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Cross-Border Resolution of Banking Groups: International Initiatives and U.S. Perspectives – Part I

PAUL L. LEE

This article, the first of three parts, analyzes the efforts of international bodies with regard to creating effective resolution regimes for systemically important cross-border banking institutions.

The pandemic financial crisis of 2007-2009 has prompted a re-examination of much of the legal and prudential framework underlying the international financial system. This re-examination has occurred at the national level, as reflected, for example, in the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) in the United States and in the legislative proposals flowing from the Vickers Report and other initiatives in the United Kingdom. It has also occurred at the international level, as reflected in the work of the Basel Committee on Banking Supervision (the “Basel Committee”) and the Financial Stability Board (the “FSB”). One of the key components in this effort is the re-examination of the resolution regimes for cross-border financial institutions, particularly those that are perceived as systemically important.

National legal regimes represent the starting and, in most cases, the ending point for the current analysis of the effectiveness of resolution regimes for cross-border financial institutions. In recognition of the primacy of national

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law, the work of the international standard-setting bodies such as the Basel Committee and the FSB has focused on the adoption of more robust national resolution regimes in the near term and on greater coordination among national resolution regimes in the medium term. Part I of this article analyzes the efforts of these international bodies and their prospects for success. As discussed in this part, progress toward adoption of robust national resolution regimes in response to the international standard-setters' calls remains fitful and progress toward broad international coordination elusive. National reform efforts are typically characterized by more introspection than circumspection. Moreover, the events of the 2007-2009 financial crisis, as compounded by subsequent events during the Eurozone crisis, have demonstrated the need for trust-building (or rebuilding) — even among jurisdictions that historically have enjoyed close relations — as a prelude to renewed coordination and cooperation. Part II of this article discusses some of the prominent national and regional efforts aimed at promoting more effective cross-border resolution of banks, with a particular emphasis on developments in the European Union.

Part III of this article analyzes the U.S. legal regimes applicable to the resolution of cross-border banking groups as an important component of any future framework for international cooperation. The development of options for the orderly resolution of the largest U.S. cross-border firms under Title II of the Dodd-Frank Act, particularly through the use of a single-point-of-entry model, holds the theoretical promise of more effective cross-border resolution with less disruption in foreign jurisdictions. Implementation of all the required elements of such an approach, however, is not yet assured. Acceptance by the markets and by the foreign authorities themselves will be essential to establishing credibility for this approach in a cross-border setting. If this approach can be made credible to all the essential stakeholders, the United States will be assured a leading role in promoting more effective cross-border resolution. At the same time, other regulatory proposals in the United States, particularly those relating to foreign banking organizations, may be seen as regressive in nature and as potentially complicating the cross-border resolution of such firms. The emerging cross-currents in U.S. practice are discussed in Part III of this article.

CALLS FOR AN INTERNATIONAL REVIEW

In the immediate wake of the destabilizing market events of September 2008, involving the bankruptcy of Lehman Brothers and the bailout of the American International Group (“AIG”), the Group of Twenty (“G20”) in November 2008 adopted an action plan to implement reforms in the international financial markets.¹ The plan contained 47 specific action points, signaling the broad ambitions of the reform effort. One of the immediate action points in the financial supervisory area was for national supervisors to establish supervisory colleges for all major cross-border financial institutions to strengthen surveillance of cross-border firms. One of the medium-term action points in the financial supervisory area was for national and regional authorities to review their resolution regimes and bankruptcy laws to ensure that they would permit an orderly wind-down of large complex cross-border financial institutions.² The resolution regime action point was scarcely more specific than that. Nonetheless, much was subsumed in this general directive. The events of the financial crisis had confirmed in the minds of many observers that existing national legal regimes were wholly inadequate to address the failure of systemically important financial institutions (“SIFIs”). Recognition of this fact led to the enactment of the Dodd-Frank Act in the United States. Title II of the Dodd-Frank Act creates a new resolution regime (as an alternative to the Bankruptcy Code) designed to facilitate the orderly liquidation of systemically important U.S. financial institutions.³

A G20 Working Group on Reinforcing International Cooperation and Promoting Integrity in Financial Markets (the “G20 Working Group”) in March 2009 provided further guidance on achieving the goals set in the G20 action plan.⁴ With respect to the resolution regime action point, the G20 Working Group indicated its support for ongoing efforts to develop an international framework for cross-border resolution that would address the issues of ring-fencing and financial burden-sharing. It is precisely the issues of ring-fencing and financial burden-sharing that stand as the greatest impediments to the development of any international framework for resolution. As a consequence, the development of an international framework for cross-border resolution of financial firms must be adjudged at best a long-term project. “In the absence of international arrangements to deal with the insolvency of cross-border financial institutions,” the G20 Working Group said that

the international bodies should explore in the medium term a framework to advance the coordination of regional cross-border resolutions.⁵ The G20 Working Group also requested the Financial Stability Forum (which was subsequently reconstituted as the FSB) and the Basel Committee to explore “the feasibility of common standards and principles as guidance for acceptable practices for cross-border resolution schemes thereby helping reduce the negative effects of uncoordinated national responses, including ring-fencing.”⁶

BASEL COMMITTEE INITIATIVES

The Basel Committee committed the review request from the G20 Working Group to its Cross-border Bank Resolution Group (the “CBRG”). The CBRG consists of representatives from the central banks and bank supervisory authorities of 15 of the 27 member countries of the Basel Committee. The United States plays a prominent role in the CBRG, with its delegation consisting of representatives from the Federal Deposit Insurance Corporation (the “FDIC”), the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System (the “Board”), and the Federal Reserve Bank of New York.

CBRG RECOMMENDATIONS

In response to the request from the G20 Working Group, the CBRG released a consultative document with a set of ten recommendations relating to cross-border bank resolution in September 2009.⁷ After a comment period, the CBRG issued its recommendations on cross-border bank resolution (the “CBRG Report”) in final form in March 2010 (with no significant changes from the consultative document).⁸ The ten recommendations in the CBRG Report were generally high-level, arising from the CBRG’s consensus-bound process. The first recommendation was the most elementary: that national authorities should have appropriate tools to deal with all types of financial firms in difficulty so that an orderly resolution could be achieved, minimizing both systemic risk and moral hazard.⁹ Examples of the kind of tools that would improve national resolution frameworks identified by the CBRG included the power to create bridge financial institutions and the authority to

transfer the assets, liabilities, and business operations of a failing firm to other institutions. The CBRG noted that these tools would be particularly important in promoting continuity of systemically important functions in a resolution setting. In truth, the first recommendation laid bare a fundamental problem facing cross-border resolution of banking groups. The basic building blocks for orderly resolution of banking entities were lacking in many national jurisdictions, thus undermining any prospect for an orderly resolution across borders. The CBRG specifically recommended that national jurisdictions have special resolution regimes to deal with failing financial firms (instead of relying on general bankruptcy or insolvency laws) and that these regimes incorporate a set of tools that address the special issues that arise in the insolvency of a financial firm. As the FSB noted in a subsequent report, “[m]any countries entered [the] crisis without a proper resolution regime, and no country had a regime that could cope with failing SIFIs [systemically important financial institutions].”¹⁰ Creating robust resolution regimes at the national level was seen to be the first order of business.

The CBRG’s second recommendation was related to, and almost as elementary as, the first recommendation. The second recommendation was that each jurisdiction should establish a national framework to coordinate the resolution of legal entities of financial groups and financial conglomerates *within* its jurisdiction.¹¹ The second recommendation laid bare a second fundamental problem in the resolution of failing financial firms. Even where a national jurisdiction had specialized resolution regimes for its financial firms, there were generally different specialized resolution regimes for different types of financial firms. Without exception, there was no regime for the resolution of a financial group as a group distinct from the separate resolution regimes for its constituent parts. In the absence of a resolution regime for a financial group, the resolution processes for its constituent parts can become conflictive and may actually devolve into legal warfare among the resolution proceedings. The combatants include not only shareholders and creditors of the various legal entities in the proceedings, but also representatives of the resolution authorities themselves. Even in the relatively simple case of a holding company and a bank subsidiary, significant challenges and conflicts between the resolution regimes can arise, as the Washington Mutual case in the United States has amply demonstrated. The CBRG Report itself used other examples from the United States to dem-

onstrate this basic point. The CBRG Report observed that no one agency in the United States had the authority or power to resolve all the significant entities in the Bear Stearns, Lehman Brothers, or AIG groups.¹² This problem is by no means limited to the United States. As the CBRG observed, a similar pattern of different resolution regimes for deposit-taking institutions, insurance institutions, and investment firms exists, for example, under the regulations and winding-up directives of the European Union. The existence of differing resolution regimes creates complicating factors for the resolution of firms even within a domestic context. The lack of coordination within a domestic context compounds the inherent risk of disarray in the near- and far-flung arms of a cross-border resolution.

Reflecting other lessons learned in the financial crisis, the CBRG made several high-level recommendations specifically aimed at facilitating the orderly resolution of large, complex financial institutions. One recommendation was that supervisors should work closely with home and host resolution authorities to understand how group structures and their individual components would be resolved in a crisis.¹³ More specifically, the CBRG recommended that if national authorities believe that their financial institution groups are too complex to permit orderly and cost-effective resolution, they should consider imposing regulatory incentives through capital or other prudential requirements to encourage simplification in a manner that would facilitate effective resolution.¹⁴ Among the factors that the supervisors were encouraged to analyze were legal, financial, and operational intragroup dependencies, such as those that might arise from the centralization of liquidity, risk-management, information technology, and other support or business functions.

