FSB FINANCIAL STABILITY BOARD

Principles for Cross-border Effectiveness of Resolution Actions

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Overview

At the St. Petersburg G20 Summit in 2013 the FSB made a commitment to "develop policy proposals on how legal certainty in cross-border resolution can be further enhanced".[1] These Principles set out statutory and contractual mechanisms that jurisdictions should consider including in their legal frameworks to give cross-border effect to resolution actions in accordance with the *Key Attributes*.[2] The Principles are not intended to be comprehensive, and each jurisdiction will need to consider what is required in the context of its own legal environment for such a legal framework to be effective. While emphasising the importance of implementing comprehensive statutory frameworks, these Principles also support contractual approaches to cross-border recognition, which the FSB agreed were critical pending the adoption of such statutory frameworks and which may also complement such regimes once they are in place. This guidance has been developed with a focus on the resolution of banks. However, many of the legal issues and principles that are discussed below may be relevant to other types of financial institutions as well as to financial market infrastructures.

In order to enhance the effectiveness of cross-border resolution, the *Key Attributes* require jurisdictions to provide for transparent and expedited processes to enable resolution measures taken by a foreign resolution authority to have cross-border effect provided that domestic creditors are treated equitably in the foreign resolution proceedings (KA 7.5). The need to give cross-border effect to resolution actions may arise with respect to a firm undergoing resolution in its home jurisdiction that operates a branch or controls a subsidiary in a foreign jurisdiction; or a firm that holds assets, liabilities or contracts located or booked in, or subject to the law of, another jurisdiction in which the firm is not established.

Statutory approaches

Statutory approaches for giving effect to foreign resolution measures in a manner consistent with KA 7.5, with due regard to the Safeguards in KA 5, may take the form of; (i) a recognition process; or (ii) the taking of measures under the domestic legal framework that support and are consistent with the resolution measures taken by the foreign home resolution authority.

- **Recognition**. Recognition implies that, at the request of a foreign party, a jurisdiction would accept the commencement of a foreign resolution proceeding domestically and thereby empower the relevant domestic authority (either a court or an administrative agency[3]) to enforce the foreign resolution measure or grant other forms of domestic

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1 Specifically, the FSB made a commitment to "develop policy proposals on how legal certainty in cross-border resolution can be further enhanced, such as by inclusion in debt instruments of clauses that recognise the effect of resolution actions taken in another jurisdiction" and "develop proposals for contractual or statutory approaches to prevent large-scale early termination of financial contracts." The FSB Report to the G20 on *Progress and Next Steps towards Ending "Too-Big-To-Fail" (TBTF)* identified legal uncertainties about the cross-border effectiveness of resolution measures as one of the main obstacles to the resolution of systemically important financial institutions (SIFIs) that operate across borders. http://www.financialstabilityboard.org/publications/r_130902.pdf.

2 A consultative version of these principles was issued in September 2014. See http://www.financialstabilityboard.org/2014/09/c_140929/

3 The *Key Attributes* generally require that jurisdictions confer resolution powers on an administrative authority but allow for judicial involvement in resolution. The *Key Attributes* indicate that to the extent that the resolution planning process contemplates that judicial action may be necessary it should ensure that the time required for court proceedings will not

relief, for example, a stay on domestic creditor proceedings. Recognition is not dependent on the exercise of resolution powers in the local jurisdiction. Once recognition is granted, the measures adopted by the foreign home authority can be given effect in accordance with the law of the domestic jurisdiction even if there are no grounds for the commencement of domestic resolution proceedings. Recognition generally does not extend to the application of provisions of foreign law that are inconsistent with the domestic framework.

- **Supportive measures.** Supportive measures involve the taking of resolution (or other) measures by the relevant domestic authorities, in the context of domestic resolution proceedings or supervisory action, to produce the effect of, or otherwise support, the resolution action taken by the foreign resolution authority. In this regard, the relevant domestic authority may act at the request of the foreign resolution authority or independently take resolution or other actions that are consistent with the foreign measures. However, its ability to take such action may be conditional on the commencement of domestic resolution proceedings and the resolution authority would be limited to the measures that are available under the domestic regime. Differences between the resolution powers available in the home and host jurisdictions could therefore give rise to inconsistencies between the outcome desired by the foreign home authority and the outcome the host authority would be able to achieve. Such inconsistency could be minimised if both home and host jurisdictions implement regimes that are consistent with the *Key Attributes* or adopt resolution strategies that take into account the differences in resolution powers. Early coordination among relevant jurisdictions through institution-specific cooperation agreements and MOUs can facilitate a process that relies on supportive measures.

