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

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This is the third part of a four-part article analyzing the efforts of international bodies to create effective resolution regimes for systemically important cross-border banking institutions. This part analyzes the U.S. resolution regimes as they apply to the U.S. operations of foreign banking organizations.

A core element of any prospective arrangement for the cross-border resolution of a banking group will derive from the design and operation of the applicable U.S. resolution regime or regimes. For U.S. banking groups that have been designated as global systemically important banks ("G-SIBs") by the Financial Stability Board (the "FSB"), the truth of this proposition should be self-evident.[1] All the U.S. G-SIBs have cross-border operations, albeit varying in individual size and significance. But even for the U.S. G-SIBs with the largest cross-border operations, the preponderance of their U.S. operations means that the application of the relevant U.S. resolution regime or regimes to their U.S. operations will largely determine the overall course of the global resolution process. Many foreign G-SIBs also

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have substantial and in some cases critical operations in the United States.[2] The resolution regimes applicable to their U.S. operations will likewise be an important factor in determining the course of any global resolution process for these foreign G-SIBs.

Parts I and II of this article discuss international and regional efforts aimed at promoting cooperative approaches to the cross-border resolution of banking groups, focusing in particular on the Key Attributes of Effective Resolution Regimes for Financial Institutions (the "Key Attributes") promulgated by the FSB.[3] Parts III and IV of this article analyze the relevant U.S. resolution regimes and their conformance with the Key Attributes. Part III analyzes the U.S. resolution regimes as they apply to the U.S. operations of foreign banking organizations. Part IV analyzes the U.S. resolution regimes as they apply to U.S. banking organizations.

OVERVIEW OF U.S. RESOLUTION REGIMES

The likely application of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") (in lieu of the Bankruptcy Code) to the holding company of any U.S. G-SIB (if it were to encounter severe financial difficulty threatening the financial stability of the United States) means that a resolution regime specifically designed to facilitate the orderly resolution of the firm would apply.[4] The FSB has previously noted that the adoption of the Title II regime represents a major step forward in implementing the Key Attributes.[5] Title II is designed *inter alia* to address concerns with the disruptive effects that are thought to arise from the application of a traditional corporate bankruptcy mechanism to a systemically important financial institution.[6]

Design is of course important, but it is not sufficient to ensure that an orderly process will result. Planning for and effective implementation of the process is also required. The Federal Deposit Insurance Corporation (the "FDIC") as the administrator of Title II has devoted significant efforts to developing (within the design limits of Title II) the strategies best calculated to facilitate an orderly resolution of a systemically important U.S. financial institution. The staff of the FDIC has identified the single-point-of-entry strategy as the most promising approach to implementation of Title II.[7] A sin-

gle-point-of-entry strategy, if successfully implemented, would minimize the likelihood that separate bankruptcy or other insolvency proceedings would have to be initiated for the operating subsidiaries of the holding company in the United States or in foreign jurisdictions. This strategy is specifically designed to minimize the disruptive effects of the overall resolution process in a cross-border setting. The challenges of implementing a single-point-of-entry strategy as well as a range of other implications flowing from Title II are discussed in detail in Part IV of the article.

A U.S. bank holding company encountering severe financial difficulty that is not made subject to a Title II proceeding will be subject to resolution under the Bankruptcy Code.[8] In the event of a bankruptcy filing by or against a bank holding company, it is likely that various operating subsidiaries of the holding company would seek the protection of the Bankruptcy Code or might be placed into an insolvency or other resolution proceeding, for example, by a bank regulatory authority in the case of a depository subsidiary or by a state insurance authority in the case of an insurance subsidiary. The initiation of multiple bankruptcy or other insolvency proceedings at the operating subsidiary level will likely result in overlaps, conflicts, and challenges among the proceedings and in loss of value to many creditors in the process. The use of a "prepackaged" bankruptcy filing for a holding company providing for the ongoing operation of its subsidiaries could theoretically mitigate some of these disruptive effects. There is, however, only limited precedent for the use of a prepackaged bankruptcy for a large banking group.[9]

In any event, the application of Title II to a systemically important U.S. financial company or the application of the Bankruptcy Code and other potentially applicable U.S. laws, such as the Federal Deposit Insurance Act (the "FDIA") with respect to an insured depository subsidiary, to other financial groups, will largely determine the course of the cross-border resolution of a U.S. group. The choice, where available, between the application of Title II or the application of the Bankruptcy Code will fundamentally affect the course of the cross-border resolution. Unlike Title II, Chapters 7 and 11 of the Bankruptcy Code do not incorporate certain of the provisions that the Key Attributes indicate are necessary or desirable to facilitate the orderly resolution of a financial institution.

U.S. resolution regimes will also be relevant to foreign G-SIBs and other

foreign banking groups if they have operations in the United States. The form and legal character of the U.S. operations of a foreign bank will dictate the U.S. resolution regime or regimes that will be applicable to those operations. A branch or agency office of a foreign bank in the United States would be subject to liquidation under applicable federal or state banking law.[10] If a foreign bank also operates an insured depository subsidiary, the depository subsidiary would be subject to liquidation under the FDIA.[11] If a foreign bank operates an insurance subsidiary (chartered under state insurance law), the insurance subsidiary would be subject to rehabilitation or liquidation under applicable state insurance law.[12] If a foreign bank operates a registered broker-dealer subsidiary, that subsidiary would be subject to liquidation under the special provisions of the Securities Investor Protection Act, which is conducted in accordance with many of the provisions of a Charter 7 case under the Bankruptcy Code.[13] If a foreign bank has an intermediate holding company in the United States, the intermediate holding company would be subject to resolution under the Bankruptcy Code (or potentially Title II of the Dodd-Frank Act if resolution of the company under the Bankruptcy Code would have serious adverse effects on financial stability in the United States).[14] Other U.S. subsidiaries of a foreign bank would also be subject to resolution under the Bankruptcy Code (unless expressly excluded from eligibility by the Bankruptcy Code).

As this cascade of possibilities suggests, the varying elements of a foreign bank's U.S. operations may be subject to varying bankruptcy or insolvency regimes. The following sections of this article survey the differences in approach and potential outcome under these varying regimes as applicable to the U.S. operations of a foreign banking organization.

POTENTIAL APPLICATION OF THE BANKRUPTCY CODE TO FOREIGN BANKS

The natural and necessary starting point for an analysis of the U.S. insolvency laws applicable to a foreign banking institution is the Bankruptcy Code. The analysis begins with Section 109, which establishes who may be a debtor under the Bankruptcy Code. Section 109(a) provides that only a person that has a place of business or property in the United States is eligible

to be a debtor under the Bankruptcy Code.[15] The term "property" has been broadly construed by the bankruptcy courts. The presence of a bank account in the United States, for example, constitutes property for purposes of Section 109(a).[16] Likewise, the ownership of shares of a U.S. company constitutes property in the United States for purposes of Section 109(a).[17] A foreign company that has even a nominal amount of property in the United States is eligible to be a debtor under Section 109(a).[18] It should be noted, however, that even where a foreign company has property in the United States, a bankruptcy court may abstain from hearing the case under the authority provided in Section 305 of the Bankruptcy Code or dismiss the case under the authority provided in Section 1112 of the Bankruptcy Code.[19]