Another critical recommendation was that there should be planning in advance for orderly resolution. The CBRG called for all systemically important cross-border financial institutions to prepare contingency plans that address the means to preserve the firm as a going concern during a period of financial distress and, if necessary, to facilitate a rapid resolution or wind-down of the firm.¹⁵ The recommendation for contingency plans, subsequently re-styled as recovery and resolution plans, or more colloquially as living wills, has been adopted by many national jurisdictions as a regular component of their supervisory oversight of large regulated entities. It is now a truth universally acknowledged that advance planning by both supervisory authorities and large

complex firms is a necessary (but not sufficient) condition to any prospect for the orderly resolution of such firms. The recommendations in the CBRG Report for dealing with large, complex institutions were influenced by experiences in the financial crisis as well as the legislative steps already in train in the United States. The version of financial reform legislation, initially adopted by the House of Representatives in December 2009 and ultimately enacted in July 2010 as the Dodd-Frank Act, included a new authority for the orderly liquidation of systemically important U.S. financial institutions, a requirement for resolution plans to promote orderly liquidation, and other measures designed to incentivize or require simplification of complex institutions.¹⁶

The CBRG recommendations outlined above were principally directed at the adoption of robust resolution regimes at the national level. Moving from the national level to the international level, the CBRG recommended that national authorities seek convergence of the national resolution tools described above to facilitate coordinated resolution of financial institution operations in multiple jurisdictions.¹⁷ The differences in procedural and substantive approaches to insolvency regimes among national jurisdictions compound the problem of effective coordination of cross-border resolutions. For example, many jurisdictions rely on a court-administered winding-up process rather than an administrative process for the resolution of financial firms. Among regimes, some are regarded as pro-debtor, others as pro-creditor. Similarly, the triggers for the initiation of insolvency proceedings differ widely among jurisdictions. While recognizing that the management and resolution of failing financial firms remain a “domestic competence,” the CBRG noted that having similar resolution tools at the national level and similar early intervention thresholds may facilitate coordinated solutions across borders.¹⁸ A quizical observer might conclude that adding similar tools to national resolution regimes will prove an easier task than assuring that national authorities actually use the tools in an expanded toolbox in a similar manner, especially those relating to early intervention or (as discussed below) bail-in.

As a more direct matter, the CBRG also recommended that national authorities consider the development of procedures to facilitate the mutual recognition of crisis management measures and resolution proceedings.¹⁹ This recommendation comes against a backdrop of differing approaches among national regimes to the recognition of foreign resolution proceedings. On the one

hand, in the European Union, the principle of recognition of other Member States' insolvency proceedings, including for branches located in host Member States, has long been established.²⁰ On the other hand, the UNCITRAL Model Law on Cross-Border Insolvency, which seeks to promote cross-border recognition of foreign insolvency proceedings, does not encompass banks and insurance companies. Chapter 15 of the U.S. Bankruptcy Code, which represents the U.S. adoption of the UNCITRAL Model Law, expressly excludes from its scope foreign banks with branch or agency operations in the United States.²¹ Recognition of crisis management measures and foreign resolution proceedings will require changes to many national laws. Without such changes to national laws, the use of various resolution tools, such as the use of a bridge bank by the home country resolution authority and the transfer of assets and liabilities of host country branches of a failing bank to the bridge bank, may be subject to serious impediments under home and host country laws.

In what at first glance may seem a relatively straightforward proposition, the CBRG also recommended the development of cross-border cooperation and information sharing measures. This recommendation was based on the observation that crisis management and resolution of cross-border financial groups require "a clear understanding by different national authorities of their respective responsibilities for regulation, supervision, liquidity provision, crisis management and resolution."²² The CBRG noted that such arrangements were required to ensure the sharing of needed information both for purposes of contingency planning during normal times and for crisis management and resolution during troubled times. The CBRG also specifically noted that material adverse developments should be shared among key authorities as and when they arise. The latter observation signaled that the recommendation for cooperation and sharing of information may not be as straightforward as it seems at first glance. In fact, in its discussion of this recommendation, the CBRG related both technical and practical problems that had arisen in the context of information sharing between home and host supervisors during the financial crisis. Some problems arose from legal constraints under national laws on sharing of information. Other problems arose from more practical considerations. The CBRG generally noted that supervisors have entered into memoranda of understanding ("MOUs") and other letter exchanges setting out expectations for the sharing of information, but that these arrangements are not legally en-

forceable. More revealing was a CBRG observation that given the experience during the financial crisis, there were reasonable concerns that MOUs would not be followed in times of crisis “as national authorities are accountable to national governing bodies with respect to how they take local interests into account.”²³ Developing this theme further, the CBRG noted that home country authorities may be reluctant to provide information that they perceive as negative out of the fear that the host authorities will then be prompted to take actions “adverse to the national interests of the reluctant authorities.”²⁴ The CBRG identified the essence of the underlying dilemma: in some cases, better information sharing might reduce the risk of ring-fencing by host authorities; in other cases, better information sharing may simply reinforce a ring-fencing impulse. In the end, the CBRG settled upon the simple norm that material adverse developments should be shared among key supervisory authorities as and when they arise. The discussion of the information sharing experience in the financial crisis confirms that a trust-building (or rebuilding) exercise is in order in the official sector. Through the efforts of the FDIC, the United States has been actively involved in negotiating new understandings on cross-border information sharing and resolution planning. The FDIC recently released a joint paper on cross-border resolution with the Bank of England and announced the signing of an MOU with the Canada Deposit Insurance Corporation on information sharing.²⁵ The full range of FDIC efforts aimed at international coordination is discussed in Part III of this article.

In addition to these high-level recommendations, the CBRG also offered several more specific recommendations. One was that the jurisdictions should promote the use of risk-mitigation techniques, such as enforceable netting agreements, collateralization, and segregation of client positions.²⁶ The CBRG Report noted that while significant progress had been made over the last two decades on certain risk-mitigation techniques such as confirming the legal framework for termination, liquidation, and close-out netting of OTC derivative contracts in the event of insolvency, there were still areas of uncertainty such as the effect under foreign law of such provisions, as well as variations in home country regimes. Similarly, there was an observation that greater risk-reduction could be achieved by encouraging greater standardization of derivative contracts, migration of standardized contracts onto regulated exchanges, clearing and settlement of such contracts through regulated

central counterparties, and greater transparency through trade repositories.²⁷ Another specific recommendation was that the national resolution authority should have the legal authority to temporarily delay operation of contractual early termination clauses in order to permit a transfer of financial market contracts to another sound financial institution or a bridge financial institution.²⁸ Where such a transfer is not possible, the contractual rights to terminate, net, and apply pledged collateral should be preserved, subject to a short delay in the operation of termination clauses. Many of these recommendations likewise reflect measures that were then being considered in the United States as part of the legislative reform process and were ultimately adopted as part of the Dodd-Frank Act. For example, the power to delay (for one business day) termination rights on derivative contracts is an important feature of the Title II regime in the Dodd-Frank Act, discussed in Part III of this article.

The final recommendation from the CBRG was of a higher order. This recommendation encouraged the national authorities to consider and incorporate into their planning clear options or principles for exiting the kinds of public intervention that were required during the financial crisis. This recommendation was made in the name of restoring market discipline, minimizing moral hazard, and promoting the efficient operation of the markets. The CBRG noted that various national authorities had been “creative” in developing *ad hoc* government assistance for large financial institutions during the financial crisis, but without a clear understanding of how these public support mechanisms could ultimately be exited in favor of private mechanisms.²⁹ As recent reports indicate, the problems created by the bailouts during the financial crisis and the difficulty of exiting from those bailouts continue to plague government decision-makers.³⁰

CBRG COMMENTARY

In addition to the recommendations themselves, the CBRG Report offered a broader-ranging commentary on the challenges facing international coordination and the development of an international framework for insolvency. Several observations in the commentary stand out. The first observation is that “[t]here is no international insolvency framework for financial firms and a limited prospect of one being created in the near future.”³¹ The

first half of this observation comes as no surprise. The second half, on the other hand, is more revealing because it appears to reflect a concession not only to current reality but also to future reality that there will not be a comprehensive international framework for the resolution of financial firms. The reference to a “limited” prospect for an international insolvency framework in the “near future” suggests an element of understatement.

The CBRG commentary offered several explanations for the dim prospects for a comprehensive international framework. The first explanation is based on challenges facing cross-border resolutions in general:

Challenges in resolving a cross-border bank crisis arise for many reasons, one of which is that crisis resolution frameworks are largely designed to deal with domestic failures and to minimize the losses incurred by domestic stakeholders. As such, the frameworks are not well suited to dealing with serious cross-border problems. Many earlier discussions of these issues have been framed in terms of either a so-called universal resolution approach that recognises the wholeness of a legal entity across borders and leads to its resolution by a single jurisdiction — or a territorial or ring fencing approach — in which each jurisdiction resolves the individual parts of the cross-border financial institution located within its national borders. Neither characterisation corresponds to actual practice, though recent responses, like prior ones, are closer to the territorial approach than the universal one.³²

These general challenges are further compounded when the failing enterprise is a large, complex financial institution. Here the challenges involve not only issues of national creditor protection, but also national taxpayer protection. As noted in the commentary:

The absence of a multinational framework for sharing the fiscal burdens for such crises or insolvencies is, along with the fact that legal systems and the fiscal responsibility are national, a basic reason for the predominance of the territorial approach in resolving banking crises and insolvencies. National authorities tend to seek to ensure that their constituents, whether taxpayers or member institutions underwriting a deposit insurance or other fund, bear only those financial burdens that are necessary to mitigate the risks to

their constituents. In a cross-border crisis or resolution, this assessment of the comparative burdens is complicated by the different perceptions of the impact of failure of a cross-border institution and the willingness or ability of different authorities to bear a share of the burden.³³

The issue of burden-sharing in the resolution of large cross-border financial firms is a recurring theme in virtually all the policy discussions surrounding cross-border bank resolution. The CBRG observed that the alternative to a territorial approach would be to reach broad *and* enforceable agreement on the sharing of financial burdens by stakeholders in different jurisdictions, but that the development of mechanisms for sharing of financial burdens for the future resolution of cross-border financial institutions would face “considerable challenges” and appeared unlikely in the “short term.”³⁴ This observation too appears to incorporate an element of understatement.