Recognition and supportive measures complement each other and in some cases both may be required to achieve the desired outcome. Legal and procedural differences may mean that a recognition process is more suitable for certain resolution actions or certain situations, while supportive measures may be the preferred approach for others. Existing cross-border cooperation and recognition frameworks adopt a combination of approaches. See Annex I for examples of existing frameworks.

Contractual recognition

Contractual recognition approaches can help support the cross-border enforceability of resolution action. If properly crafted and widely adopted, contractual recognition approaches offer a workable solution until comprehensive statutory regimes for giving cross-border effect

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compromise the effective implementation of resolution measures: see KA 2.1 (administrative authorities) and KA 5.4 (judicial interventions).

to resolution action are adopted. Contractual arrangements may also complement and support statutory regimes once such regimes are in place. They should, in particular, be considered in order to support the cross-border enforceability of:

(i) temporary restrictions or stays on the exercise of early termination rights (including those resulting from cross-defaults) under financial contracts that are governed by the laws of a jurisdiction other than that of the contracting financial institution that is subject to the resolution regime; and

(ii) a write-down, cancellation or conversion of debt instruments in resolution ('bail-in') where the instruments are governed by the laws of a jurisdiction other than that of the issuing entity.

Temporary stays on early termination rights

Effective temporary stays on early termination rights that arise only by reason of or in connection with a firm's entry into resolution are important to prevent the close-out of financial contracts in significant volumes. Such close-out action upon entry into resolution could disrupt the provision of critical functions, lead to the firm in resolution having an unbalanced book and undermine the objective of a resolution action that seeks to maintain the continuity of critical functions. The *Key Attributes* therefore require jurisdictions to include in their resolution regimes powers for authorities to impose such temporary stays, accompanied by appropriate safeguards for counterparties.[4]

In the absence of an appropriate statutory framework or contractual recognition provisions, there is a risk that domestic courts enforcing a contract governed by their domestic law may not give effect to a restriction or temporary stay on the exercise of early termination rights (including as a result of cross-defaults) imposed under a foreign resolution regime, or would be unlikely to do so sufficiently promptly to meet the needs of effective resolution in the foreign jurisdiction.

Bail-in

Authorities must have confidence that the exercise of resolution powers will be legally enforceable in relation to a firm's loss-absorbing resources. Where instruments are governed by a foreign law, an acceptable level of confidence can be achieved only where there are legal frameworks in place by which the write-down or conversion of the instruments under the issuer's home resolution regime can be recognised promptly and with an adequate degree of predictability and certainty in other relevant jurisdictions, or where the instruments include legally enforceable contractual provisions recognising the application of resolution tools by the relevant resolution authority. The inclusion of contractual bail-in recognition clauses in

[4] KA 4 specifies that a temporary stay should be strictly limited in time (for example, for a period not exceeding 2 business days); should be subject to adequate safeguards that protect the integrity of financial contracts and provide certainty to counterparties (as set out in I-Annex 5 to the *Key Attributes*); and should not affect the exercise of early termination rights of a counterparty that are not related to entry into resolution or the exercise of the relevant resolution power (for example, failure to make a payment, or deliver or return collateral on a due date) occurring before, during or after the period of the stay.

debt instruments governed by the laws of a jurisdiction other than the home jurisdiction of the issuing entity can help support the cross-border enforceability of bail-in actions taken by the home resolution authority in relation to the issuing entity. Although there cannot be complete certainty, courts will generally enforce contractual provisions properly entered into unless they are deemed to be contrary to public policy.