Certain categories of entities that would otherwise be eligible to be a debtor under Section 109(a), however, are excluded from eligibility under Section 109(b) of the Bankruptcy Code. Among the categories of entities excluded from eligibility by Section 109(b)(2) are domestic insurance companies and domestic banks.[20] The reason for the exclusion of each of these categories is that state insurance laws contain specialized regimes for the rehabilitation or liquidation of insurance companies and federal and state banking laws contain specialized regimes for the conservatorship or receivership of banks. These specialized regimes apply to these entities to the exclusion of the Bankruptcy Code. Section 109(b)(3)(B) also excludes from eligibility a foreign bank that has a branch or agency in the United States.[21] The reason for this exclusion is similar to the reason for the exclusion of domestic banks. As discussed below, federal and state banking laws contain specialized regimes for the liquidation of branches and agencies of foreign banks in the United States.[22] The exclusion from eligibility for a foreign bank that has a branch or agency in the United States extends not only to a plenary case under Chapter 7 or Chapter 11, but also to an ancillary case under Chapter 15.[23]

The exclusion from eligibility for a foreign bank that has a branch or agency in the United States under Section 109(b)(3)(B) does not extend to affiliates or other subsidiaries of the foreign bank. Thus, as indicated above, if a foreign bank with a branch or agency in the United States establishes other entities in the United States, such as holding companies or other operating subsidiaries (that are not otherwise excluded from eligibility under Section

109(b)), these other entities would be eligible for debtor status under the Bankruptcy Code. A parallel question is posed by a fact pattern involving a foreign bank with a branch or agency in the United States that is owned by a foreign holding company. Assuming the foreign holding company has other property in the United States (such as bank accounts in the name of the holding company or ownership interests in other U.S. companies), the foreign holding company itself would be eligible for debtor status under Section 109. As noted above, even if the foreign holding company has property in the United States, a bankruptcy court would have the authority under Section 305 or Section 1112 of the Bankruptcy Code to dismiss the case.

There are only limited examples of a foreign bank commencing a plenary bankruptcy case in the United States. One recent example is the case of Arcapita Bank ("Arcapita").[24] Arcapita was an Bahraini-chartered investment bank and private equity firm licensed as a "wholesale bank" by the Central Bank of Bahrain. Arcapita had no branch or agency office in the United States. Arcapita's principal activities were investing for its own account and providing investment opportunities for third-party investors in conformity with Islamic Shari'ah rules. Through a group of subsidiary holding companies, Arcapita held minority investments in various operating portfolio companies, including operating portfolio companies in the United States. Arcapita and certain of its non-U.S. holding company subsidiaries commenced Chapter 11 cases to provide a forum for a global restructuring of their liabilities. The nature of Arcapita's liabilities, which were essentially longer-term non-deposit liabilities, permitted the use of a Chapter 11 reorganization process. It is unlikely that a foreign bank with a typical bank liability structure, i.e., with demand and other short-term deposit liabilities, could realistically envision the use of either a Chapter 7 or Chapter 11 case. Nor would the home country regulatory or resolution authorities likely countenance such an approach.

A more likely option for an eligible foreign bank is the use of an ancillary case under Chapter 15 of the Bankruptcy Code. Chapter 15 was added to the Bankruptcy Code in 2005 to incorporate the UNCITRAL Model Law on Cross-Border Insolvency.[25] Chapter 15 is specifically designed to provide assistance to a foreign insolvency or reorganization proceeding and to promote fair and efficient administration of cross-border insolvencies.[26] A

Chapter 15 case is commenced by a foreign representative (i.e., a person or body authorized to act as a representative of the foreign proceeding) filing a petition with the bankruptcy court for "recognition" of the foreign proceeding.[27] A number of foreign representatives for foreign banks in insolvency or reorganization proceedings have commenced ancillary cases under Chapter 15, principally to protect the assets of the foreign bank in the United States.[28] Upon recognition of a foreign proceeding that is a foreign "main" proceeding, certain sections of the Bankruptcy Code, such as Section 362 relating to an automatic stay and Section 363 relating to the sale of property, automatically apply with respect to the property of the debtor within the territorial jurisdiction of the United States.[29] In a recent Chapter 15 case for a foreign bank, the bankruptcy court issued an order pursuant to Sections 363 and 365 to permit the sale of assets of the foreign bank debtor free of all liens and claims.[30] Upon recognition of a foreign proceeding whether as a main or nonmain proceeding, the bankruptcy court may grant any other appropriate relief, such as staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights or obligations, staying execution against the debtor's assets, and entrusting the overall administration or realization of the debtor's assets within the territorial jurisdiction of the Unites States to the foreign representative.[31] A Chapter 15 case can thus serve as an important tool for a foreign representative to marshal, protect, and realize upon the assets of a foreign bank debtor in the United States.

The use of a Bankruptcy Code case, however, has little or no potential application to most large foreign banks because most large foreign banks have a branch or agency in the United States and so are excluded as a legal matter from eligibility for a case under Chapter 7 or Chapter 11.[32] Moreover, as a practical matter, it is unlikely that the liquidation or reorganization of a major foreign bank could be effectively administered in a Chapter 7 or Chapter 11 case. The exclusion for a foreign bank with a branch or agency, however, also extends to an ancillary case under Chapter 15. One can foresee instances in which assistance might be needed for a foreign proceeding of such an entity, but will not be available under Chapter 15. The most obvious case would be that of a foreign bank that has property in the United States, such as correspondent accounts or investments that are not carried on the books of its U.S. branch or agency. If the specialized bank liquidation proceeding

for the branch or agency cannot assert jurisdiction over these assets, these assets might escape any protective process in the United States.[33] A possible, if partial, solution to this problem might be found in the continued exercise by state and federal (non-bankruptcy) courts of their common law authority to assist a foreign proceeding that is not eligible for a Chapter 15 case because of Section 1501(c).[34] There is support in the legislative history of Chapter 15 for such an approach.[35] In the main, however, a foreign bank with a branch or agency in the United States will have to look to the special federal and state banking law regimes for the rules that would govern the liquidation of its direct banking operations in the United States.

SPECIAL LIQUIDATION REGIMES FOR U.S. BRANCHES AND AGENCIES OF FOREIGN BANKS

A foreign bank has options — at least when it comes to the form of its banking operations in the United States. A foreign bank can choose to operate through a separately incorporated depository institution subsidiary in the United States. This depository institution can be chartered by the Office of the Comptroller of the Currency (the "Comptroller") under federal banking law or by a state chartering authority under state law. With few exceptions, depository institutions are required to obtain insurance covering their deposit accounts under FDIA. In the event of material financial distress, a federally insured depository institution would be subject to resolution or liquidation by the FDIC under the conservatorship or receivership provisions of the FDIA. These provisions are discussed in Part IV of this article.

In lieu of or in addition to establishing a depository institution subsidiary in the United States, a foreign bank may also establish direct banking offices in the United States in the form of a branch or agency licensed either by the Comptroller under federal banking law or by a state regulatory authority under state banking law.[36] A branch or agency is not a separate legal entity, but rather a constituent part of the foreign bank itself. As noted above, a foreign bank that operates a branch or agency in the United States is expressly excluded from eligibility for debtor status under Section 109(b)(3)(B) of the Bankruptcy Code because federal and state banking laws make express provision for the liquidation of such a branch or agency.