The CBRG itself appeared to be divided over the comparative merits of a universal approach versus a territorial approach. The CBRG Report discussed the arguments in favor of both approaches, including the supervisory ring-fencing approach (through asset pledge and asset maintenance requirements) imposed by some jurisdictions on branches of foreign banks.³⁵ The CBRG Report noted that some members of the CBRG believe that the presence of supervisory ring-fencing measures and a territorial approach by a host country encourage early intervention by the authorities.³⁶ Under this approach, the host jurisdiction has a strong incentive to ensure that the assets of a local branch exceed the liabilities of that branch. This has the effect of more closely aligning the supervisory approach of the host country with the assets available to pay stakeholders of the local branch. A related effect is that the threat of ring-fencing may put pressure on the home jurisdiction to resolve the problems of the institution. Also, as noted in the CBRG Report, a ring-fencing approach can contribute to the resiliency of the separate operations within host countries by promoting the separate functionality of the local operations.³⁷

Other members of the CBRG maintained that ring-fencing could exacerbate the problems for a bank and increase the probability of default.³⁸ Ring-fencing, if done as an *ex ante* supervisory matter, could also create inefficiencies in the allocation of capital and liquidity. These members observed that *ex post* ring-fencing by host authorities might undermine an orderly liquidation process being undertaken by the home country supervisor that seeks to trans-

fer the bank and all its foreign branches to a bridge bank or other purchaser.³⁹ Against the background of these competing considerations, the CBRG Report offered a sobering observation based on the events of the financial crisis:

The fact that ring fencing has occurred between national jurisdictions with pre-existing cross-border rules providing for allocation of responsibility for deposit insurance and similar types of public commitments and with long histories of close supervisory cooperation, demonstrates the strong likelihood of ring fencing in crisis management or insolvency resolution. This is particularly so where host supervisors are faced with the prospect of the failure of the home office to whom liquidity has been upstreamed. The crisis has also demonstrated that in a period of market instability there is rarely time to carefully weigh cooperative cross-border management of crises.⁴⁰

In the end, the CBRG suggested a middle approach that recognizes “the strong possibility of ring fencing in a crisis, and helps ensure that home and host supervisors focus on needed resiliency *within national borders*.”⁴¹ This middle approach would require “discrete” changes to national laws to create a more complementary legal framework that would permit the continuity of key financial services across borders. Several of the CBRG Report’s recommendations, such as those relating to the availability of bridge financial companies and transfer provisions for financial contracts, would create such complementary elements among national regimes. The CBRG provided this rationale for its middle approach:

While not denying the legitimacy of ring fencing in the current context, this [middle] approach aims at improving, inter alia, the ability of different national authorities to facilitate continuity in critical cross-border operations....⁴²

The commentary in the CBRG Report was clearly informed by the experience of individual members of the CBRG during the financial crisis, especially in the cross-border failures (*de jure*) of Lehman Brothers and Kaupthing and (*de facto*) of Fortis and Dexia. The experiences with Fortis and Dexia appear to have been particularly searing for some of the European members

of the CBRG. In respect of the Fortis situation, for example, the CBRG Report observed, in a most diplomatic fashion, that “[d]espite a long-standing relationship in ongoing supervision and information sharing, the Dutch and Belgian supervisory authorities assessed the situation differently.”⁴³ It apparently came as a surprise to some that in a financial crisis, national supervisors might act on the basis of what they perceive to be their own national interest. In any event, the CBRG Report did little to question the probability (or even the legitimacy) of a territorial approach, notwithstanding the concern expressed in the G20 Working Group report. In progressive legal circles, any tendency toward territorialism is regarded as faintly atavistic. In the best of all possible worlds, universal impulses would prevail over baser territorial instincts. The CBRG observation about the strong likelihood of a ring-fencing response in a crisis situation is more grounded in recent experience than some progressive legal thinkers might have hoped.

IMF STAFF PAPER

At the same time that the CBRG was preparing its report, the staff of the International Monetary Fund (the “IMF”) was also considering the issues surrounding the resolution of cross-border banks. In June 2010, the IMF staff released its own paper on the resolution of cross-border banks.⁴⁴ The premise of the paper was that the most far-reaching solution to the problem of cross-border bank insolvency, namely, an international treaty obligating countries to defer to the resolution decisions of the jurisdiction where the financial institution or group has its main activities, would necessitate a “considerable sacrifice of national sovereignty” and hence was not feasible in the foreseeable future.⁴⁵ The IMF staff paper suggested a “pragmatic” alternative in the form of a nonbinding framework for enhanced coordination, which would be subscribed to by those countries that are in a position to satisfy its elements. The staff paper proposed four key elements for the framework:

- (1) countries would amend their laws to require national authorities to coordinate their resolution efforts with other countries to the maximum extent consistent with the interest of creditors and domestic financial stability;
- (2) the enhanced coordination framework would only apply to those coun-

tries that have in place “core-coordination standards” relating to the design and application of their resolution systems;

- (3) although a key objective of the framework would be to minimize the need for public funding, because public funding at least on a temporary basis may be needed, the framework would specify the principles to guide the burden-sharing process among subscribing authorities; and
- (4) subscribing countries would agree to coordinated procedures to enable resolution actions to be taken as quickly as possible and to have cross-border effect.⁴⁶

The staff paper suggested the stakes in this exercise are high. It noted that because of concern with domestic financial stability and the potential fiscal costs of bank failure, the authorities in many countries have been unwilling to surrender control over the issues relating to cross-border bank resolution through treaty or other binding arrangement. However, if pragmatic cooperation cannot be achieved, the IMF staff paper posited that “financial stability concerns may require a ‘de-globalization’ of financial institutions so that they fit within existing local resolution frameworks.”⁴⁷

The IMF staff paper put the following gloss on the first key element of the framework described above: the authorities of a country should be required to coordinate with resolution authorities in other countries, but only to the extent that the authorities determine that such coordination is consistent with their own national interests. The IMF staff paper stated that the authorities in a host jurisdiction would assess whether, under a coordinated approach, creditors of branches or subsidiaries in the host country are likely to receive “at least what they would receive had the branch or entity been liquidated on a territorial basis by the host jurisdiction.”⁴⁸ This statement appears to recognize and accept ring-fencing when imposed by host country law or perhaps even by supervisory practice. A subsequent statement in the IMF staff paper, nonetheless, appears to indicate that the proposal is not intended to encourage ring-fencing.⁴⁹

The second key element, core-coordination standards, is intended to establish a “reasonable level of high quality convergence” among the home and host jurisdictions subscribing to the framework.⁵⁰ The core-coordination standards identified by the IMF staff paper are themselves four. The first is nondiscrimination against foreign creditors. The IMF staff paper indicated

that host jurisdictions will need to be satisfied that the other jurisdictions will not discriminate against creditors of a local branch. A domestic depositor preference in a home country, based on the nationality or location of the depositor, would be inconsistent with this core standard.⁵¹ The second core-coordination standard is effective intervention tools. The IMF staff paper identified as the most critical tools the following: early intervention authority, power to restructure debt claims, authority to suspend termination provisions in certain financial contracts, power to transfer assets and liabilities to other institutions (including a bridge bank) without consent of third parties, power to provide bridge financing, and ability to assume public ownership of the institution on a temporary basis.⁵²

The third core-coordination standard is appropriate creditor safeguards. The IMF staff paper recognized that the extraordinary powers given to a resolution authority, including the power to interfere with contractual rights, must be accompanied by basic safeguards, including a right to compensation to ensure that a creditor is left no worse off as a result of the resolution than if the bank had not been resolved but instead had failed and been liquidated.⁵³ The fourth core-coordination standard is sufficiently robust and harmonized rules on priority to recognize the interests of host country insured depositors and deposit guarantee schemes. As the IMF staff paper acknowledges, this may require a broader harmonization of deposit guarantee scheme features across jurisdictions, including categories of insured depositors and amounts of protection.⁵⁴ The practical prospect of harmonizing divergent national deposit guarantee schemes is not assessed by the IMF staff paper.

The point on insured depositors and deposit guarantee schemes is related to the third key element in the framework proposal: that the framework would specify principles to guide the burden-sharing process among cooperating jurisdictions. Here the IMF staff paper simply noted that home countries are likely to be unwilling or unable to provide all the public funding necessary to stabilize a large international financial group.⁵⁵ Accordingly, host countries may need to contribute if they want to keep the international group (or parts of it) intact. As the IMF staff paper states, a host country's decision whether to contribute ought to be informed by the fact that funding from the host country will likely be required even if a strictly national resolution is pursued.⁵⁶

The fourth key element of the framework recognizes that if basic coordi-

nation standards have been accepted by the subscribing jurisdictions, then the ability to coordinate rapidly will be enhanced if there is an established set of procedures. Here the IMF staff paper suggests that when a financial firm with branches in a foreign jurisdiction encounters financial difficulty, it would appear most appropriate for the lead role to be played by the home authorities, particularly as the home jurisdiction is likely to be the principal source of public funds to support the resolution.⁵⁷ However, the framework would reserve for host jurisdictions the discretion to act independently, if necessary, to protect their national interests. The IMF staff paper suggests that the framework could apply not only to a banking institution with cross-border branches, but also to a banking group operating cross-border through subsidiaries. The dynamics of resolution coordination for a group is likely to be even more complex than the dynamics for a situation involving principally an institution with cross-border branches. The IMF staff paper does not discuss in any detail the additional challenges facing coordinated resolution of a complex group structure.

