liquidation of a bank forming part of a group gives rise to issues that differ from those arising in the liquidation of a standalone institution. While liquidation proceedings remain generally structured on an entity-by-entity basis, a bank's membership in a group may create operational and financial interdependencies that require enhanced coordination among authorities, liquidators and, where relevant, courts. The Chapter therefore examines how the legal framework can ensure that the liquidation of an individual bank is not impeded by group relationships, including through rules on the treatment of intra-group financing and related-party claims, contingency planning for operational continuity, and mechanisms to facilitate cooperation and coordination.[176]

107. Similar considerations arise in the insurance sector. Over the past two decades, insurance supervision has increasingly evolved from a purely legal-entity approach towards a group-wide perspective.[177] Large insurance groups frequently operate through complex networks of subsidiaries, branches and affiliated entities located in multiple jurisdictions. Risks may arise not only at the level of individual insurers but also through intra-group transactions, shared services, risk concentrations and operational interdependencies. Although insolvency proceedings generally continue to be conducted on an entity-by-entity basis, the increasingly integrated organisation of insurance groups means that the liquidation of an insurer within a group may have significant implications for the wider group and *vice versa*.

108. International guidance and supervisory standards increasingly emphasise the importance of monitoring intra-group transactions, exposures, and risk concentrations within insurance groups.[178] Such arrangements may include intra-group reinsurance, intercompany loans, guarantees, capital support arrangements, liquidity management mechanisms, common operational services such as information technology (IT), claims administration, actuarial support and accounting. While these arrangements may contribute to the efficient functioning of insurance groups in the ordinary course of business, they also create legal, operational, and financial interdependencies that may require specific attention in situations of financial distress.[179] For example, questions may arise concerning

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176 UNIDROIT LGBL, Chapter 9.

177 IAIS, *Insurance and Financial Stability* (2011), paras 11–12. The IAIS identifies internationally active insurance groups as requiring enhanced supervisory cooperation and coordination and notes the development of ComFrame and supervisory colleges to support effective group-wide supervision across jurisdictions. See also IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 23. In the European Union, *Solvency II*, Title III establishes a comprehensive framework for insurance group supervision.

178 See *e.g.*, IAIS, *Insurance Core Principles and ComFrame* (2024), ICPs 23 and 25. The FSB has likewise highlighted intra-group loans, guarantees, derivatives, reinsurance contracts, liquidity support, cost-sharing arrangements, and shared services as important sources of internal interconnectedness for recovery and resolution planning. See FSB, *Internal Interconnectedness in Resolution Planning for Insurers: Practices Paper* (2022).

179 One option for addressing group-wide vulnerabilities involves transferring the viable operations to another insurer or a newly established successor entity while leaving residual liabilities behind in the failing entity. See *e.g.*, the restructuring of the Anbang Insurance Group in China. During that process, Chinese regulators established Dajia Insurance Group to receive Anbang's viable insurance businesses and policy portfolios, thereby preserving business continuity while residual entities remained subject to subsequent judicial insolvency proceedings. The legal framework for these measures is found primarily in Arts. 145–148 of the *Insurance Law*, which empower the regulatory authority to assume control and restructure an insurer facing severe solvency issues. See Li, Q., Ma, M., & Zhao, S., *A comparative study on the protection of insured's rights and interests in insurer risk disposal* (2024).

the enforceability and valuation of intercompany claims, the treatment of intra-group guarantees and reinsurance recoverables, the continuation or termination of shared service arrangements, the exercise of set-off rights, the avoidance of intra-group transactions entered into shortly before the opening of liquidation proceedings, and the treatment of affiliate claims under statutory priority rules. As in the banking context, legal certainty regarding the treatment of such arrangements may contribute to an orderly liquidation while reducing the risk that uncertainty concerning intra-group exposures exacerbates financial distress within the wider group.

109. Where financial distress culminates in the opening of liquidation proceedings, the integrated economic reality of an insurance group may create tensions with the traditionally entity-centric nature of insolvency law. A liquidator's primary statutory duty under business insolvency law to maximise the asset value of a single entity may prompt actions – such as unilaterally terminating intra-group financing agreements or withholding critical shared services – that may have adverse consequences for the wider group, potentially impairing the continued operation of otherwise healthy affiliates or reducing overall group value.