This section provides a detailed analysis of the federal and state banking law regimes for the liquidation of branches and agencies of foreign banks.[37] A leitmotif emerges in the following discussion, namely, that the liquidation regimes for branches and agencies contained in federal and state banking law suffer from certain of the deficiencies that the Key Attributes are intended to address.[38] Ring-fencing requirements embedded in these laws, for example, are generally inconsistent with the thrust of the Key Attributes. But it is not merely the *presence* of ring-fencing requirements in these laws that presents difficulties. Equally problematic is the *absence* of many of the basic tools cited in the Key Attributes as necessary to promoting an orderly resolution process. An analysis of the provisions of the federal and state liquidation regimes for branches and agencies of foreign banks suggests that these regimes as currently constituted will not assist in promoting a coordinated global resolution for a foreign bank and may actually impede a global resolution process.

FEDERALLY-LICENSED BRANCHES AND AGENCIES OF FOREIGN BANKS

The International Banking Act of 1978 (the "IBA") authorizes the Comptroller to license a foreign bank to operate a branch or an agency in any state in which the establishment of such an office is not prohibited by state law.[39] A federally-licensed branch or agency (a "federal branch" or "federal agency") is subject to comprehensive supervision and regulation by the Comptroller under the IBA. Among the powers provided to the Comptroller is the power to close and liquidate a federal branch or agency. These closure and liquidation powers are provided in the relatively short compass of Sections 4(i) and 4(j) of the IBA.[40]

Section 4(i) of the IBA provides that the authority to operate a federal branch or agency will automatically terminate if the foreign bank voluntarily relinquishes its authority or if the foreign bank's authority or existence is terminated or cancelled in its country of organization. Section 4(i) also provides that (i) if the Comptroller is of the opinion that a foreign bank with a federal branch or agency has failed to comply with any rule, regulation or order of the Comptroller, or (ii) if a conservator is appointed for the foreign bank or a similar proceeding is initiated in the foreign bank's country of organization,

the Comptroller has the power to revoke the foreign bank's authority to operate a federal branch or agency.[41] The revocation of authority to operate the branch or agency will necessitate the liquidation of the branch or agency.

Section 4(j)(1) of the IBA provides that upon certain events (discussed below), the Comptroller may appoint a receiver "who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller."[42] The latter phrase incorporates the powers that a receiver under the National Bank Act (the "NBA") could exercise at the time of the enactment of the IBA. Under Section 4(j)(1) the Comptroller may appoint a receiver if (i) the Comptroller has revoked the foreign bank's authority to operate a federal branch or agency under Section 4(i); (ii) a creditor of the foreign bank has obtained a judgment against it arising from a transaction with a federal branch or agency of the foreign bank and the judgment remains unpaid for 30 days; or (iii) the Comptroller becomes satisfied that the foreign bank is insolvent.[43] It should be noted that the decision to appoint a receiver remains nominally in the discretion of the Comptroller. The occurrence of certain events, however, would almost invariably force the Comptroller to appoint a receiver. The revocation of the foreign bank's authority to operate in its country of organization or the appointment of a liquidator for the foreign bank in its country of organization, for example, would almost certainly compel the Comptroller to appoint a receiver to protect the assets of the foreign bank in the United States. Other types of interventions by the country of organization of the foreign bank, such as the appointment of a temporary administrator or conservator or a contractual bail-in, might leave more latitude for the Comptroller to stay his hand at least temporarily.

It appears that the Comptroller may have the option under a separate provision of federal banking law to appoint a conservator rather than a receiver for a federal branch or agency.[44] Unlike a receiver, a conservator would not become invested with title to the assets of the branch or agency. Instead, the conservator would succeed to the powers of the shareholders, directors and officers of the bank to operate the bank.[45] Appointing a conservator rather than a receiver might provide the Comptroller with greater flexibility to work with foreign regulatory or resolution authorities in achieving an orderly reso-

lution of the U.S. operations of the foreign bank. However, under various financial contracts to which the foreign bank is a party, the appointment of a conservator may trigger termination and other close-out rights that will prejudice the ability of the conservator in the U.S. and resolution authorities in the home jurisdiction to facilitate an orderly resolution of the foreign bank. As a practical matter, there is no example of the Comptroller appointing a conservator for a federal branch or agency and only rare examples of the Comptroller appointing a conservator for a national bank in recent decades.[46]

The Comptroller does have the option under the broad discretion provided by the IBA to forbear from appointing either a conservator or receiver for a foreign bank with a federal branch or agency. The Comptroller might wish to forbear at least for a short period to avoid the legal consequences that flow from the appointment of a receiver (discussed below) and to retain the flexibility to assist a cross-border resolution of the foreign bank if the Comptroller has sufficient confidence that a cross-border resolution being led by the home country authorities of the foreign bank would protect the creditors of the federal branch or agency to the same extent as the appointment of a receiver would under the provisions of Section 4(j)(2) of the IBA. Such forbearance might be made easier if a pre-existing recovery and resolution plan of the foreign bank provided practical assurances to the Comptroller that a credible resolution process (such as through a bail-in mechanism or the creation of a well-funded foreign bridge bank) could be rapidly implemented.[47]

The Comptroller can also take certain supervisory steps to increase the protections for a branch or agency if there are advance signs of weakness in a foreign bank. For example, the Comptroller can increase the amount of the "capital equivalency deposit" (also sometimes referred to as an asset pledge requirement) that a foreign bank is required to maintain for its branch or agency or impose an asset maintenance requirement that requires the foreign bank to hold in the United States a specified percentage of assets in excess of the third-party liabilities payable at the branch or agency.[48] The use of ex ante supervisory measures may in individual cases provide the Comptroller with additional comfort that a temporary forbearance in appointing a receiver will not prejudice the recovery rights of the creditors of the federal branch or agency. Historical experience suggests that ex ante supervisory measures can play an important role in protecting the creditors of a branch

or agency.[49] Moreover, the Federal Reserve Board has recently issued rules that could in individual cases result in Board-mandated asset maintenance requirements for certain federal and state branches and agencies.[50] The purpose of these provisions would be to build an additional asset buffer for those foreign banks with U.S. branches or agencies that do not meet new capital stress testing requirements imposed by the Federal Reserve Board under the Dodd-Frank Act.[51] This buffer may provide an additional cushion to assist in a recovery period and, failing recovery, an additional cushion to protect creditors in a liquidation process for the foreign branch or agency.

If the Comptroller does exercise the authority to appoint a receiver, certain consequences appear to flow as a matter of law from that appointment. One set of consequences flows from the language of Section 4(j)(1) of the IBA with respect to the scope of the receivership proceeding. The language of Section 4(j)(1) provides that the receiver *shall* take possession of *all* the property and assets of the foreign bank in the United States. Two further subsets of consequences flow from this particular language. First, the appointment of a receiver by the Comptroller for a foreign bank with a federal branch or agency apparently displaces the authority of any state bank regulator with respect to a receivership of any state-licensed branch or agency that the foreign bank may also have in the United States.[52] The purpose of this language in Section 4(j)(1) is presumably to assure that there will be a single receivership process for all of the branches and agencies of the foreign bank in the United States and thus avoid the overlaps and conflicts that would otherwise arise from multiple federal and state receivership proceedings. Certain ambiguities may nonetheless arise under this provision. It is not clear how the language of Section 4(j)(1) would be applied if a state banking authority had already taken possession of the assets of the state branch or agency before the Comptroller appointed a federal receiver under Section 4(j)(1). The act of taking possession can typically be effected under state law by the stroke of a pen and the punch of a keypad. The act of taking possession under state banking law would vest title to certain assets in the state banking authority or receiver. If title has vested in a state banking authority or receiver, it is not clear whether the subsequent appointment of a federal receiver by the Comptroller would take precedence over the title previously vested in the state banking authority or receiver.