FSB INITIATIVES

The FSB functions as an umbrella body overseeing and coordinating the work of the other international financial standard-setting groups, such as the Basel Committee. While the member jurisdictions of the FSB largely overlap with the membership of the Basel Committee, the national representatives to the FSB typically include not only a representative of the central bank or other bank regulatory authority, but also a representative of the ministry of finance or treasury, providing a broader policy (and, dare one say, political) perspective. One of the principal goals of the FSB is to develop and promote the implementation of effective regulatory and supervisory policies among its members. Among the techniques used to promote these policies is the development of “international financial standards” endorsed by the FSB. Under the charter of the FSB, each member jurisdiction has specifically committed to implement the international financial standards agreed upon by the FSB.

POLICY FRAMEWORK FOR G-SIFIS

The FSB assumed overall responsibility for the development and implementation of international financial standards to address a broad range of

issues arising from the 2007-2009 financial crisis. As one of its early tasks, the FSB assumed responsibility for recommending and implementing a policy framework for addressing the systemic risks and moral hazards associated with global systematically important financial institutions (“G-SIFIs”). In October 2010, the FSB issued its recommendations in a document entitled “Reducing the moral hazard posed by systemically important financial institutions.”⁵⁸ The recommendations encompassed various measures to address systemic risk and the “too-big-to-fail” problem, including provisions for higher loss-absorption, increased supervision, and viable resolution options. The FSB document noted that any effective approach to the “too-big-to-fail” problem must have “effective resolution at its base.”⁵⁹ The FSB posited that an effective resolution regime for a G-SIFI must allow the continued operation of the firm’s essential financial functions, including uninterrupted access by depositors to their funds, wherever located, and the transfer and sale of viable parts of the firm, while apportioning losses to creditors in a fair and predictable manner. Against these objectives, the FSB document offered a negative assessment of the then-prevailing state of affairs:

While some jurisdictions have enacted or are considering legislative changes, most existing arrangements do not meet these objectives. Internationally, impediments to cross-border resolution derive from major differences in national resolution regimes, absence of mutual recognition and agreements for joining up home and host regimes, and lack of planning for handling stress and resolution. The complexity and integrated nature of group structures and operations, with multiple legal entities spanning national borders and business lines, make rapid and orderly resolutions under current regimes virtually impossible.⁶⁰

The initial recommendations in the FSB document thus focus on the need for robust action by national jurisdictions to implement legal reforms to their individual resolution regimes. The FSB concluded that the national reforms should include a designated resolution authority for financial institutions with the kinds of powers proposed in the CBRG Report. Among the tools that the national jurisdictions should consider is a restructuring mechanism to allow recapitalization of a financial institution as a going concern by

way of a contractual and/or statutory (*i.e.*, within resolution) debt-to-equity conversion and write-down tools. The FSB also recommended that the resolution authority in each jurisdiction should be provided with the legal capacity *and* obligation to cooperate and share information with foreign resolution authorities. These legal powers would facilitate another recommendation made by the FSB, namely, that there should be an institution-specific cooperation agreement between home and host authorities for each G-SIFI. The FSB urged the development of institution-specific cooperation agreements as the easiest and most flexible approach to cross-border coordination and cooperation because the adoption on a multilateral basis of all the necessary elements of an effective resolution approach was likely unachievable.⁶¹

To address other perceived impediments to cross-border cooperation, the FSB recommended that the national authorities should review, and where appropriate, eliminate provisions in national laws that impair fair cross-border resolution, such as depositor priority rules that give preferential treatment to domestic depositors over those of foreign branches.⁶² Other recommendations included that recovery and resolution plans should be mandatory for G-SIFIs and that the national authorities should have the power, exercisable under clear criteria, to require a financial institution to make changes in its legal and operational structure and business practices to facilitate the implementation of recovery and resolution measures. The FSB document further suggested that resolvability under existing resolution regimes should be an important consideration in a host country's determination of any changes to be required in a hosted institution's operations. The FSB volunteered the following advice:

Host jurisdictions may wish to decide, in light of the systemic significance (or otherwise) of the hosted foreign institution for their financial system and economy, and in light of the applicable resolution regimes and cooperation agreements, whether to permit a branch presence, or to permit a subsidiary presence, so that resolution is a local responsibility, but with co-ordination with the home (or group) regulatory and resolution authority.⁶³

The FSB thus expressly invited a rethinking of existing supervisory practices with respect to the form of cross-border operations of financial firms. As discussed in Part II of this article, several major jurisdictions appear to have

accepted that invitation. It is likely that the FSB included this comment to encourage home countries to reform their resolution regimes. In the absence of such reform by particular countries, however, the comment provides the policy (and political) cover for a host country to revise its approach to the acceptance of branches from such countries or, at a minimum, its approach to the supervision of such branches, *e.g.*, by requiring additional asset or liquidity buffers in the host country.

CBRG SURVEY REPORT

Further evidence of the challenges facing cross-border resolution emerged from a detailed survey report released by the CBRG in July 2011.⁶⁴ The report provided an analysis of the resolution regimes for all the member jurisdictions of the Basel Committee. The survey confirmed the wide variety in the existing national resolution regimes for financial institutions. The variety encompassed such matters as whether there is a specialized resolution regime for banks or other financial institutions, whether the regime applies to holding companies of financial institutions or to financial groups or conglomerates, and whether there is a specific resolution regime for systemically important financial institutions. Similar variety was found in the triggers for the invocation of resolution authority and in the availability of powers (such as the power to transfer liabilities) once a resolution regime is invoked. In many countries, the resolution authority appears to lack the legal power to delay temporarily the operation of early termination provisions in financial master agreements. As might also be expected, the survey found significant differences among national depositor protection arrangements.⁶⁵

The report also noted that limited progress had been made in the cross-border area in most jurisdictions. Even where particular jurisdictions had made improvements to their domestic resolution regimes, uncertainty still exists as to the mechanism to implement recognition of new resolution measures, such as with respect to bridge banks and transfer powers, in a cross-border case. Equally important, the report found that few changes had been made with respect to cross-border information sharing arrangements.⁶⁶ As a result, there would be constraints on sharing information for resolution planning purposes, as well as in actual crisis situations. The report found

that there had been no progress toward the development of a framework for cross-border enforcement of resolution actions, such as cross-border mutual recognition agreements between home and host jurisdictions. As to the concomitant need for agreement on burden-sharing, the report simply noted that because of “the complexity of the issue and the possible impact on national budgets, the process of considering burden-sharing arrangements is at a preliminary stage.”⁶⁷ This observation, like previous observations from the CBRG on this subject, partakes of understatement.

FSB CONSULTATIVE DOCUMENT ON EFFECTIVE RESOLUTION

The findings of the CBRG survey report confirmed to the FSB the need to accelerate the reform of domestic resolution regimes and the development of frameworks for cross-border enforcement of resolution measures.⁶⁸ The work of the CBRG and the IMF staff laid the conceptual foundation for reform of bank resolution regimes by establishing the overarching principles that should apply to the reform process and by identifying the practical tensions that would have to be resolved among jurisdictions in the process. It fell to the FSB to convert these principles into specific standards that could be adopted by individual jurisdictions and monitored by international bodies as part of an implementation process. This the FSB did by releasing in July 2011 a Consultative Document on Effective Resolution of Systemically Important Financial Institutions (the “Consultative Document on Effective Resolution”).⁶⁹

The Consultative Document on Effective Resolution proposed a set of 52 key attributes (the “Proposed Key Attributes”) covering twelve broad areas for national resolution regimes. The Proposed Key Attributes were designed at bottom to improve the capacity of national authorities to resolve SIFIs without systemic disruption and without exposing taxpayers to the risk of loss. The FSB proposed that these key attributes would constitute “international financial standards,” thereby invoking the commitment under the FSB charter of each member jurisdiction to implement these standards and to be subject to assessment on these standards under the IMF/World Bank Financial Sector Assessment Program.⁷⁰ The FSB acknowledged that not all the measures in the Proposed Key Attributes would be suitable for all finan-

cial sectors or circumstances.⁷¹ The FSB also recognized that legislative and regulatory changes would be required in many jurisdictions to implement the Proposed Key Attributes.