Official action to promote widespread adoption of contractual recognition

The impact of contractual solutions on aiding the cross-border enforceability of resolution actions depends on a sufficiently widespread adoption of appropriate contractual language by market participants. By its nature, any contractual solution binds only the parties that agree to it. This is particularly relevant in the context of contractual agreements to stay or limit the exercise of early termination rights since, in order to be effective, such contractual provisions would have to be agreed to by both sides of the trade. For example, in respect of OTC bilateral derivatives documented under the ISDA Master Agreement (1992 and 2002 versions), the International Swaps and Derivatives Association developed a Resolution Stay Protocol.[5] The Protocol contractually opts adhering parties into provisions within certain qualifying special resolution regimes that limit the exercise of termination rights.

FSB Members made a commitment to act in a concerted manner to promote, by way of regulation or other enforceable measures, the broad adoption of the contractual approach to cross-border effectiveness of temporary stays of early termination rights (including with respect to cross-defaults) in financial contracts and of bail in provisions in debt instruments. Regulatory measures and incentives that require or encourage firms to include appropriate contractual recognition provisions across their cross-border contractual arrangements more generally should help to improve the firms' overall resolvability.

Adoption of statutory recognition frameworks

The development of effective statutory frameworks and legal processes for giving prompt effect to foreign resolution actions should be the ultimate objective. Given that it will take time to develop and adopt appropriate statutory frameworks, contractual approaches to the effectiveness of temporary stays and the write-down or conversion of instruments under a resolution regime, offer a means of significantly enhancing the likelihood that these resolution measures will be effective in other jurisdictions. However, contractual approaches also have limitations:

(i) First, a contractual approach in isolation may not achieve the level of legal certainty that would be conferred by widespread adoption of statutory frameworks consistent with KA 7.5.

(ii) Second, to materially enhance the resolvability of a firm, a contractual approach needs to be widely adopted by the firm and its counterparties in relation to all relevant cross-border contracts.

[5] See Annex III.

(iii) Finally, if contractual provisions recognising temporary stays on early termination rights or the exercise of bail-in powers are not included in all relevant cross-border contracts, there is a risk that similarly situated creditors may have different rights and be treated differently in resolution.

Jurisdictions should therefore continue to pursue the development and adoption of statutory frameworks, which supplement and may eventually supersede contractual approaches.

Principles for Cross-border Effectiveness of Resolution Actions

Statutory Measures

Jurisdictions should consider the following principles and elements as they develop statutory frameworks and legal processes to enable prompt effect to be given to foreign resolution actions.

1. Authorities should pursue a close alignment of resolution powers and tools with the *FSB Key Attributes of Effective Resolution Regimes for Financial Institutions* to facilitate the process of giving cross-border effect to resolution actions.

Recognition of foreign resolution actions may be difficult or impossible, as a matter of law or policy, if resolution regimes in home and host jurisdictions differ substantially and do not provide for the same or similar actions. A close alignment of resolution powers and tools with the *Key Attributes* will help achieve cross-border effectiveness of resolution actions. As part of their resolution planning within CMGs, home and key host authorities should reach a clear understanding of commonalities and differences between their respective resolution powers and tools and be aware of circumstances where lack of alignment of tools might compromise cross-border recognition.

2. The legal framework should confer on a domestic authority or authorities the legal capacity to give effect to foreign resolution measures.

Jurisdictions may achieve the objectives of the *Key Attributes* (KA 7.5) by establishing any of the following:

(i) an administrative and/or judicial framework for recognition;

(ii) an administrative and/or judicial framework for taking supportive measures; or

(iii) a framework that combines recognition and supportive measures in an administrative and/or judicial form. To the extent judicial involvement is required under national law, the safeguards under KA 5.4 to KA 5.6 should be in place.

Where the statutory framework takes the form of a *recognition process*, the relevant authority, which could be the supervisory or resolution authority or a court, should have the legal capacity to recognise and enforce foreign resolution measures at the request of a foreign authority, subject to clearly specified conditions relating, for example, to:

(i) equitable treatment of domestic creditors in the foreign resolution proceeding; and

(ii) protection of local financial stability (see Principles 3 and 4).

The legal framework should also provide a foreign resolution authority with legal standing to request recognition and enforcement.

Where the statutory framework takes the form of *supportive measures*, the relevant authority's legal capacity to act would derive from the domestic resolution framework or general legal framework, including its authority to cooperate with foreign authorities as

required by KA 7.[6] Such action may be taken either at the request of the foreign authority or at the domestic authority's own initiative.