Second, the receiver appointed by the Comptroller also takes possession of all the *other* property and assets of the foreign bank in the United States. Thus, for example, correspondent accounts and other investment accounts maintained by the head office or other foreign offices of the foreign bank at other banks and financial institutions in the United States pass into the "possession" of the receiver. Because of the prevalence of U.S. dollar-denominated assets in the global financial system and the likely situs of many of these assets in the United States, this latter consequence may hold significant implications for the management of the cross-border resolution process of a foreign bank with a federal branch or agency. If the foreign bank did not have a federal branch or agency, these U.S. assets would be subject either to a proceeding under Chapter 7 of the Bankruptcy Code or to a Chapter 15 proceeding in aid of a foreign proceeding. Of equal or perhaps even greater consequence is the conclusion that the receiver would take possession of any direct shareholdings of the foreign bank in U.S. companies, including U.S. operating subsidiaries or a U.S. intermediate holding company. The shares of these companies, if held directly by the foreign bank, would presumably constitute "assets" of the foreign bank in the United States. If the receiver takes possession of any such direct shareholdings, it would put the Comptroller in a more central position in the overall resolution process in the United States. This outcome can perhaps be avoided by the structural expedient of interposing a foreign holding company between the foreign bank and its U.S. subsidiaries.

A second set of consequences flow from the language of Section 4(j)(2) with respect to the rules for the receivership process itself. Like the New York State Banking Law provisions upon which the IBA was explicitly modeled (and which are discussed below), the receivership process in the IBA relies on a "separate entity" or ring-fencing approach to the receivership of the federal (and if applicable, the state) branches and agencies of the foreign bank located in the United States. Section 4(j)(2) of the IBA provides that the receiver must pay

> every depositor and creditor of such foreign bank whose claim or claims shall have been proven or allowed, the full amount of such claims arising out of transactions had by them with any branch or agency of such for-

> eign bank located in any State of the United States, except (A) claims that would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate legal entity, and (B) amounts due and other liabilities to other offices or branches or agencies of, and wholly owned (except for a nominal number of directors' shares) subsidiaries of, such foreign bank.[53]

Under this language, creditors of the foreign bank whose transactions were only with the head office or other non-U.S. offices of the foreign bank would not be eligible to prove their claims in the receivership or receive payment on their claims from the receivership. Section 4(j)(2) of the IBA also excludes from eligibility and payment from the receivership amounts due to other offices and wholly-owned subsidiaries of the foreign bank even if those offices or subsidiaries have claims arising out of transactions with a branch or agency in the United States. Under Section 4(j)(2) once the claims of all depositors or creditors who had transactions with any of the branches or agencies have been proven and paid (together with all the expenses of the receivership), the Comptroller (or the FDIC if it was appointed receiver for an FDIC-insured federal branch) is required to turn over the remainder of the proceeds of the receivership to the head office of the foreign bank or the domiciliary liquidator or receiver of the foreign bank.[54] This represents a paradigmatic territorial approach to international insolvency.

As noted above, these provisions in the IBA were modeled upon the receivership provisions of the New York Banking Law for state branches and agencies. The New York Banking Law has for many decades provided for a separate entity or ring-fencing approach to the liquidation of a state-licensed branch or agency of a foreign bank. As one of the first states to authorize the establishment of agencies of foreign banks in the United States early in the twentieth century, the basic contours of the New York Banking Law were set at a time when reliance on potential recourse to the head office or foreign receiver of a foreign bank would have been regarded as doubtful at best and feckless at worst.[55] The separate entity or ring-fencing approach was originally conceived as an alternative to requiring a foreign bank to establish a subsidiary in the U.S. to engage in banking activities.[56] In this sense, the separate entity or ring-fencing approach might have been regarded at the time

as a progressive measure, offering an alternative to the even more territorial approach reflected in a "subsidiarization" requirement. Over time, however, the separate entity theory — at least as applied to the prospect of a liquidation proceeding for a foreign branch or agency — has been overshadowed by the negative connotation associated with ring-fencing.[57]

The explicit ring-fencing approach for the liquidation of a foreign agency was incorporated into the New York Banking Law in 1930.[58] The separate entity or ring-fencing provisions in the New York Banking Law were subsequently amended with greater specificity as to excluded claims in 1946 and 1960.[59] The exclusions in Section 4(j)(2) of the IBA were taken verbatim from the receivership provisions of the New York Banking Law as they stood at the time of the enactment of the IBA. The incorporation of a separate entity or ring-fencing approach into the IBA reflected the fact that more advanced approaches to the cross-border resolution of banks had not yet begun to be developed at the time of enactment of the IBA in 1978.[60]

Not only do the receivership provisions of the IBA date from an early era of foreign bank operations in the United States, but even more significantly, the receivership provisions of the IBA have not kept pace with subsequent revisions in the state banking law provisions upon which the IBA provisions were originally based. The receivership provisions for a state-licensed branch or agency of a foreign bank in New York Banking Law were significantly expanded in 1993, 1999, and 2000 to incorporate, for example, new provisions for the treatment of derivatives and other financial contracts.[61] These provisions in the New York State Banking Law paralleled provisions previously added to the FDIA for insured banks.[62] The receivership provisions in the IBA, on the other hand, may not have been amended since their enactment. As a result, the outcome on certain issues in the receivership proceeding for a foreign bank lacks the clarity provided in other U.S. resolution regimes, such as the FDIA and certain state banking laws.[63]

The Comptroller has relied on legal interpretations to fill some of the most obvious gaps in the receivership provisions of the IBA and NBA. For example, the chief counsel of the Comptroller has issued two interpretive letters that seek to address some of the issues relating to the treatment of derivatives and other financial contracts in the receivership of a federal branch of a foreign bank.[64] These interpretive letters seek to provide interpretive an-

swers that replicate the answers provided in the "qualified financial contract" provisions contained in the FDIA applicable to the receivership of an insured bank. Although helpful, these interpretive letters do not enjoy the same weight as a regulation issued by the Comptroller or even more obviously an amendment to the receivership provisions of the IBA. The Comptroller has adopted regulations implementing Section 4(i) with respect to its authority to terminate the authority of a foreign bank to operate a branch or agency.[65] The Comptroller has also adopted regulations providing for the voluntary closure and liquidation of a federal branch or agency of a foreign bank.[66] The Comptroller, however, has not adopted any regulations implementing the receivership provisions in Section 4(j).