The principles reflected in the Proposed Key Attributes were similar to those outlined by the FSB in its October 2010 release and by the CBRG in its March 2010 report. The Proposed Key Attributes simply provided greater specificity and delineation of these principles. Thus, the Proposed Key Attributes called for each jurisdiction to have a designated administrative authority responsible for exercising resolution powers over financial institutions, and where there are multiple resolution authorities for different types of financial firms, for the jurisdiction to identify a lead resolution authority.⁷² The resolution regime should provide for “timely and early” entry into resolution before the financial institution is balance-sheet insolvent, with clear standards for the threshold conditions for such entry into resolution.⁷³ The Proposed Key Attributes called for resolution authorities to have a full set of powers, including the power to establish temporary bridge financial institutions, to transfer assets and liabilities without regard to consent or novation requirements, to carry out “bail-in within resolution,” to stay temporarily the exercise of early termination rights on financial contracts, to impose a moratorium with a suspension of payments on unsecured creditors and a stay on creditor actions to attach assets, and to override rights of shareholders to approve a merger, sale or other restructuring of the failing firm.⁷⁴ Other Proposed Key Attributes called for the establishment of institution-specific cross-border cooperation agreements between home and host authorities, cross-border crisis management groups among home and key host authorities, resolvability assessments, and detailed recovery and resolution plans.⁷⁵ Each of these Key Attributes would be critical to the process of managing the financial difficulties encountered by a SIFI and ultimately to any prospect of managing an orderly resolution of a troubled SIFI. To facilitate the implementation of all these measures, the Proposed Key Attributes also called for jurisdictions to ensure that there were no legal, regulatory or policy impediments to hinder the exchange of information.⁷⁶

In addition to this set of 52 Proposed Key Attributes, the Consultative Document on Effective Resolution included a number of other annexes, discussing in further detail the key elements of a bail-in within resolution regime, institution-specific cross-border cooperation agreements, resolvability assess-

ments, and recovery and resolution plans. The Consultative Document on Effective Resolution also included two discussion notes on creditor hierarchy, depositor preference, and depositor protection, and on the conditions for a temporary stay on early termination rights for financial contracts. To the untutored eye, the Consultative Document appeared to set an ambitious agenda, suggesting that the FSB had put aside any doubts about the practical feasibility of achieving convergent national resolution regimes. Nonetheless, some industry observers actually perceived a lack of ambition in the FSB's proposals. For example, one industry respondent noted that the recommendations did not attempt to address *ex ante* the fundamental issue of sharing the costs of resolution among national authorities, and that until this issue is resolved, there would always be an incentive for national authorities to act in their own interest.⁷⁷ Other respondents saw a lack of resolve in the failure by the FSB to set a specific timeline or deadline for the introduction of national legislation to implement the proposed regime and for the ultimate convergence of national regimes.⁷⁸

FSB KEY ATTRIBUTES

After receiving comments on the Consultative Document on Effective Resolution, the FSB issued a final document, Key Attributes of Effective Resolution Regimes for Financial Institutions (“Key Attributes”) in November 2011.⁷⁹ The Key Attributes largely follow the course set in the Proposed Key Attributes. As a result of comments received from various respondents on the Proposed Key Attributes and the annexes to the Proposed Key Attributes, however, the FSB revised, clarified, and in some cases, provided greater specificity to, the Key Attributes. The Key Attributes expanded to 62 in number, reflecting the incorporation into the Key Attributes of certain points covered in annexes to the Proposed Key Attributes.

The FSB published an overview of the responses to the Consultative Document on Effective Resolution.⁸⁰ That overview could not do justice to the full range of comments received on the Consultative Document on Effective Resolution. But it nevertheless provides an insight into what the FSB itself regarded as the most important issues raised in the Consultative Document on Effective Resolution and how the FSB sought to mediate between conflicting views on some of these issues. The FSB noted that the respon-

dents agreed that special resolution regimes are needed to ensure the continued performance of systemically critical functions of a failing SIFI. This includes the power to create a bridge entity or to write down liabilities, powers not generally available under ordinary corporate insolvency laws.⁸¹ The FSB also noted that a majority of respondents supported the proposal in the Consultative Document on Effective Resolution that entry into resolution should be initiated when an institution is or is likely to be no longer viable and before it becomes balance-sheet insolvent.⁸² While there appeared to be support for triggering resolution when an institution is likely to be no longer viable, respondents expressed concerns about the use of “hard” or simplistic numeric measures to establish an intervention threshold and about the reference to “early” entry into resolution.⁸³ As with many other of the Proposed Key Attributes, respondents agreed with the basic principle underlying this Proposed Key Attribute, but raised significant questions about the lack of specificity in implementing the principle.

This pattern of agreement in principle with the principle, but concern about the specifics of implementation of the principle was reflected in the comments on many of the Proposed Key Attributes. For example, the FSB noted that a clear majority of global financial institutions supported the introduction of statutory “bail-in within resolution” as an additional resolution option.⁸⁴ This option would allow for creditor recapitalization by way of an exchange of debt claims for equity in the failing firm or by way of transferring systemically important and other viable operations of the failing firm to a bridge institution and exchanging debt claims against the failing firm for equity in the bridge institution. A number of respondents raised questions about the appropriate scope of liabilities to be subject to a statutory bail-in mechanism. Some respondents recommended a broad scope for application of bail-in, including wholesale deposits.⁸⁵ Other respondents urged that various categories of liabilities, such as repos, derivatives, and other secured debt be excluded from the bail-in regime.⁸⁶ Some bank trade associations indicated that their members were not yet in agreement on such issues as whether short-term liabilities should be excluded from any bail-in mechanism and whether there should be any provision for a depositor preference in the insolvency scheme.⁸⁷ In response to the diversity of views on the appropriate scope of bail-in within resolution, the FSB observed that Key Attribute 3.5, which provides for the availability of

bail-in within resolution as an option, does not specify the types of liabilities that should be subject to bail-in (other than to exclude secured claims and insured deposit claims).⁸⁸ Key Attribute 3.5 does provide that bail-in within resolution should be applied in a manner that respects the hierarchy of claims in liquidation. As discussed in Parts II and III of this article, a creditor recapitalization or bail-in approach, particularly using a single-point-of-entry model, is now considered the preferred methodology by the FDIC under its orderly liquidation regime in Title II of the Dodd-Frank Act. Bail-in presents a set of complex issues that are not fully addressed in the Key Attributes, including, for example, whether the supervisory authorities should specify a minimum amount of “bail-in-able” liabilities to be maintained by a banking institution. Further development of both the principles and mechanics of bail-in will be required as part of any national resolution regime.

The FSB also noted that all the respondents stressed the importance of effective cross-border coordination, but differed as to how best to achieve that coordination. Some respondents recommended focusing on MOUs and bilateral agreements because they considered multilateral coordination to be unachievable in the near or medium term.⁸⁹ Others advocated moving quickly to a binding multilateral agreement and mutual recognition framework.⁹⁰ The FSB observed that while falling short of a binding framework for national recognition and international cooperation, Key Attributes 8.1 and 8.2 relating to crisis management groups and Key Attributes 9.1 and 9.2 relating to institution-specific cross-border cooperation agreements represent significant steps toward a cross-border framework, and that more binding mechanisms would not be feasible at this time.⁹¹ An institution-specific cross-border cooperation agreement is, of course, nothing more than *entente cordiale*. Such an agreement will work as long as the interests of the parties are generally aligned or complementary. If the interests diverge significantly, the commitments under such an agreement are less likely to be observed. As noted above, the CBRG Report specifically analyzed the effects of the latter circumstance on the efficacy of nonbinding cooperation agreements during the financial crisis.

The fundamental question of the allocation of resolution authority between home and host countries also provoked extensive comment. The FSB noted that a majority of industry stakeholders suggested that resolution should be carried out by the home country on a group-wide basis.⁹² In fact, most

industry respondents argued that the home jurisdiction of a group should have exclusive control over the resolution process for the group, coordinating as appropriate with host country supervisors in any crisis management group. Some industry groups suggested that a host jurisdiction should be able to initiate a resolution proceeding for operations in the jurisdiction only with the consent of the home country jurisdiction. Other industry groups took the flat position that a host jurisdiction should have no resolution powers in respect of a local branch.⁹³

These comments reflect the underlying reality captured in former head of the Bank of England Mervyn King's now famous observation that large banks live globally, but die locally. Many of the largest financial firms are managed to the maximum extent legally possible *as if* there were no national borders. These firms posit that in the hypothetical case of their resolution, they should likewise be resolved without regard to national borders. This desire of course must confront the reality that for legal purposes their component parts (most obviously, separately incorporated subsidiaries, but, for many purposes, also branch operations) are subject to host country boundaries and constraints. The tension between the global business model and the national legal framework is nowhere more evident than in a resolution scenario. This fundamental tension underlies many of the features of the Key Attributes. The FSB did not recede from its general position in Proposed Key Attribute 1.1 on the resolution of branches. Key Attribute 1.1 provides that each jurisdiction should have a resolution regime that extends not only to domestic firms, but also to branches of foreign firms within the jurisdiction (except for a jurisdiction that is subject to a binding obligation to respect the resolution of financial institutions under the authority of the home country, as is the case in the European Union). In the United States, federal and state banking laws govern the operation and, if necessary, the closure and liquidation of branches and agencies of foreign banking organizations. These federal and state laws are discussed in Part III of this article.

In its overview document, the FSB observed that the comments suggesting that the home countries should have primary or exclusive responsibility over a group resolution did not consider the circumstances under which a home country might be unable or unwilling to resolve a cross-border SIFI as a whole and the possibility that this would have significant consequences in host countries.⁹⁴

As a result, the FSB sought to strike a balance between the need to achieve a cooperative group-wide resolution and the need to provide a host jurisdiction with the authority to protect the financial stability of its own jurisdiction. The FSB addressed these comments by providing in Key Attribute 7.3 (as it had in the Proposed Key Attributes) that a national resolution regime should extend to local branches of foreign firms and should have the capacity either (i) to support a resolution carried out by a foreign home country authority or (ii) in “exceptional cases,” to take measures on its own initiative when the home country is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction’s financial stability.⁹⁵

The first alternative under Key Attribute 7.3 would ensure that a host authority could cooperate with a home country authority in the application of special resolution tools to local operations, such as through the transfer of property in the host jurisdiction to a foreign bridge institution or private sector purchaser. The second alternative under Key Attribute 7.3 would allow the host jurisdiction to take independent domestic action, where necessary, to protect domestic stability in the absence of effective international cooperation and information sharing. This Key Attribute appears to be more reliant on *detente* than *entente* between home and host jurisdictions. On the one hand, it seems unlikely that jurisdictions with existing regimes that provide the local resolution authority with broad discretion to initiate action against a branch of a foreign institution will surrender any of that legal authority. At best, it can be hoped that they would consult with or provide prior notice to a home country before taking action under local law. On the other hand, the existing legal regimes in many host countries may not provide the host resolution authority with the power to recognize a transfer of local branch assets to a foreign bridge institution. The default setting in such jurisdictions will be to the second alternative of the Key Attribute unless amendments are made to the national resolution laws to permit at least discretionary recognition of foreign resolution proceedings.