3. The legal framework for giving effect to foreign resolution measures or adopting measures to support foreign resolution actions should clearly establish: (i) the conditions for recognition, enforcement or support actions; (ii) the grounds for refusal of such actions, which should be limited; and (iii) the process for taking such actions.

Legal frameworks may be designed in such a way that recognition and enforcement is quasi-automatic if the foreign proceeding or measure meets certain conditions. Grounds for refusing recognition of any foreign resolution proceeding and/or enforcing the foreign resolution measure should be clearly defined and generally limited to cases where the foreign resolution proceeding or measure in question would:

(i) have adverse effects on local financial stability (for example, the measure would affect the continuity of economic functions that are critical to the local financial system or would be inconsistent with or undermine the implementation of local resolution action undertaken or planned by the host authority);

(ii) contravene local public policy, (for example, if the effects of the foreign resolution measure could result in inequitable treatment of domestic creditors as compared to third-country creditors with similar legal rights or the procedure does not adequately ensure due process; see Principle 4); or

(iii) have material fiscal implications (for example, where the foreign resolution measure would expose local public authorities or taxpayers to loss).

Recognition of foreign resolution proceedings should in principle not be contingent on reciprocity since such a condition could unnecessarily constrain the circumstances in which recognition could be granted and even prevent recognition where it would clearly be in the jurisdiction's interests to grant it. Where the legal framework includes a condition of reciprocity, that condition should not be absolute. In particular, it should not prevent recognition without reciprocity where such recognition is in the interests of the jurisdiction, for example, by contributing to financial stability.

The grounds for taking supportive measures will be based on the provisions of the domestic resolution or supervisory framework that more generally permits the authorities to take resolution action. For example, for the domestic resolution authority to take supportive measures it would typically be necessary for a domestic resolution proceeding to have commenced and for the domestic resolution authority to decide that cooperation with the home authority was consistent with the objectives of the resolution framework.

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[6] In particular: KA 7.1 (empowerment to achieve a cooperative solution), KA 7.2 (no automatic action) and KA 7.3 (powers over foreign branches to support foreign resolution measures).

4. The process for giving effect to foreign resolution measures should be guided by the principle of equitable treatment of creditors.

The equitable treatment of creditors provides a foundation for effective cross-border cooperation and for coordination of different resolution proceedings. Any perception that creditors may be discriminated against, whether based on their nationality, residence, or the location of their claim or other factors (and whether de facto or de jure), may affect authorities' incentives to cooperate in the implementation of an agreed resolution strategy and give rise to risk of litigation. What constitutes equitable treatment may need to be determined on a case-by-case basis considering outcomes under different scenarios (for example, comparing treatment under foreign and domestic proceedings and considering treatment of similarly situated creditors across different legal entities of the same firm). Home and host authorities should discuss, as part of their resolution planning, how to ensure that in a resolution outcomes for similarly situated creditors are perceived as fair and equitable.

5. Processes for giving effect to foreign resolution actions should be expedited.

National authorities should ensure that recognition processes are expedited. To the extent possible and as part of resolution planning, authorities should engage with the relevant foreign authorities in advance to make sure that the procedures for giving effect to foreign resolution actions by way of a recognition process or supportive measures can be carried out with the necessary speed and predictability. In cases where implementation of recognition or supportive measures requires involvement of judicial authorities, such involvement should occur on an expedited basis (K.A. 5.4).

6. The capacity to give effect to foreign resolution actions should be complemented by the necessary legal protections for authorities and their officials.

As specified in KA 2.6, the protection from liability for authorities and their staff should also apply to actions taken in good faith to support foreign resolution authorities. Similarly, legislation should not provide for judicial action that could constrain the implementation of, or result in a reversal of, measures taken by resolution or supervisory authorities acting within their legal powers and in good faith to recognise or support foreign resolution actions (and should instead, in accordance with KA 5.5, provide for financial remedies).

Contractual Measures

7. Authorities should require, or provide incentives for, firms to adopt, where appropriate, contractual approaches to fill the gap until statutory approaches have been fully implemented and to complement such approaches by reinforcing the legal certainty and predictability of cross-border recognition under statutory frameworks that are in place.