110. Furthermore, a failing insurer may need to continue to rely for some time during the liquidation proceeding on services (*e.g.*, treasury services, IT, etc.) provided by other entities within group. For insurers that could be systemic in failure, the *FSB Key Attributes* recognise that the abrupt withdrawal of essential services could jeopardise the resolution objectives. Resolution authorities should therefore have the power, *inter alia*, to require group entities (irrespective of whether they are regulated) to continue providing such services to an insurer in resolution or any successor or acquiring entity.[180] Although these recommendations are directed to resolution rather than liquidation, they reflect a broader policy concern that operational interdependencies within financial groups should not unnecessarily disrupt the orderly management of a failing institution. For non-systemic banks, Chapter 9 of the LGBL similarly recommends that the continuation or termination of existing intra-group service arrangements should be at the discretion of the bank's liquidator, who should also have the power to renegotiate, modify or enter into new intra-group service agreements where necessary to facilitate the liquidation.[181] The Working Group may therefore wish to consider whether comparable powers should be recommended in the context of insurer liquidation.

111. Effective liquidation of insurers that form part of a group may also require appropriate mechanisms for cooperation and coordination among liquidators, supervisory authorities and courts, including across jurisdictions where different group entities (financial or non-financial institutions) are subject to separate proceedings.[182] Such coordination does not imply substantive consolidation or the pooling of assets and liabilities, but may facilitate information sharing, the management of intra-group relationships, the preservation of important operational services and the orderly realisation of assets.[183] The Working Group may therefore wish to consider whether the legislative

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[180] *FSB Key Attributes* (2024), KA 3.2(iv) and Appendix II-Annexe 2, para. 4.3. A growing number of jurisdictions have implemented analogous powers in their domestic resolution frameworks. For example, in Singapore, Section 130 of the *Financial Services and Markets Act 2022* empowers the Monetary Authority of Singapore to direct significant associated entities of a financial institution to ensure the uninterrupted provision of essential services to an institution under resolution.

[181] UNIDROIT LGBL, Chapter 9, Recommendation 86.

[182] One possible mechanism for facilitating coordination between separate liquidation proceedings involving entities within the same group is the appointment of the same liquidator in multiple proceedings, where permitted under applicable law. Such an appointment may, however, raise potential conflicts of interest, which would need to be appropriately addressed. See the *World Bank Principles*, C16.5, and the UNIDROIT LGBL, para. 416. See also, *e.g.*, the Australian Restructuring, Insolvency & Turnaround Association (ARITA), *Code of Professional Practice: Practice Statement Insolvency 1* (Independence, § 1.7.1), recognising that the same liquidator may be appointed to multiple related companies for commercial and practical reasons, including cost savings, information sharing and obtaining a more complete picture of the group's activities and financial position, but highlighting the need to address potential conflicts of interest.

[183] See, *e.g., Insolvenzordnung* (InsO) (Germany), §§ 3a–3e and 269a–269i, providing for cooperation between insolvency courts and administrators and for group coordination proceedings without consolidating the separate insolvency estates. For insurance undertakings, coordination proceedings take effect only where the supervisory authority has applied for or consented to them. *Versicherungsaufsichtsgesetz* (VAG), § 312(1). In

framework should expressly encourage or facilitate such cooperation while preserving the separate legal identity of each insurer.

Questions for the Working Group:

- *Should the future Guide address the failure of insurers that are part of a group as a separate topic?*

  If so, which scenarios should it address? For example (i) the liquidation of a single insurer within an otherwise healthy group; (ii) the concurrent failure of an insurer and one or more other financial institutions (e.g., a bank) within the group; (iii) the concurrent failure of an insurer and one or more non-financial group entities?

- *What legal issues arising from a failing insurer's membership in a group should the Guide address? For example, should it include recommendations on intra-group claims, reinsurance arrangements, financing transactions, guarantees, shared services, set-off, avoidance of intra-group transactions, and/or priority of affiliate claims (see also Section J above)?*

- *Should the Guide provide recommendations regarding coordination and information-sharing among liquidation authorities (whether judicial or administrative), liquidators, and other relevant authorities where several entities within the same group are subject to insolvency or resolution proceedings?*

L. Cross-Border Aspects

112. Chapter 10 of the UNIDROIT LGBL addresses cross-border dimensions of bank liquidation, recognising that the failure of a bank with operations, assets, creditors, subsidiaries or branches in multiple jurisdictions requires coordinated international action. The Chapter adopts the principle of modified universalism as the preferred framework for cross-border bank liquidation, advocating a centralised approach led by the home jurisdiction while recognising that parallel proceedings or local measures may be necessary to protect legitimate domestic interests. It provides recommendations on cooperation and communication between authorities, recognition of foreign liquidation proceedings, and coordination of proceedings in cross-border banking groups, with the objective of promoting efficient, fair, and predictable cross-border bank liquidation while balancing international cooperation with the protection of local stakeholders.