The requirement for recovery and resolution plans presented similar concerns about the respective roles of home and host jurisdictions. As the FSB noted, the majority of industry respondents expressed strong interest in a single plan approach, under which the home country would lead the development of a group resolution plan for a G-SIFI in coordination with

the members of the crisis management group.⁹⁶ The FSB noted that the development of a group resolution plan led by the home authorities is a core component of the Key Attributes, but that to safeguard host country interests, the FSB needed to consider circumstances under which a home country may not have the capacity or willingness to coordinate the effective resolution of a cross-border SIFI as a whole.⁹⁷ The relevant Proposed Key Attribute (11.6) thus provided that the home country should lead the development of a group resolution plan in coordination with the members of the firm's crisis management group, and where a host jurisdiction deemed the group resolution plan insufficient, or otherwise with the agreement of the home country, a host resolution authority could maintain its own resolution plan for the parts of the firm active in its jurisdiction. Reflecting further sensitivity to the concerns of host jurisdictions, the FSB made revisions to the relevant Key Attributes. As revised, Key Attribute 11.8 provides that, at least for G-SIFIs, the home resolution authority should lead the development of a group resolution plan in coordination with the members of the firm's crisis management group. But Key Attribute 11.9 now expressly provides that host resolution authorities may maintain their own resolution plans for the firm's operation in their jurisdiction, cooperating with the home country authority to ensure the plan is as consistent as possible with the group plan.⁹⁸

These changes were a concession to political and practical reality. Certain host jurisdictions have legal or regulatory requirements for a resolution plan for domestically incorporated entities, including a domestically incorporated subsidiary of a foreign entity, and even for a local branch of a foreign entity. These requirements must be met under host country law without regard for the fact that a home country authority may be preparing a group-wide plan. As discussed in Part III of this article, the Dodd-Frank Act has been construed by the Board to require a U.S.-based resolution plan for the U.S. operations, including U.S. branches, of a foreign bank with \$50 billion or more of worldwide assets.⁹⁹

A proliferation of recovery and resolution plan requirements holds the potential for fragmentation in the planning process and ultimately in the resolution process itself. A host country resolution planning process may also lend itself more readily to ring-fencing approaches if conducted in isolation. Industry participants and other commentators have adopted the term

“balkanization” to characterize the risk that they see in the proliferation of separate resolution planning requirements for cross-border firms and other kindred supervisory initiatives.¹⁰⁰ The planning processes, even if multiple and hence incrementally burdensome to a firm, may still have some value for the firm if they help to alert the firm to evolving expectations from host authorities. These processes may also have an additional value for the supervisory and resolution authorities if they become an occasion for trust-building through consultation and coordination exercises.

The FSB has incorporated into the Key Attributes a requirement for resolution authorities to undertake regular resolvability assessments of G-SIFIs. This concept had been included in an annex to the Proposed Key Attributes, but now is formally part of the Key Attributes. Key Attribute 10.3 provides that group resolvability assessments should be conducted by the home authority of the G-SIFI and coordinated within the firm’s crisis management group, taking into account national assessments by host authorities.¹⁰¹ Key Attribute 10.4 further provides that host authorities that conduct resolvability assessment of subsidiaries in their jurisdictions should coordinate as far as possible with the home authority conducting the resolvability assessment for the group as a whole.¹⁰²

Many of the comment letters expressed strong reservations about any proposed supervisory intervention into group structure based on a resolvability assessment exercise. One common theme in the comments was that impediments beyond an institution’s power to control (such as the state of resolution law in a jurisdiction) should not be used as a justification for requiring institutions to change their business or legal structure or otherwise be factored into a resolvability assessment.¹⁰³ One comment letter sought to draw a distinction between the structure of a firm as an endogenous factor that should be considered in a resolvability assessment and the national legal framework as an exogenous factor that should not be counted against a firm in the resolvability assessment.¹⁰⁴ Many comment letters asserted that resolvability assessments and recovery and resolution plans should not in any event be used for supervisory intervention into the structure or operation of healthy financial institutions.¹⁰⁵

A number of comment letters also raised concerns with the suggestion that the use of intra-group guarantees should be restricted as part of a resolvability assessment.¹⁰⁶ Various respondents noted that intra-group transactions can in-

crease the resilience of a group and must be balanced against concerns for the possible effect of intra-group exposures on resolvability. The FSB in response to these comments said that it would continue to consider the question of group structure and intra-group transactions as part of its ongoing work on resolvability.¹⁰⁷ But on the fundamental question of the ultimate supervisory authority to require changes in structure or operations of a financial firm, the FSB itself was firm. The FSB has provided in Key Attribute 10.5 that supervisory authorities should have the power, where necessary, to require changes in a firm's business practices, structure, or organization to reduce the complexity and costliness of resolution, including the power to require systematically important functions to be segregated in legally and operationally independent entities that are shielded from group problems.¹⁰⁸ The latter suggestion may be seen as a form of functional ring-fencing for critical business functions.

The Key Attributes address issues with respect to creditor protection in more detail than the Proposed Key Attributes, which provided a discussion of certain creditor protection issues in an annex devoted to the topic.¹⁰⁹ One core point is included in Key Attribute 7.4 (as it was in Proposed Key Attribute 8.5): national laws and regulations should not discriminate against creditors on the basis of their nationality, the location of their claim, or the jurisdiction where it is payable.¹¹⁰ This proposition, sounding perhaps in principles based on natural law, may be unobjectionable in theory, but it may present significant problems in practice. The United States, for example, could be deemed to be a major offender of this principle because of the so-called "national depositor preference" provision in the Federal Deposit Insurance Act (the "FDIA").¹¹¹ This depositor preference provision has generally been thought not to apply to deposits payable only at a branch of an insured bank outside the United States. Various options, short of amending the FDIA (which might be difficult to achieve), are potentially available to address this issue. The FDIC itself has recently proposed that U.S. banks by contract expressly make deposits at their foreign branches payable both at the foreign branch and in the United States, thus giving such deposits the benefit of the depositor preference provision.¹¹² Other industry parties have argued that the FDIC has the legal ability to revisit an earlier informal interpretation of the depositor preference provision and provide a new interpretation that extends the benefit of the depositor preference provision to deposits at foreign branches, even if they are not payable at a

location in the United States.¹¹³

Resolution of this depositor treatment issue may play a significant role in facilitating a more cooperative approach toward cross-border resolution of banking groups. The U.K. Financial Services Authority (the “FSA”) elevated this issue in the international discourse when it issued a Consultation Paper in September 2012, suggesting that it would restrict firms from non-European Economic Area countries with national depositor preference regimes from accepting deposits in the U.K. unless arrangements were made to ensure the U.K. depositors would be no worse off than the depositors in the home country if the firm fails.¹¹⁴ The Consultation Paper identified the United States, Australia, Singapore, and Turkey as countries with offending national depositor preference regimes.¹¹⁵ The potential operation of national depositor preference provisions may lead host jurisdictions to respond with ring-fencing measures or restructuring proposals like those included in the Consultation Paper to protect host jurisdiction depositors. Such responses are not calculated to inspire faith in coordination or cooperation. The Consultation Paper provides *en passant* another insight into the effectiveness of the FSB process. In the Consultation Paper, the FSA notes that despite the call in the Key Attributes for the removal of national depositor preference laws, “there has been little evidence that countries that operate such regimes have made any attempt to change or amend their existing laws or that any change is envisaged.”¹¹⁶ The FSA has apparently concluded that only unilateral action by a host jurisdiction will induce “cooperation” by the offending home jurisdictions.

The Key Attributes also address the treatment of claims in a creditor hierarchy as well as a fundamental protection for creditors in the form of the principle: “no creditor worse off than in liquidation.” The FSB noted that a large number of respondents called for strong assurance that the hierarchy within the capital structure and statutory ranking of creditor claims would be respected whatever special resolution measures were used.¹¹⁷ At the same time, the FSB also noted other comments to the effect that it may be necessary to depart from an absolute priority rule and from a rule of equal treatment of similarly situated creditors in a class in order to contain the potential systemic impact of a firm’s failure. More specifically, the FSB noted that depositors or other parties who provide critical funding for a SIFI’s operations may need to be paid in full or guaranteed to be transferred to a creditworthy

bridge entity to ensure continuity of important parts of the SIFI's business or to avoid a larger run throughout the financial system.¹¹⁸ Key Attribute 5.1 provides for such flexibility. At the same time, Key Attribute 5.2 provides that creditors should have a right to compensation where they do not receive at a minimum what they would have received in a liquidation of the firm under the applicable insolvency regime.¹¹⁹ This implements the "no creditor worse off than in liquidation" principle. This approach essentially parallels the approach taken in the orderly liquidation provisions of Title II of the Dodd-Frank Act.¹²⁰

CONCLUSION

The promulgation of the Key Attributes represents an important step in promoting the adoption of more robust national regimes for bank resolution. To be clear, however, it is only the first step in the process. The member jurisdictions of the FSB must now implement the Key Attributes, initially by legislative changes and then by regulatory and supervisory changes. The word from the FSB to its member jurisdictions must now be *adelante, avanti,* and *vorwärts* with implementation! Even with this directive, the pattern of national implementation will likely vary. Several jurisdictions, including the U.S., the U.K., and Switzerland, have already adopted major reform measures, incorporating many but not all of the principles reflected in the Key Attributes. Progress in other countries will require more time and will be less certain as to individual outcomes.