Contractual approaches to cross-border recognition should in particular be promoted in relation to temporary restrictions or stays on the exercise of early termination rights (including as a result of cross-defaults) in financial contracts; and in relation to the write-down,

cancellation or conversion of debt instruments in resolution ('bail-in') where the instruments are governed by the laws of a jurisdiction other than that of the issuing entity.

(i) *Official measures to support the adoption of contractual provisions recognising temporary stays on early termination rights* under specific resolution regimes may take the form, for example, of requirements in prudential rules for some or all firms subject to those rules to adopt such provisions in financial contracts that contain early termination rights;[7] or of requirements for such firms to improve resolvability.

To the extent appropriate and consistent with their domestic legal framework, authorities should promote contractual recognition clauses for temporary stays that are effective in regard to transactions entered into under both existing and new contract documentation.

(ii) *Official measures to support adoption of contractual provisions recognising statutory bail-in actions in debt instruments governed by the law of a foreign jurisdiction* may take the form, for example, of requirements that must be met as a condition of a debt instrument's qualification to satisfy a requirement for loss-absorbing capacity in resolution;[8] or requirements for such firms to improve their resolvability.

8. Contractual cross-border recognition of temporary stays on early termination rights should be framed as a contractual agreement by the parties to a financial contract to be bound by temporary stays on early termination that are imposed under the resolution regime applicable to the counterparty, subject to safeguards that are consistent with the *Key Attributes*.

Contractual provisions that operate through an agreement to be bound by stays imposed in accordance with statutory provisions that implement the *Key Attributes* can help support the cross-border enforceability of temporary stays that are imposed through the exercise of statutory powers that are consistent with the *Key Attributes*. In the absence of statutory or contractual provisions to the contrary, courts may not enforce a restriction or temporary stay on the exercise of early termination rights imposed under a foreign resolution regime where the contract is governed by their domestic law, or would be unlikely to do so sufficiently promptly to meet the needs of effective resolution.

Effective cross-border recognition clauses may be framed as an agreement by the parties to a financial contract to be bound by a temporary stay on the exercise of early termination rights (that would otherwise be triggered under the contract) that is imposed under the resolution regime applicable to the defaulting counterparty. The effect of such clauses is that the parties agree contractually to be bound (subject to related safeguards) by a statutory temporary stay imposed under a resolution regime, irrespective of their location and irrespective of the law governing the contract. By providing for parties to a financial contract to 'opt in' to the

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[7] Alternatively, an equivalent effect can be achieved by provisions in prudential rules that prohibit regulated firms from entering into such contracts that do not contain appropriate contractual recognition clauses.

[8] This approach may be adopted where the resolution regime of the issuer's home jurisdiction provides for statutory write-down and conversion powers. In those jurisdictions where loss absorption in resolution is achieved through a combination of bridge institution and transfer powers with liquidation of the assets and liabilities that are left behind in the failing firm, contractual recognition language may not be a necessary condition for TLAC-eligible instruments depending on the legal regime.

statutory stay provisions of the resolution regime that applies to the defaulting counterparty, the provision brings the contract within the scope of the relevant statutory regime (i.e., all parties, domestic and foreign, would be subject to the same stay).

An example of this model for contractual recognition of temporary stays imposed under applicable statutory regimes has been developed in the 2014 Resolution Stay Protocol which provides for amendments to the ISDA Master Agreement (1992 and 2002 versions) under which the majority of OTC bilateral derivatives are traded (see Annex II).

9. Capital or debt instruments that are governed by the laws of a jurisdiction other than that of the issuing entity should include legally enforceable provisions recognising a write-down, cancellation or conversion of debt instruments in resolution ('bail-in') by the relevant resolution authority if the entity enters resolution.