113. Similar issues arise in insurer insolvency, where questions of jurisdiction, recognition of foreign proceedings, cooperation among authorities, treatment of creditors and the coordination of parallel proceedings may arise. Insurers frequently operate through branches and subsidiaries located in multiple jurisdictions,[184] and policyholders, creditors, reinsurers and assets may be dispersed across several countries. Consequently, the insolvency of an insurer may require extensive coordination among courts, liquidation authorities, liquidators, PPSs and other relevant bodies. Cross-border difficulties may arise even where only one insurance legal entity is subject to liquidation, particularly where that entity has foreign branches, local asset deposits or policyholders situated abroad.

114. International standards increasingly recognise the importance of cross-border cooperation in insurance recovery and resolution. The *IAIS ICPs* encourage supervisors to establish mechanisms for

Italy, the *Codice delle Assicurazioni Private* (Title XVI) contains a dedicated Chapter VII on the extraordinary administration and compulsory administrative liquidation of the ultimate Italian parent undertaking and other companies belonging to the insurance group. The framework also facilitates coordination of proceedings through the appointment of the same administrators or liquidators, subject to conflict-of-interest safeguards, and establishes common rules on jurisdiction.

[184] IAIS, *Insurance and Financial Stability* (2011), paras 11-12 (highlighting the importance of cross-border supervision and cooperation in relation to internationally active insurance groups).

cooperation in the resolution and orderly exit of insurers.[185] The *ComFrame* establishes additional expectations for the supervision and resolution planning of internationally active insurance groups.[186] The *FSB Key Attributes* likewise provide for cooperation between home and host authorities, the development of institution-specific cooperation agreements in relation to financial institutions that could be systemic or critical in failure and the establishment of Crisis Management Groups to facilitate orderly cross-border resolution.[187]

115. Existing international and regional legal frameworks similarly facilitate cross-border cooperation. The UNCITRAL insolvency instruments, particularly the *MLCBI* may provide useful mechanisms for the recognition of foreign proceedings, cooperation between courts and insolvency representatives, and coordination of cross-border insolvencies, even if insurers may be excluded from their scope.[188]

116. Additional legal instruments increasingly emphasise timely cooperation, procedural coordination and information-sharing among the authorities involved in cross-border distress.[189] Within the EU, insurance insolvency is largely based on the principles of unity, universality and mutual recognition.[190] Under *Solvency II*, only the competent authorities of the home Member State may open winding-up proceedings in respect of an insurer, including its branches in other Member States. The decision is recognised across the EU without any further formality.[191] The *IRRD* further strengthens cooperation by establishing arrangements for cooperation, coordination and information-sharing among resolution authorities, supervisory authorities and other competent bodies in relation to cross-border insurance resolution.[192]

117. Notwithstanding these developments, approaches to cross-border insurance insolvency continue to differ significantly across jurisdictions. Outside integrated regional frameworks, recognition of foreign proceedings and cooperation among authorities may present greater challenges. In many jurisdictions, insurers are excluded from general cross-border insolvency frameworks or are subject to specialised insolvency regimes reflecting concerns relating to

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185 IAIS, *Insurance Core Principles and ComFrame* (2024), ICP 25 (Supervisory Cooperation and Coordination) and ICP 12 (Exit from the Market and Resolution). See also IAIS, *Issues Paper on the Roles and Functioning of Policyholder Protection Schemes* (2023), para. 124, suggesting timely exchange of information, including confidential information, among supervisors, resolution authorities and PPSs to enable them to discharge their respective responsibilities effectively.

186 IAIS, *Insurance Core Principles and ComFrame* (2024), which supplements the ICPs for internationally active insurance groups by providing for supervisory colleges, group-wide supervisors, Crisis Management Groups, and cross-border cooperation in resolution planning (CF25).

187 FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (2024), KAs 7-9; Consistent with these standards, a growing number of jurisdictions have introduced statutory mechanisms to facilitate the recognition and implementation of foreign resolution actions. For example, Singapore's *Financial Services and Markets Act 2022* (Sections 102-104, particularly Section 103) empowers the Monetary Authority of Singapore to recognise foreign resolution actions, subject to safeguards protecting domestic financial stability and the equitable treatment of Singapore creditors.