Observers should not lose sight of the fact that substantial policy choices lie embedded in many of the Key Attributes themselves.¹²¹ These policy issues will occasion discussion and dispute in individual jurisdictions as they are considered. The scope of eligible bail-in liabilities and the breadth of any depositor preference provision are examples of two important policy issues entwined in the Key Attributes. A number of jurisdictions have asked the FSB to provide more detailed guidance on a range of issues implicated by the Key Attributes. Without definitive guidance, it is likely that jurisdictions will vary in their approach to these issues, resulting ultimately in more divergent national regimes than might be expected from a process designed to promote greater convergence among resolution regimes.¹²²

Observers should also not lose sight of the difference between adopting changes in law and effecting changes in behavior. It will prove easier to achieve apparent convergence of national regimes (or elements of national regimes) by adopting changes to law than to achieve actual convergence in practice by the coordinated use of the new powers, particularly where a measure of discretion is left (as it inevitably will be) to the individual national authorities exercising those powers. Undue reliance should not be placed merely on the fact that a jurisdiction has revised its insolvency laws along the lines recommended in the Key Attributes. The political willingness of a national authority to impose a broad-ranging bail-in on senior creditors and uninsured depositors or to fund the critical cross-border functions of a large complex institution in resolution will only be known when a crisis event actually arises.

Nonetheless, progress on the adoption of robust national regimes is still a predicate to any potential convergence of laws and practices in cross-border resolutions. The efforts in the European Union to devise a convergent legal regime for the resolution of banks and credit institutions in its Member States provide useful insights to the difficulties and demands of the process. The success of the efforts in the European Union, home to 14 of the 28 banking institutions currently designated as global systematically important banking institutions by the FSB, together with the efforts in the United States, will largely determine the success of the FSB standard-setting process. The efforts of the FSB in providing additional guidance on implementation of the Key Attributes and the efforts of the European Union in crafting a convergent regional regime are explored in Part II of this article.

NOTES

¹ Leaders of the Group of Twenty, *Declaration: Summit on Financial Markets and the World Economy* (Nov. 15, 2008), available at <http://www.g20.utoronto.ca/2008/2008declaration1115.html>.

² *Id.* at 2.

³ Pub. L. No. 111-203, Title II, 124 Stat. at 1442-1520 (codified at 12 U.S.C. § 5381 (2012)). For a discussion of the policy considerations underlying the enactment of Title II of the Dodd-Frank Act, see Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and*

Critique — *Part I*, 128 Banking L.J. 771 (2011), & *Part II*, 128 Banking L.J. 867 (2011).

⁴ G20, *G20 Working Group on Reinforcing International Cooperation and Promoting Integrity in Financial Markets (WG2): Final Report* 5 (Mar. 27, 2009), available at www.astrid-online.it/Dossier--d1/Documenti/The-London/G20_wg2_27_03_09.pdf.

⁵ *Id.* at 5.

⁶ *Id.* Shortly after the issuance of the G20 Working Group Final Report, the staff of the International Monetary Fund and the World Bank issued an extensive conceptual paper on bank insolvency issues. See IMF AND THE WORLD BANK, *An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency* (Apr. 17, 2009), available at <http://www.imf.org/external/np/pp/eng/2009/041709.pdf>. The paper contained a broad-ranging discussion of the issues underlying domestic bank insolvency regimes, but it explicitly excluded from its scope any discussion of cross-border insolvency. *Id.* at 4.

⁷ BASEL COMMITTEE, *Consultative Document, Report and Recommendations of Cross-border Bank Resolution Group* (Sept. 2009), available at <http://www.bis.org/publ/bcbs162.htm>.

⁸ BASEL COMMITTEE, *Report and Recommendations of Cross-border Bank Resolution Group* (Mar. 2010), available at <http://www.bis.org/publ/bcbs169.htm> [hereinafter *CBRG Report*].

⁹ *Id.* at 22-24.

¹⁰ FSB, *Consultative Document, Effective Resolution of Systematically Important Financial Institutions* 8 (July 19, 2011), available at http://www.financialstabilityboard.org/publications/r_110719.pdf [hereinafter *Consultative Document on Effective Resolution*].

¹¹ *CBRG Report*, *supra* note 8, at 25-27.

¹² *Id.* at 8.

¹³ *Id.* at 29-31.

¹⁴ *Id.*

¹⁵ *Id.* at 31-34.

¹⁶ See Pub. L. No. 111-203, § 165, 124 Stat. at 1423-32 (codified at 12 U.S.C. § 5365), Title II, 124 Stat. at 1442-1520 (codified at 12 U.S.C. § 5381) (2012).

¹⁷ *CBRG Report*, *supra* note 8, at 26-27.

¹⁸ *Id.* at 27.

¹⁹ *Id.* at 28-29.

²⁰ *Id.* at 17. The *CBRG Report* notes that even in jurisdictions such as those in

the European Union that adhere to a “universal” insolvency procedure for banks and their branches, each national authority is likely to attach most weight to the pursuit of its own national interests in the management of a crisis. *Id.* at 4. The operation of the European Union insolvency regime for banks and other credit institutions is discussed in Part II of this article.

²¹ 11 U.S.C. § 1501(c)(1) excludes from the application of Chapter 15 a proceeding for an entity that is excluded from eligibility as a debtor under 11 U.S.C. § 109(b). A foreign bank that has a branch or agency in the United States is excluded from eligibility as a debtor under 11 U.S.C. § 109(b)(3)(B). For a discussion of this exclusion, see Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 180-82 (2002).

²² CBRG Report, *supra* note 8, at 36.

²³ *Id.* at 35.

²⁴ *Id.*

²⁵ FDIC and the Bank of England, *Resolving Globally Active, Systemically Important, Financial Institutions* (Dec. 10, 2012), available at www.fdic.gov/about/srac/2012/gsifi.pdf; FDIC and the Canada Deposit Insurance Corporation, *Memorandum of Understanding Concerning the Resolution of Insured Depository Institutions and Certain Other Financial Companies With Cross-Border Operations in the United States and Canada* (June 11, 2013), available at <http://www.fdic.gov/news/news/press/2013/pr13051.pdf>. See also Joe Adler, *FDIC’s Global Wind-Down Tour Makes More Stops*, AMERICAN BANKER, Mar. 26, 2013, at 1 (discussing the FDIC’s efforts aimed at coordination of cross-border resolutions and the obstacles confronting those efforts). For a detailed discussion of the challenges posed by the bankruptcy of complex international financial institutions, see Government Accountability Office, *Bankruptcy: Complex Financial Institutions and International Coordination Pose Challenges*, GAO-11-707 (July 2011), available at <http://www.gao.gov/new.items/d11707.pdf>.

²⁶ CBRG Report, *supra* note 8, at 36-38.

²⁷ *Id.* at 39.

²⁸ *Id.* at 42.

²⁹ *Id.* at 43.

³⁰ See, e.g., Mark Scott & Julia Werdiger, *Pressure in Britain Over What to Do With Bailed-Out Banks*, N.Y. TIMES, June 7, 2013, at B7; Max Colchester & David Enrich, *Bank Bailout Blues Stall U.K. Recovery*, WALL ST. J., May 14, 2013, at A1.

³¹ CBRG Report, *supra* note 8, at 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4-5.

³⁵ *Id.* at 16-17.

³⁶ *Id.* at 18.

³⁷ *Id.* One may surmise that part of the support for a territorial approach came from certain members of the U.S. delegation to the CBRG. *See, e.g.,* Thomas C. Baxter, Jr., Joyce M. Hansen, & Joseph H. Sommers, *Two Cheers for Territoriality: An Essay on International Bank Insolvency Law*, 78 AM. BANKR. L.J. 57 (2004) (discussing features of U.S. bank insolvency law that incorporate concepts of territoriality). The authors of this article are members of the senior staff of the Federal Reserve Bank of New York. They are active participants in the international dialogue on bank insolvency issues, including that in the CBRG, and estimable members of the supervisory *nomenklatura*.

³⁸ CBRG Report, *supra* note 8, at 18.

³⁹ *Id.* at 19.

⁴⁰ *Id.* The CBRG Report further expanded on this point as follows:

In the absence of ex ante agreement between home and the major host jurisdictions on the sharing of financial burdens for the resolution of cross-border financial institutions designed to maintain the cross-border functionality of the financial institution, most jurisdictions are likely to opt for separate resolution of a failing financial institution operating within their jurisdiction. At this stage, reaching such broad international agreement appears both unlikely and unenforceable as the practical implications of burden sharing give rise to considerable challenges. However, some further progress in this respect should not be ruled out in a regional or bank-specific context. *Id.*

The travails of the regional effort in the European Union at reaching agreement on burden-sharing are discussed in Part II of this article.

⁴¹ *Id.* at 19 (emphasis added).

⁴² *Id.*

⁴³ *Id.* at 11.

⁴⁴ IMF LEGAL AND MONETARY AND CAPITAL MARKETS DEPARTMENTS, *Resolution of Cross-Border Banks—A Proposed Framework for Enhanced Coordination* (June 11, 2010), available at www.imf.org/external/np/pp/eng/2010/061110.pdf.

⁴⁵ *Id.* at 3. The IMF staff notes that the only exception to this statement may be

on a regional basis among closely-integrated groups of countries.

⁴⁶ *Id.* at 3-4.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.* at 19 (suggesting that local laws that encourage ring-fencing of assets of a branch do not facilitate coordination).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 20.

⁵³ *Id.* at 20-21.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 24.