In the absence of such regulations, an analysis of the receivership process for a federal branch or agency must be based at least initially on the abbreviated language of Section 4(j) and the similarly abbreviated language of the insolvency and receivership provisions in the NBA. The principal provisions of the NBA relating to the receivership of a national bank date from 1864.[67] These provisions are as up to date as one would expect any provisions of law enacted in latter half of the nineteenth century to be. The enactment of detailed provisions in the FDIA for the receivership of FDIC-insured banks (virtually all national banks are FDIC-insured) in 1933, which have been regularly revised and updated, has generally obviated the need for updating the receivership provisions in the NBA. The development of case law under the receivership provisions of the FDIA has also largely substituted for the development of case law under the receivership provisions of the NBA. The arrested development of case law under the receivership provisions in the NBA provides little assistance in analyzing the receivership process under the IBA. Substantial uncertainty thus surrounds the process for the liquidation of a federal branch or agency of a foreign bank under the provisions of Section 4(j) of the IBA. This uncertainty will be further compounded if the foreign bank also operates a state branch or agency and the Comptroller must liquidate the state branch or agency as well.

To date, the Comptroller has not had occasion to invoke the provisions of Section 4(j) for any federal branch or agency of a foreign bank. Accordingly, the Comptroller has not been required to consider the full range of uncertainties underlying Section 4(j). In the absence of an actual invocation of Section

4(j), it may be difficult to identify the full range of these uncertainties. Several uncertainties, however, are readily apparent. As noted above, the absence of any specific statutory provisions in the IBA dealing with derivatives and financial contracts creates elements of uncertainty. The interpretive letters issued by the chief counsel of the Comptroller are intended to address several of these uncertainties, but in several respects the interpretive letters actually raise new areas of concern. One interpretive letter concludes that the NBA would not stay the remedies of a clearinghouse with respect to collateral security under netting agreements for foreign exchange transactions because there is no automatic stay provision in the NBA.[68] Although the interpretive letter was intended to provide assurance to the marketplace that the treatment of derivatives and other qualified financial contracts in the case of a receivership of a federal branch or agency would generally parallel the treatment in the Bankruptcy Act or the FDIA, the result under the letter would appear to permit broad close-out netting and immediate liquidation of collateral. Because there is no provision in the IBA or the NBA comparable to that in Section 11(e)(10)(B)(i) of the FDIA (added in 2005), which stays close-out netting, termination, and liquidation rights under qualified financial contracts for one business-day following the appointment of the FDIC as a receiver for an insured bank, there is a risk that wholesale close-out netting and liquidation of collateral might occur immediately upon the Comptroller's appointment of a receiver under Section 4(j)(1).[69] This could lead to an immediate dismemberment of the federal branch's operations, foreclosing the possibility of any resolution other than a fire-sale liquidation. This particular risk appears to have been addressed in a 2005 amendment to other provisions of federal banking law relating to payment system risk reduction. Under that amendment, the provisions of the FDIA relating to qualified financial contracts have expressly been made applicable to a receivership of an uninsured federal branch or agency, including the provision for a one business-day delay after the appointment of a receiver in the close-out and termination rights under a qualified financial contract.[70] Under the 2005 amendment, the FDIA provisions relating to the transfer of qualified financial contracts have also been made applicable to a receivership for an uninsured federal branch or agency.[71]

As discussed below, the New York Banking Law was amended in 1993 to specify how derivatives and other financial contracts would be handled in a

receivership of a state branch or agency. The New York Banking Law, however, provides no protection against the immediate close-out and liquidation of derivative positions to the extent otherwise permitted under the Banking Law. In this respect, the special protections for close-out netting, termination and liquidation of derivatives and other financial contracts, originally intended to be reassuring to the marketplace, are now perceived to be threatening to a bank supervisor's ability to arrange an orderly resolution of the failing institution. One of the many important recommendations contained in the Key Attributes is that a bank insolvency regime should make express provision for a temporary stay of such close-out and termination rights in financial contracts.

Partaking of the same nature are concerns about the limited set of tools that a receiver appointed under Section 4(j)(1) would generally have at its disposal. Section 4(j) of the IBA does not itself provide specific legal authority for a receiver of a federal branch or agency to engage in a "purchase and assumption" ("P&A") transaction, without prior court approval and without applicable consent from customers and counterparties (except perhaps with respect to qualified financial contracts).[72] A P&A transaction is a common form of transaction used by the FDIC as a receiver for a failed bank under the FDIA.[73] The provisions of the FDIA expressly authorize the FDIC as receiver for a failed insured bank to transfer assets and liabilities in bulk to a bridge bank established by the FDIC or to another insured bank, without court approval and without any approval, assignment or consent from any party with respect to that transfer.[74] Title II of the Dodd-Frank Act contains similar express authority for the FDIC to engage in a bulk transfer of assets and liabilities to a bridge financial company or other transferee without court approval or customer or counterparty consent.[75]

The receivership provisions of the NBA do not contain the same explicit authority for a receiver. Without prior court approval, the receiver for a federal branch or agency could not use a P&A approach to transfer the operations of a federal branch or agency to another foreign bank that was proposing to acquire the global operations of the failed foreign bank or to a new bridge bank established by the home country regulatory or resolution authority of the failed foreign bank.[76] Moreover, even if court approval could be obtained on an expedited basis (i.e., over a "resolution weekend"), it is

not clear whether court approval would negate customer and counterparty consent rights.[77]

A P&A transaction with a foreign bridge bank or other foreign successor bank would appear to be entirely consistent with the general policy objective of Section 4(j) that the creditors of the federal branch and agency be paid or provided for in full. Nonetheless, the mechanics to facilitate a P&A transaction, even if consistent with the overall policy in Section 4(j), are not provided in the IBA or the NBA. The Key Attributes identify the lack of authority to permit a rapid transfer of assets and liabilities to a foreign bridge bank or other foreign entity as a major failure in many domestic insolvency regimes.[78] The preceding analysis suggests that the critical deficiency in the IBA (and in state banking laws) is *not* — as some recent commentary has suggested — the ring-fencing provisions. Rather, it is the *lack* of other authority for the receiver, such as the authority to effect a rapid transfer of the operations of the branch or agency to a foreign bridge bank or other foreign successor. If a receiver under the IBA (or under state banking law) had such additional authority, it would preserve the option for a global resolution of the failing foreign bank and might very well obviate the need for a liquidation of the branch or agency on a ring-fenced basis.

Section 4(j) appears to envision only a straight liquidation of the federal branch or agency. When the IBA and its predecessor state banking laws were enacted, straight liquidation of the branch or agency was the only option. In a world of straight liquidation, a ring-fenced approach may have seemed reasonable, particularly from a creditor-protection perspective.[79] But in the new world, where systemic concerns attach to the potential failure of many cross-border banking institutions and where new resolution techniques (such as single-point-of-entry and bail-in) are being developed, the inability of a receiver for a foreign branch or agency in the United States to assist in achieving solutions that preserve more value in the global resolution process and that minimize the market disruption from a forced piecemeal liquidation is clearly suboptimal. Section 4(j) of the IBA suffers from certain of the deficiencies that the Key Attributes are intended to address. These deficiencies may ultimately need to be addressed by amendments to the IBA in keeping with the commitment made by the United States under FSB charter.