188 Some jurisdictions have extended the Model Law to insurance insolvencies. For instance, Ghana applies the Model Law to insurers, giving their authorities a direct framework to recognise foreign proceedings and coordinate cross-border insolvencies. See Ghana, *Corporate Insolvency and Restructuring Act 2020* (Act 1015), Schedule (adopting the UNCITRAL *MLCBI*); read in conjunction with *the Insurance Act 2021* (Act 1061), Section 92(a), which expressly provides that the provisions of the *Corporate Insolvency and Restructuring Act 2020* apply to the official winding-up of an insurer with necessary modifications.

189 For banks, see, *e.g.*, IADI, *Core Principles for Effective Deposit Insurance Systems* (2025), Principles 17-18, suggesting formal cooperation, coordination and information-sharing frameworks, including bilateral or multilateral arrangements between home and host authorities and financial safety-net participants.

190 *Solvency II*, Arts. 268-296. See also Shuai Guo, Cross-border Resolution of Financial Institutions: Perspectives from International Insolvency Law (2018), pp. 13–14, describing the principles of home-state control and mutual recognition as central features of the European framework governing cross-border insurance activity.

191 *Solvency II*, Arts. 247-258 (providing for cooperation through colleges of supervisors), and 273-274.

192 *IRRD*, Art. 69.

policyholder protection and financial stability.[193] The US framework, for example, permits a degree of recognition and cooperation while preserving territorial safeguards established under state insurance law. In the United States, although foreign insurers may seek recognition of foreign proceedings under Chapter 15 of the Bankruptcy Code, insurer insolvencies remain subject to specialised regulatory frameworks administered primarily at the state level. Moreover, 11 U.S.C. § 1501(d) expressly preserves protections afforded under state insurance laws by preventing courts from granting relief with respect to deposits, trust funds and other security maintained for the benefit of claimants in the United States.[194]

118. In the absence of a harmonised approach, cross-border coordination often relies on judicial discretion and powers applying the principles of modified universalism. The *HIH Insurance litigation* between Australia and the United Kingdom offers an illustration.[195] During the insolvency of the Australian insurance conglomerate, the English courts exercised their statutory discretion to remit locally collected assets to the principal liquidation proceedings in Australia. The courts facilitated this cooperative transfer even though the Australian statutory regime afforded priority to Australian creditors, determining that such a departure from the strict *pari passu* principle of distribution was a justifiable exception that did not offend domestic public policy.[196]

119. Cross-border issues may also concern the protection of domestic policyholders and other local claimants. Some jurisdictions require assets to be maintained locally for the benefit of policyholders of a branch or otherwise restrict the transfer or use of assets supporting local insurance liabilities.[197] Such mechanisms may improve the prospects of recovery for local policyholders and reduce reliance on a foreign proceeding. At the same time, ring-fencing may fragment the insurer's estate, impede coordinated portfolio transfers or run-off arrangements, and produce unequal outcomes among similarly situated policyholders in different jurisdictions.[198] Future guidance could therefore distinguish between justified local safeguards and precautionary measures that unnecessarily frustrate an orderly cross-border liquidation.

120. Related questions arise in connection with PPSs, particularly where jurisdictions apply different rules to the territorial scope of protection.[199] A home-jurisdiction model may allocate responsibility

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193 See Guo (2018), discussing sector-specific insolvency and resolution frameworks applicable to financial institutions.

194 United States, *Bankruptcy Code*, 11 U.S.C. § 1501, (c)-(d). While Chapter 15 incorporates the UNCITRAL *MLCBI* and permits recognition of foreign insurance company proceedings, subsection (d) preserves protections afforded under state insurance laws by restricting relief with respect to deposits, trust funds and other security maintained for the benefit of claimants in the United States. Similarly, in Australia, the *Cross-Border Insolvency Act 2008* (Art. 1) implements the UNCITRAL *MLCBI*, but insurers are excluded from its scope. In Brazil, *Law No. 11,101 of 2005* (Art. 2) incorporates the UNCITRAL *MLCBI* but excludes insurers from its general insolvency regime. Insurer liquidation is governed by a special regime supervised by SUSEP. In Colombia, *Law 1116 of 2006* (Title III) incorporates the UNCITRAL *MLCBI* but excludes entities supervised by the *Superintendencia Financiera de Colombia*, including insurers, from the general insolvency regime.

195 *McGrath v Riddell; In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852.

196 Townsend, J. International Co-operation in Cross-Border Insolvency: HIH Insurance (2008), *The Modern Law Review*, Vol 71, No 5, pp.811-822.