Where an entity has issued debt governed by the law of a foreign jurisdiction, there is a risk that the exercise of statutory ('bail-in') powers by the resolution authority of the issuing entity to write down, cancel or convert debt into equity may not be recognised in foreign jurisdictions. Contractual recognition clauses can help support the cross-border enforceability of such actions[9] and should be included in capital or debt instruments unless the home authority of the issuing entity is sufficiently confident that a write-down or conversion of those instruments under the home resolution regime would be recognised under a statutory framework for cross-border recognition in the jurisdiction of the governing law of the contract. The following principles and elements should be considered in developing such recognition clauses:

(a) Clear agreement by the debt holder to be bound by the terms of a bail-in under the statutory powers of the relevant resolution regime

The contractual provisions should contain a clear agreement by the debt holder to be bound by the terms of a bail-in under the statutory powers of the resolution regime applicable to the issuer and a further agreement that, in the event of the application of such statutory powers, other terms and conditions governing the debt instrument will be overridden where necessary to give effect to the terms of the statutory bail-in. The purpose of such agreement is to make the enforceability and effectiveness of a statutory bail-in under a (foreign) resolution regime a matter of contract law, rather than leaving open whether such write-down or conversion would be enforceable extra-territorially under conflict of law rules.

(b) Consistency with the statutory bail-in regime

The contractual provisions should be drafted in a manner that is consistent with and supports the applicable statutory bail-in regime. For example, the contractual provisions should make it clear that the terms of the bail-in will be determined by the

[9] Contractual recognition provisions of the kind described in this subsection are distinct from contractual conversion or write-down clauses. The former operate as a contractual agreement to be bound by the exercise of statutory bail-in powers by a resolution authority (which does not depend on conversion and/or write-down terms within the debt instrument). The latter refers to contractual provisions for write-down or conversion in circumstances and on terms that are specified within the debt instrument itself.

relevant resolution authority. Where an instrument also contains contractual mechanisms for conversion or write-down (whether fully or partially) upon certain defined triggers outside of resolution (for example, where the firm's capital ratio falls below a particular level), it should be clear that this contractual bail-in mechanism is distinct from the exercise of statutory bail-in by the home resolution authority and that there may be circumstances where both could be applied consecutively.

(c) Disclosure

The consequences of a bail-in should be disclosed prominently to debt holders in accordance with applicable disclosure requirements under local law. Care should be taken to ensure that the offering documents and any statements contained therein comply with the disclosure requirements in relevant jurisdictions. In particular, applicable securities regulation is likely to require clear disclosure about the potential effect that a statutory bail-in under the home resolution regime could have on the value of the instrument and the claim of the debt-holder.

(d) Enforceability under the local law

The enforceability and effectiveness of a bail-in of a debt instrument governed by foreign law will ultimately be determined by courts in accordance with that foreign law. Firms should be expected to be able to demonstrate to the relevant authorities in their home jurisdiction prior to issuing the instrument under foreign law that a statutory bail-in of the instrument by home authority will be enforceable as a result of the its contractual recognition provisions. Such expectation could be met through the provision of a reasoned independent legal opinion that addresses:

(i) the enforceability of the specific contractual provisions under the specific governing law;

(ii) the validity of specific consents or waivers of legislative provisions under the foreign governing law (for example, provisions designed to prevent amendments to bond documentation without bondholder consent), where these are required to give effect to the bail-in;

(iii) the materiality and likely effect of any qualifications or limitations (for example, on public policy grounds) on the enforceability of any bail-in action; and

(iv) compliance with applicable disclosure requirements, to the extent that breaches might compromise the enforceability of the contractual recognition provisions under the debt instruments.

Annex I

Examples of Statutory Recognition Frameworks[10]

1. The United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency

The **United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency** is currently the only example of a global framework that addresses coordination and recognition of cross-border insolvency actions. At present, however, the Model Law allows jurisdictions to exclude from the recognition framework entities such as banks that are subject to special insolvency regimes and does not include specific rules regarding groups. The Model Law provides mechanisms for facilitating access to courts in other countries; recognition of foreign proceedings; and assistance and relief to the foreign court and foreign representative. Courts applying the Model Law generally retain discretion as to whether and how to grant relief with respect to foreign proceedings. There is no reciprocity requirement under the Model Law framework.