STATE-LICENSED BRANCHES AND AGENCIES OF FOREIGN BANKS

The IBA provided a foreign bank for the first time with the option of establishing a branch or agency office in the United States with a license from the Comptroller. Prior to the IBA, a foreign bank could establish a branch or agency only by obtaining a license from a state banking authority where state law provided for such a license. Many of the largest foreign banks had already established state-licensed branches (a "state branch") or state-licensed agencies (a "state agency") at the time of enactment of the IBA. The historical dominance of state-licensed offices continues today. As of December 31, 2012, there were 149 state branches in the United States with combined total assets of approximately $1.75 trillion, compared to 47 federal branches with combined total assets of $226 billion.[80] The preponderance of state branches are located in New York (93), California (25), Illinois (11), and Florida (7). As of December 31, 2012, there were 45 state agencies with combined total assets of approximately $161 billion, compared to only one federal agency with approximately $428 million in assets.[81] The preponderance of state agencies are located in New York (14), Florida (12), Texas (9), and California (8).

State banking laws that authorize the establishment of a state branch or agency provide the rules under which a state branch or agency will operate. They also provide the rules under which the license to operate a state branch or agency may be revoked by the state authority or surrendered by the foreign bank. The surrender of a license by a foreign bank typically results in a voluntary liquidation of the branch or agency and the revocation of a license typically results in an involuntary liquidation of the branch or agency. The following analysis focuses on the laws of New York, California, Illinois, and Florida as the states with the largest population of state branches and agencies.

New York

As home to the largest concentration of foreign bank branches and agencies in number and in total combined assets, New York is an appropriate starting point for analysis. The New York Banking Law has long contained a special regime for the liquidation of state branches and agencies. The provi-

sions in the New York Banking Law have served as a model for the IBA and other state banking laws. New York is also the state with the most extensive experience with the liquidation of foreign branches and agencies.

The New York Banking Law contains relatively detailed provisions for the liquidation of a New York state-chartered banking organization. In addition to these general liquidation provisions, the New York Banking Law also contains specific provisions for the liquidation of a branch or agency of a foreign bank licensed to operate in New York. The core provisions of the New York Banking Law relating to the liquidation of a state branch or agency are contained in Section 606(4)(a). This section provides that the superintendent of the Department of Financial Services (the "Superintendent") "may also, in his or her discretion, forthwith take possession of the business and property in this state of any foreign banking corporation that has been licensed by the superintendent" upon a finding that any of the reasons enumerated in Section 606(l) of the New York Banking Law exists with respect to the foreign banking corporation.[82] The grounds enumerated in Section 606(l) are wide-ranging, including a violation of law, an unsound or unsafe condition, or a refusal to comply with any order of the Superintendent.[83] In addition to the grounds enumerated in Section 606(l), the Superintendent may also under the terms of Section 606(4)(a) take possession if the foreign bank is in liquidation in its home domicile or if there is reason to doubt its ability or willingness to pay in full the claims of creditors of its New York branch or agency.

Like the provisions of Section 4(j)(1) of the IBA, the act of taking possession is in the discretion of the Superintendent, but also like Section 4(j)(1), the act of taking possession invokes legal consequences. Section 606(4)(a) provides that title to the business and property in New York of the foreign bank vests by operation of law in the Superintendent forthwith upon taking possession.[84] Upon taking possession, the Superintendent is required to "liquidate or otherwise deal with such business and property of the foreign banking corporation in accordance with the provisions of [the Banking Law] applicable to the liquidation of banking organizations."[85] The latter phrase incorporates into the receivership process for a foreign branch or agency the general liquidation provisions of the New York Banking Law for a state-chartered banking organization.

The most important provision for the liquidation process is contained in Section 606(4)(a) itself:

> Only the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies, or with its New York branch or branches, shall be accepted by the superintendent for payment out of such business and property in this state as provided in this article. Acceptance or rejection of such claims by the superintendent shall not prejudice such creditors' rights to otherwise share in the assets of such corporation. The following claims shall not be accepted by the superintendent for payment out of such business and property in this state: (1) claims which would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate and independent legal entity; and (2) amounts due and other liabilities to other offices, agencies or branches of, and affiliates of, such foreign banking corporation.[86]

As noted above, Section 4(j)(1) of the IBA is directly modeled on Section 606(4)(a). The basic approach involving payment only to those creditors who had transactions with the state branch or agency is the same. The approach in Section 4(j)(2) of the IBA also generally parallels the approach in Section 606(4)(b) of the New York Banking Law, which provides that when the accepted claims and expenses of the liquidation have been paid in full or provided for, the Superintendent upon court order shall turn over the remaining assets in the first instance to other offices of the foreign banking corporation that are being liquidated in the United States when necessary to pay accepted claims in those proceedings.[87] After such payments, if any, are made, any remaining proceeds of the New York receivership shall be turned over to the principal office of the foreign banking corporation or to the duly appointed liquidator or receiver of the foreign banking corporation.[88]

Although the core provisions of Section 606(4) parallel the approach taken in Section 4(j) of the IBA, other provisions in New York Banking Law provide greater specificity in a number of respects than the liquidation provisions in the IBA and the NBA. In response to the New York Banking Department's experience in the liquidation of the agency of Bank of Credit

and Commerce International in 1991 and other federal developments (such as amendments to the FDIA dealing with qualified financial contracts), significant revisions were made to the liquidation provisions of the New York Banking Law in 1993.[89] Section 611-a was added to provide for the appointment of a single judge to supervise the liquidation and for the power to order expedited procedures. Section 615 was revised to provide specifically for setoff of liabilities that arise out of transactions had with the branch or agency of a foreign bank, reflecting the ring-fencing requirements of Section 606(4)(a). Section 618-a was added to provide detailed rules for the special treatment of derivatives and other qualified financial contracts, similar to those contained in the FDIA, allowing immediate close-out and netting. These provisions were regarded as particularly important clarifications because of the growing role of derivatives in the international marketplace.[90] Section 618-a also provides a special rule for calculating termination payments under a multibranch master netting agreement to which the New York branch or agency is a party. It is a provision of Mozartian complexity, designed to meld the historical ring-fencing approach in Section 606(4)(a) with modern financial practices.[91] Section 619 of the New York Banking Law was also amended to provide that the Superintendent's taking of possession operates as an automatic stay and injunction (subject to certain specified exceptions, including most prominently an exception for qualified financial contracts) against various creditor actions, including any act to create, perfect or enforce a lien against property of the foreign bank.

Notwithstanding these clarifications and enhancements to the liquidation provisions of the New York Banking Law, certain deficiencies or uncertainties remain. On the one hand, the New York Banking Law allows the immediate close-out, netting and liquidation of collateral under qualified financial contracts. This permits the firesale liquidation of collateral and may impede the prospect for any resolution other than a straight liquidation of the branch or agency. This outcome is inconsistent with the approach recommended in the Key Attributes.