197 For example, in Canada, the *Winding-up and Restructuring Act* (ss. 161–163) requires a foreign insurer carrying on business in Canada to maintain assets in Canada for the protection of Canadian policyholders and other local claimants, give claims arising from its Canadian insurance business priority over those assets in a winding-up, and regulate the distribution of any remaining Canadian assets and the treatment of claims connected with the company's Canadian operations.

198 IAIS, *Insurance and Financial Stability* (2011), para. 18. The IAIS notes that legal and regulatory restrictions affecting transfers of funds within insurance groups may create obstacles to the management of liquidity and financial distress in cross-border group structures. Guo similarly notes, in the context of cross-border bank resolution, that ring-fencing measures may may undermine the effectiveness of global resolution cooperation. See also Claessens Stijn, Herring Richard and Dirk Schoenmaker, A Safer World Financial System: Improving the Resolution of Systemic Institutions (2010), *Geneva Reports on the World Economy 12*, p.2.

199 IAIS, *Issues Paper on the Roles and Functioning of Policyholder Protection Schemes* (2023), paras. 68-75; IFIGS, *Framework Guidance for Insurance Guarantee Schemes* (2020), Principle 5 ("Cross-border Issues"). These publications distinguish between home and host jurisdiction models for determining PPS (or insurance

by reference to the insurer's authorisation or establishment, whereas a host-jurisdiction model may focus on the location of the risk, branch or policyholder. Where different models coexist, gaps, overlaps or disputes may arise regarding which scheme is responsible for compensation. Cross-border cases may also require coordination concerning the exchange of policyholder data, determination and payment of covered claims, funding, reimbursement and the exercise of subrogated rights against the insurer's estate. Differences in the creditor ranking accorded to subrogated claims may affect both recoveries by PPSs and distributions to other creditors.[200]

121. Future guidance could seek to reconcile these competing interests without compromising the policyholder protection and financial stability objectives of insurance law. Guidance may consider recommending statutory authority for courts, liquidators and competent authorities to communicate and cooperate with their foreign counterparts, recognition criteria and public-policy safeguards, coordination protocols for parallel proceedings, and bilateral or multilateral memoranda of understanding establishing responsibilities, communication channels and procedures for sharing confidential information.

Questions for the Working Group:

- *Should the future Guide contain a dedicated chapter on cross-border insurance insolvency?*
- *Should the Guide promote modified universalism as the preferred approach to cross-border insurance liquidation, while recognising the need for limited territorial safeguards to protect policyholders? How should the Guide address tension between cross-border coordination and the protection of domestic policyholders and creditors?*
- *Should the Guide include recommendations on cooperation between liquidation authorities, liquidators and other relevant authorities in cross-border cases? What forms of cooperation and communication should be encouraged?*
- *Should the Guide address coordination between PPSs in cross-border cases, including the allocation of responsibility for covered claims, information exchange, funding, reimbursement and subrogated recoveries?*
- *Should the Guide include guidance on the coordination of parallel proceedings?*
- *Should the Guide recommend statutory mechanisms for the recognition of foreign insurance liquidation proceedings, including safeguards based on public policy and the protection of policyholders?*
- *Should special guidance be provided regarding branches, subsidiaries and internationally active insurance groups (see also Section K above)?*
- *What guidance can be provided to overcome statutory barriers (e.g., relating to data privacy and confidentiality) when information-sharing is required among cross-border insolvency representatives and courts?*

guarantee scheme (IGS)) coverage and recommend greater coordination where possible. Where different approaches coexist, they encourage bilateral or multilateral arrangements to clarify which scheme is responsible for compensation and related operational matters, including funding and cost allocation.

[200] IADI, *Core Principles for Effective Deposit Insurance Systems* (2025), p. 21, discussing, in the context of deposit insurance schemes, whether the insurer may obtain depositor's preferential ranking through subrogation. Similar considerations may arise in the insurance sector in relation to policyholder protection schemes, including the potential transfer of priority ranking through subrogation.

ANNEXE I

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ANNEXE II

TENTATIVE WORK PLAN 2026-2029

Activity	2026		2027				2028				2029
	Q2	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	Q1
Set up of WG											
1st WG meeting											
Preparation of input in selected areas											
2nd WG meeting											
Preparation of updated input											
3rd WG meeting											
Preparation of draft chapters											
4th WG meeting											
Preparation of revised draft Guide											
5th WG meeting											
Consultation											
6th WG meeting											
Submission of draft to UNIDROIT GC for adoption											