⁵⁶ *Id.*

⁵⁷ *Id.* at 25.

⁵⁸ FSB, *Reducing the moral hazard posed by systemically important financial institutions* (Oct. 20, 2010), available at www.financialstabilityboard.org/publications/r_101111a.pdf.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 3-4.

⁶¹ *Id.* at 4-5.

⁶² *Id.* at 4.

⁶³ *Id.* at 5. The FSB noted that this advice was not applicable to Member States of the European Union because of the freedom to establish branches and subsidiaries guaranteed by the Treaty of the European Union. *Id.* at 5 n.1.

⁶⁴ BASEL COMMITTEE, *Resolution policies and frameworks — progress so far* (July 2011), available at <http://www.bis.org/publ/bcbs200.htm>.

⁶⁵ *Id.* at 3-4.

⁶⁶ *Id.* at 4-5.

⁶⁷ *Id.* at 5.

⁶⁸ *Consultative Document on Effective Resolution*, *supra* note 10, at 7.

⁶⁹ *Id.*

⁷⁰ *Id.* at 11.

⁷¹ *Id.* The FSB specifically noted that it would be working with other international standard-setting bodies, such as the International Association of Insurance Supervisors and the International Organization of Securities Commissions, to develop sector-specific guidance on resolution issues for non-bank SIFIs.

⁷² *Id.* at 24-25.

⁷³ *Id.* at 25.

⁷⁴ *Id.* at 25-26.

⁷⁵ *Id.* at 29-32.

⁷⁶ *Id.* at 33.

⁷⁷ See Letter from the British Bankers' Association to the FSB 1-2 (Sept. 2, 2011), available at http://www.financialstabilityboard.org/press/c_110909k.pdf [hereinafter BBA Letter].

⁷⁸ See Letter from the International Banking Federation to the FSB 2 (Sept. 5, 2011), available at http://www.financialstabilityboard.org/press/c_110909gg.pdf [hereinafter IBFED Letter]; Letter from the Institute of International Finance to the FSB 3 (Sept. 2, 2011), available at http://www.financialstabilityboard.org/press/c_110909gg.pdf [hereinafter IIF Letter]; Letter from the European Banking Federation to the FSB 1 (Aug. 16, 2011), available at http://www.financialstabilityboard.org/press/c_110909w.pdf [hereinafter EBF Letter].

⁷⁹ FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Oct. 2011), available at www.financialstabilityboard.org/publications/r_111104cc.pdf [hereinafter *Key Attributes*]. The *Key Attributes* were issued as a core component of a set of policy measures to address systemically important financial institutions, released at the same time by the FSB and endorsed by the G20 leaders. In addition to the *Key Attributes*, the policy measures included requirements for additional loss-absorption capacity above the Basel III minimum for global systemically important banks (an initial group of 29 such banks were identified by the FSB) and requirements for more intensive and effective supervision of SIFIs. See FSB, Press Release: FSB issues International Standard for Resolution Regimes (Nov. 4, 2011), available at www.financialstabilityboard.org/press/pr_111104dd.pdf. See also FSB, Press Release, FSB announces policy measures to address systemically important financial institutions (SIFIs) and names initial group of global SIFIs (Nov. 4, 2011), available at http://www.financialstabilityboard.org/press/pr_111104cc.pdf.

⁸⁰ FSB, *Effective Resolution of Systemically Important Financial Institutions: Overview of responses to the public consultation* (Nov. 4, 2011), available at http://www.financialstabilityboard.org/publications/r_111104dd.pdf [hereinafter *Overview of Responses*].

⁸¹ *Id.* at 1.

⁸² *Id.* at 2.

⁸³ See, e.g., IBFed Letter, *supra* note 78, at 3; EBF Letter, *supra* note 78, at 1; IIF Letter, *supra* note 78, at 12.

- ⁸⁴ *Overview of Responses*, *supra* note 80, at 2.
- ⁸⁵ *See, e.g.*, IBFed Letter, *supra* note 78, at 4; EBF Letter, *supra* note 78, at 3.
- ⁸⁶ *See, e.g.*, BBA Letter, *supra* note 77, at 7; IIF Letter, *supra* note 78, at 20.
- ⁸⁷ *See, e.g.*, BBA Letter, *supra* note 77, at 7; IIF Letter, *supra* note 78, at 20.
- ⁸⁸ *Overview of Responses*, *supra* note 80, at 3.
- ⁸⁹ *See, e.g.*, IBFed Letter, *supra* note 78, at 5; EBF Letter, *supra* note 78, at 23.
- ⁹⁰ *See, e.g.*, EBF Letter; *supra* note 78, at 15; Letter from the Fédération Bancaire Française, to the FSB 1 (Sept. 2, 2011), *available at* http://www.financialstabilityboard.org/press/c_110909aa.pdf [hereinafter FBF Letter].
- ⁹¹ *Overview of Responses*, *supra* note 80, at 3-4.
- ⁹² *Overview of Responses*, *supra* note 80, at 4.
- ⁹³ *See, e.g.*, EBF Letter, *supra* note 78, at 8; BBA Letter, *supra* note 77, at 4.
- ⁹⁴ *Overview of Responses*, *supra* note 80, at 4.
- ⁹⁵ *Key Attributes*, *supra* note 79, at 13. Key Attribute 7.3 indicates that it would not apply to jurisdictions that are subject to a binding obligation to respect the resolution of financial institutions under the authority of a home jurisdiction, as is the case under the European Union winding-up directives. *Id.*
- ⁹⁶ *Overview of Responses*, *supra* note 80, at 5.
- ⁹⁷ *Id.*
- ⁹⁸ *Key Attributes*, *supra* note 79, at 17-18.
- ⁹⁹ *See* Resolution Plans Required, 76 Fed. Reg. 67,323, 67,336 (Nov. 1, 2011) (discussing the application of the resolution plan regulation to foreign banking organizations in the United States).
- ¹⁰⁰ *See, e.g.*, Peter Lee, *The Balkanization of European Banking*, EUROMONEY (Oct. 31, 2012), *available at* <http://www.euromoney.com/Article/3111003/The-balkanization-of-European-banking.html>. *See also* Letter from the IIF to the Board of Governors of the Federal Reserve System 12 (April 30, 2013) (commenting on proposed regulations relating to the treatment of the U.S. operations of foreign banking organizations), *available at* http://www.federalreserve.gov/SECRES/2013/May/20130502/R-1438/R-1438_043013_111122_562504653776_1.pdf.
- ¹⁰¹ *Key Attributes*, *supra* note 79, at 16.
- ¹⁰² *Id.*
- ¹⁰³ *See, e.g.*, IBFed Letter, *supra* note 78, at 7; FBF Letter, *supra* note 90, at 9; EBF Letter, *supra* note 78, at 17; BBA Letter, *supra* note 77, at 9.
- ¹⁰⁴ *See, e.g.*, FBF Letter, *supra* note 90, at 9.
- ¹⁰⁵ *See, e.g.*, IBFed Letter, *supra* note 78, at 7; FBF Letter, *supra* note 90, at 2; EBF Letter, *supra* note 78, at 1.

¹⁰⁶ See, e.g., IBFed Letter, *supra* note 78, at 7; EBF Letter, *supra* note 78, at 20; BBA Letter, *supra* note 77, at 11.

¹⁰⁷ *Overview of Responses*, *supra* note 80, at 5.

¹⁰⁸ *Key Attributes*, *supra* note 79, at 16.

¹⁰⁹ *Consultative Document on Effective Resolution*, *supra* note 10, at 67-70.

¹¹⁰ *Key Attributes*, *supra* note 79, at 13.

¹¹¹ See 12 U.S.C. § 1821(d)(11).

¹¹² See Deposit Insurance Regulations; Definition of Insured Deposit, 78 Fed. Reg. 11,604 (Feb. 19, 2013).

¹¹³ Letter from Wayne A. Abernathy, Executive Vice President, American Bankers Association, & Cecelia Calaby, Executive Director and General Counsel, ABA Securities Association, to Robert E. Feldman, Executive Secretary, FDIC (April 19, 2013), available at https://www.fdic.gov/regulations/laws/federal/2013/2013-ae00-c_03.pdf.

¹¹⁴ FINANCIAL SERVICES AUTHORITY, *Consultation Paper CP 12/23: Addressing the implications of Non-EEA national depositor preference regimes* (Sept. 2012), available at <http://www.fsa.gov.uk/static/pubs/cp/cp12-23.pdf>.

¹¹⁵ *Id.* at 9.

¹¹⁶ *Id.* at 6.

¹¹⁷ *Overview of Responses*, *supra* note 80, at 6.

¹¹⁸ *Id.*

¹¹⁹ *Key Attributes*, *supra* note 79, at 11.

¹²⁰ 12 U.S.C. § 5390(a)(7) & (d)(2) & (3). Neither Title II nor Key Attribute 5.2 provides any guidance on the difficult valuation issues implicit in the hypothetical determination of what a particular creditor would have received if a traditional liquidation process had been pursued rather than a Title II orderly resolution or a special resolution mechanism envisioned by Key Attributes 5.1 and 5.2.

¹²¹ For a detailed discussion of the issues that confront the efforts for devising an insolvency framework for cross-border resolution of financial institutions, including those surrounding the Key Attributes, see IIF, *Making Resolution Robust — Completing the Legal and Institutional Frameworks for Effective Cross-Border Resolution of Financial Institutions* (June 2012), available at <http://www.iif.com/download.php?id=vVrz1cqVQzI=>.

¹²² For an example of additional guidance recently given by the FSB on the recovery planning requirement in the Key Attributes, see Brooke Masters, *Banks' living wills start to take form*, FIN. TIMES, Aug. 5, 2013, at 15.