On the other hand, the New York Banking Law appears to provide broader authority than the IBA for the receiver to facilitate a transfer of the branch or agency operations to a successor foreign bridge bank or other foreign successor bank. Section 618(1)(a) of the New York Banking Law autho-

rizes the Superintendent upon an order of a court to sell or otherwise dispose of all or part of the real and personal property of the banking organization wherever situated. Securing such court approval on an expedited basis, however, cannot be assured. Such court approval might not in any event negate any customer, counterparty or other contract provision requiring consent to an assignment or transfer. But Section 634 of the New York Banking Law also provides the Superintendent with power *without* a court order to transfer or assign the assets of the branch or agency of a foreign bank to another banking organization.[92] This authority might facilitate a rapid transfer of assets to a foreign bridge bank or other foreign successor bank. The language of Section 634, unlike the language of the FDIA and Title II, however, does not expressly provide that the transfer or assignment is effective without any consent to the transfer or assignment as might be required, for example, under contract law.[93] As a result, Section 634 may not provide as much assistance as the transfer provisions in the FDIA or Title II. Finally, if the Superintendent has taken possession of assets of the foreign bank in New York beyond those appearing on the books and records of the branch or agency, the Superintendent would apparently need court approval to release those assets to the domiciliary liquidator or receiver of the foreign bank.[94] Securing court approval on an expedited basis for the release of these other assets may be critical to achieving a global resolution of the foreign bank.[95]

The revisions made to the New York Banking Law in 1993, 1999, and 2000 represent important clarifications and enhancements to the regime for the liquidation of a foreign branch or agency. The earlier addition of the authority in Section 634 for the Superintendent to effect a transfer or assignment of all the assets of a foreign branch or agency to another foreign bank branch or agency without a court order is also helpful. Section 634 could be improved if it provided for such a transfer or assignment to be effective without any consent from any other party and if it were extended to the transfer or assignment of liabilities as well as assets as do the relevant provisions of the FDIA and Title II. To complement the authority for a transfer of the assets and liabilities of a branch or agency, the New York Banking Law should also be revised to impose a one business-day delay for close-out, netting and liquidation rights under qualified financial contracts. Finally, the provisions of Section 606(4)(b) should be revised to allow the Superintendent to release

any other assets of a foreign bank of which the Superintendent has possession, without a court order, if the Superintendent is satisfied that the depositors and other creditors of the branch or agency have been fully provided for as part of a transfer of the operations of the branch or agency to a new foreign bridge bank or other successor foreign bank. These revisions would assure that the Superintendent could facilitate an appropriate cross-border resolution plan, while preserving the core protections for depositors or creditors of the New York branch or agency as contained in Section 606(4)(a).

California

The California Financial Code contains provisions governing the liquidation of California state-chartered banks.[96] It also contains provisions specifically designed for the liquidation of a foreign bank branch or agency licensed by the California commissioner. These provisions follow a pattern like that in New York. These provisions provide discretionary authority for the Commissioner of Business Oversight (the "Commissioner") to issue an order suspending or revoking the license of the foreign bank to operate a branch or agency.[97] The Commissioner may revoke a license if among other things the foreign bank (i) has violated any provision of California law, (ii) is in unsound or unsafe condition, (iii) has sought relief under any bankruptcy, reorganization, insolvency or moratorium law, or (iv) has become subject to any proceeding to appoint a receiver, liquidator, or conservator.[98] If the Commissioner finds that any of the grounds for a suspension or revocation of the license exists and concludes that is necessary for the protection of the creditors of the bank's business in California or for the protection of the public interest, the Commissioner may by order take immediate possession of the property and business of the foreign bank.[99] When the Commissioner does take possession of the property and business of a foreign bank, he is directed to conserve or liquidate the property and business pursuant to the other provisions of the Financial Code dealing with the conservation or liquidation of a California state-chartered bank.[100] The Financial Code provisions applicable specifically to a foreign branch or agency provide that the creditors of the business in California will be entitled to priority over other creditors with respect to the assets of the bank's business in California.[101] The

Financial Code provisions applicable to a foreign bank branch or agency also provide that once the liquidation of the property and business of the foreign bank is completed, the Commissioner will transfer any remaining assets to the foreign bank in accordance with a court order. If the foreign bank has an office in another state that is in liquidation and the assets are insufficient to pay in full the creditors of that office, the court must order the Commissioner to transfer to the liquidation of that office an amount of any remaining assets as necessary to cover the insufficiency.[102] These provisions closely follow the pattern in New York Banking Law.

In several respects, however, the California Financial Code differs from the New York Banking Law. The California Financial Code does not include any specific provision for the treatment of derivatives and other qualified financial contracts. This is a significant shortcoming. On the other hand, the general liquidation provisions of the California Financial Code contain express authority for the commissioner with court approval to sell any part or the whole of the business of a licensee (such as a foreign branch or agency) to another licensee. The relevant provision provides that the purchasing licensee shall "by operation of law and without further transfer, substitution, act, or deed to the extent provided in the agreement of purchase and sale or the order of the court approving the purchase and sale" succeed to the rights, obligations, and assets of the licensee whose business is being sold.[103] This provision provides the authority for the use of a P&A transaction (albeit with court approval) and might facilitate the transfer of the branch or agency as part of a larger resolution plan for the foreign bank.

Illinois

The Illinois Foreign Banking Office Act provides that the commissioner may take possession of the business and property in Illinois of the banking office of a foreign branch that has been previously authorized by the commissioner.[104] Upon taking possession, the commissioner is required to conserve or liquidate the business and property "with absolute preference and priority given to the creditors of the foreign bank arising out of transactions with, and recorded on the books of, its Illinois state branch or Illinois state agency over creditors of the foreign bank's offices located outside [Illinois]."[105] When the

commissioner has completed the liquidation of the property and business of the foreign bank, the commissioner is required to transfer any remaining assets to the foreign bank in accordance with such orders as a court may issue.[106] These receivership provisions for a foreign branch or agency in Illinois law parallel those in New York and California law. Under the general receivership provisions of the Illinois Banking Law, the receiver for a foreign bank may upon a court order sell and convey the assets of the foreign branch in whole or in part.[107] The Illinois Banking Law does not make express provision for the treatment of derivatives and other financial contracts.

Florida

The Florida statutes contain liquidation provisions for foreign banks (referred to in the Florida statutes as "international banks") that are licensed to operate a branch or agency in Florida.[108] The core provisions of the Florida statute closely track the language of Section 606(4)(a) & (b) of the New York Banking Law.[109] The Florida law also incorporates substantially all the same additions to its foreign bank receivership provisions as were adopted by New York in 1993. Thus, the Florida statutes contain the rules for the special treatment of qualified financial contacts in general and the treatment of multibranch master netting agreements in particular.[110] Along with New York Banking Law, the Florida statutes represent among the most detailed state law regimes governing the liquidation of a branch or agency of a foreign bank. But the Florida statutes generally appear to anticipate a straight liquidation of the foreign branch. The Florida statutes do not provide for a temporary stay of any close-out and termination rights under qualified financial contracts. Nor do they provide for a transfer by the receiver of the operations of the branch or agency except pursuant to a court order.[111] Like the laws of California and Illinois, the laws of Florida do not currently incorporate several of the most important requirements set forth in the Key Attributes.

RECOVERY AND RESOLUTION PLANS

One of the most important elements of the Key Attributes relates to recovery and resolution planning. Key Attribute 11.2 states that jurisdic-

tions should require robust and credible recovery and resolution plans for all G-SIBs.[112] The home resolution authority should lead the development of a group resolution plan in coordination with all the member jurisdictions of the crisis management group for the G-SIB. Host authorities in jurisdictions where the G-SIB has a systemic presence should also be given access to the plans.[113]

The Dodd-Frank Act incorporates its own version of recovery and resolution planning. Among the enhanced prudential requirements contained in Section 165 of the Dodd-Frank Act is a requirement for U.S. bank holding companies with assets of $50 billion or more and foreign banking organizations with worldwide assets of $50 billion or more to prepare a resolution plan demonstrating how the organization could be resolved in a rapid and orderly manner in the event of material financial distress or failure.[114] The Federal Reserve Board and the FDIC have adopted regulations outlining the broad requirements for such resolution plans.[115] They have also issued guidance documents, providing more specific requirements and assumptions for the plans initially submitted in 2012.[116]

The guidance documents call for various elements of information relevant from the perspective of the analysis in this article. For example, the guidance documents require information relating to the mandatory or discretionary actions or forbearances that the home or host authorities would need to take to facilitate a proposed resolution strategy. More specifically, the guidance requires information on what actions the authorities would need to take or forbear from taking to avoid adverse consequences flowing from ring-fencing by host jurisdictions.