2. Swiss legislation

Swiss legislation allows the Swiss Financial Market Supervisory Authority (FINMA) to recognise foreign bank insolvency proceedings or measures provided certain conditions are met, including that the proceeding or measure is not manifestly incompatible with Swiss public policy and that the foreign decree or insolvency measure has been ordered in the country where the bank is incorporated or where its headquarters is located. The effect of recognition is that FINMA may commence concurrent, local insolvency proceedings against the bank. Alternatively, FINMA may subject local assets directly to the foreign insolvency proceeding, if: (i) the foreign insolvency proceedings treat the claims of collateralised and privileged creditors domiciled in Switzerland equally; and (ii) the foreign insolvency proceedings adequately take into account the other claims of creditors domiciled in Switzerland. The recognition proceedings generally take about two months, but may take longer depending on the complexity of the case and the speed with which the necessary documents are provided to FINMA. The affected bank's governing body, but not its owners or creditors, may file an appeal against FINMA's recognition decision.

3. The Monetary Authority of Singapore (MAS) Act

Under the **Monetary Authority of Singapore (MAS) Act**, MAS has powers to transfer the business or shares of a financial institution or to restructure or require issuance of shares, in support of a foreign resolution action. The exercise of the powers is subject to Ministerial approval and there is no need to go to Court. In exercising the powers, MAS must consider whether the failure of the institution would have a widespread adverse effect on the financial system in Singapore or the economy of Singapore, whether it is in the public interest to do so and whether the interests of the depositors of the transferor institution are granted depositor

[10] Reference to existing frameworks for cross-border recognition is not intended to set a standard or establish guidelines for future frameworks.

priority in accordance with the law. MAS should also be satisfied that the relevant action is appropriate, having regard to the stability of the financial system in Singapore.

4. The European Union Bank Recovery and Resolution Directive (BRRD)

The **European Union Bank Recovery and Resolution Directive (BRRD)** and related amendments to the Winding-Up Directive[11] provide a framework for recognition and enforcement of resolution decisions within the EU and between EU Member States and third countries. Within the EU, resolution measures taken by a resolution authority in respect of an institution within its jurisdiction and resolution measures agreed in resolution colleges in the case of groups are automatically recognised and must be enforced by resolution authorities of other Member States. Decisions regarding the recognition of resolution proceedings of non-EU countries that concern groups may be taken either jointly by the EU resolution college (if established); or, in its absence, or where the proceeding concerns an institution that is not part of a group, individually by each national resolution authority. As regards both group resolution measures and decisions from non-EU countries in relation to institutions located in their territories, the BRRD provides that resolution authorities may only refuse recognition on specified grounds, including that: the non-EU resolution proceedings would have adverse effects on financial stability in the Member State or in another Member State; creditors located or payable in a Member State would not receive the same treatment as creditors of the non-EU country; the recognition or enforcement of the non-EU resolution proceedings would have material fiscal implications for the Member State; or the effects of recognition or enforcement would be contrary to national law.

[11] Directive 2001/24/EC on the reorganisation and winding-up of credit institutions.

Annex II

Operation of the ISDA 2014 Resolution Stay Protocol

Through adhering to the ISDA Protocol, parties agree to "opt in" to the provisions governing temporary stays under the resolution regime applicable to their counterparty. As a result, if the counterparty (or one of its related entities) enters resolution, the ability of the adhering party to exercise early termination rights is subject to the restrictions of that resolution regime.

The contractual "opt in" only applies to specified resolution regimes and subsequently enacted resolution regimes that incorporate the counterparty safeguards that are set out in the *Key Attributes*. Relevant conditions and safeguards include:

- the resolution is undertaken by an administrative resolution authority;
- creditors that suffer greater loss than they would have in liquidation are entitled to compensation ('no creditor worse off than in liquidation');
- the temporary stay does not exceed two business days;
- either all payment and delivery obligations of both the counterparty in resolution and the non-defaulting counterparty are satisfied during the stay, or all payment and delivery obligations are suspended during that period;
- there is no 'cherry-picking' within netting sets, and netting rights remain enforceable to the extent there is a breach of the safeguards;
- the stay does not apply to default rights that are not resolution-related or rights that arise from subsequent and independent resolution proceedings.

Adherence to the Protocol enables parties to amend the terms of their ISDA Master Agreements and any related credit support arrangements without renegotiating and re-executing their trading documentation. The Protocol applies to existing agreements and to new agreements.