The full text of the Section 165 resolution plans is not publicly available. The resolution plan regulation requires that only an abbreviated and high-level summary of the resolution plan be made publicly available.[117] Thus, the public section of a resolution plan provides only limited information relating to the approach to the resolution process itself. A review of the public section of the Section 165 resolution plans of the foreign G-SIBs that have banking operations in the United States nonetheless offers a glimpse at least at certain of the assumptions with respect to the resolution strategy for branch and agency operations. The public sections of the resolution plans filed by most foreign G-SIBs simply recite that the foreign banking organization assumes that its U.S.

branch or agency operations will be taken over by the Comptroller or applicable state banking authority and will be liquidated in accordance with the applicable banking law.[118] This assumption in the plans is based on the prescribed assumption in the guidance documents that requires the foreign banking organization in its resolution plan to assume the insolvency or failure of material U.S. entities (which for many foreign banking organizations will include any significant U.S. branch or agency). The public sections of the resolution plans do not discuss how the branch or agency would be liquidated. Some plans refer to a wind-down of the operations. Other plans allude generally to the possibility of a sale or transfer of the branch or agency operations in the liquidation process, but without any detail as to how this transfer or sale could be effected. At least one foreign bank in its resolution plan observed that its U.S. branches and subsidiaries were so integrated with its foreign operations that the possibility of separately divesting or reorganizing them seemed unlikely. The foreign bank accordingly said that it had assumed that its operations could not be sold in a resolution scenario and would instead have to be wound down.[119] The theme of wind-down rather than sale appears to dominate the resolution plan filings by the foreign G-SIBs.

A few of the plans suggest alternate approaches. The public section of the Section 165 plan submitted by Barclays in October 2013 states that Barclays' preferred global resolution strategy would be based on a top-down or SPE strategy utilizing bail-in and that Barclays is working with the U.K. and other authorities to further the development of this strategy. On the basis of this preferred strategy, Barclays states that it believes that its U.S. entities would be unlikely to undergo a resolution event or become insolvent.[120] Barclay's U.S. resolution strategy assumes, however, that even in a resolution event Barclays' New York branch management would continue to operate the branch under "heightened supervision" by the NYSDFS, apparently in conjunction with a top-down resolution proceeding in the U.K.

Deutsche Bank in its resolution plan submitted in June 2012 assumed that the German authorities would set up a bridge bank in Germany and transfer the systematically important parts of Deutsche Bank to the new bridge bank. The resolution plan expressly assumed that the U.S. authorities would not take actions that they might otherwise be entitled to take under U.S. law (such as the initiation of proceedings under applicable U.S. resolu-

tion regimes), but that would frustrate the implementation of the German bridge bank.[121] In contrast, in its October 2013 plan submission, Deutsche Bank assumed that the German authorities would transfer only non-U.S. businesses to the German bridge bank and that the U.S. operations would be left behind in a "rump bank" and go into the applicable U.S. resolution proceedings.[122] The Deutsche Bank plan says that while it has assumed this treatment of its U.S. operations for purposes of illustrating their treatment in the context of the applicable U.S. resolution regimes in its Section 165 resolution plan, Deutsche Bank does not believe that this approach is the probable or preferred outcome in the event of a group resolution.[123]

The public sections of the Section 165 resolution plans filed by the foreign G-SIBs do not provide a basis for analyzing the feasibility of a coordinated cross-border resolution of a foreign G-SIB. The requirements in the regulatory guidance that a filing entity can not assume cooperation between home and host jurisdictions and that a filing entity must assume the failure of its material entities (including branches or agencies as appropriate) in the United States actually mask certain of the critical underlying issues in a cross-border resolution. These issues include whether the U.S. regulatory and resolution authorities themselves have the legal ability to facilitate a rapid transfer of the U.S. branch or agency operations to a bridge bank created by the resolution authorities in the home country of the foreign bank or to a successor foreign bank that proposes to acquire the global operations (or significant parts) of the failing foreign bank. Similarly, the regulatory required assumptions in the Section 165 resolution plans mask the issue whether the applicable U.S. resolution regimes would protect the U.S. branches or agencies against immediate close-out, netting and other creditor actions that might interfere with an orderly transfer of the U.S. operations to a foreign bridge bank or other successor foreign bank. To be sure, the issue of close-out rights on financial contracts transcends any one resolution regime because of the varying choice of law provisions applicable to such financial contracts. Ultimately, a contract approach may provide the only global solution. The FDIC and other leading regulatory authorities have called upon the International Swaps and Derivatives Association to adopt uniform language in its model contracts to provide for a short-term suspension of early termination rights in the event of a resolution of a global systemically important financial institution.[124]

CONCLUSION

The cross-border resolution of a foreign bank with U.S. operations will likely involve analysis of several U.S. legal regimes. If the foreign bank has subsidiaries in the United States, the individual subsidiaries may be subject to voluntary or involuntary proceedings under the Bankruptcy Code unless the particular subsidiary (such as a domestic bank) is expressly excluded from eligibility under Section 109(b). A foreign bank itself may be subject to a voluntary or involuntary proceeding under the Bankruptcy Code if it does not maintain a branch or agency in the United States. Most large foreign banks maintain either a branch or agency in the United States. As a result, most large foreign banks will not be subject to a potential case under the Bankruptcy Code (including a Chapter 15 ancillary case).

For a foreign bank with a branch or agency, the relevant liquidation regime will be the federal or state banking law applicable to its branch or agency. For a foreign bank operating a federal branch or agency, the liquidation regime under the IBA will apply not only to the assets and liabilities of the federal branch or agency, but to all the other assets of the foreign bank in the United States. For a foreign bank operating only a state branch or agency, the liquidation regime under state banking law will typically apply to the assets and liabilities shown on the books and records of the branch or agency and also to other assets of the foreign bank located in the state where the branch or agency is licensed to operate. Assets located in other states (unless shown on the books and records of the branch and agency as assets of the branch or agency) will generally not be subject to the liquidation regime of the state that has licensed the branch or agency. A Chapter 15 case will not be available to administer these assets although state and federal (non-bankruptcy) courts may retain the authority under common law principles to assist in marshaling and protecting such assets.

The special federal and state banking law regimes for the liquidation of branches and agencies of foreign banks are closed systems that reflect in the view of many commentators an outdated approach to resolution practices, including ring-fencing. As this article suggests, the shortcomings of these systems stem less from their ring-fencing approach than from their lack of other tools to assist in an orderly wind-down, sale or bail-in of a foreign bank. For example, the failure of state banking laws to provide for a temporary

stay on close-out rights on financial contracts may prejudice the ability of a foreign resolution authority to orchestrate an orderly transition to a foreign bridge bank or other foreign acquirer. Similarly, the inability for a receiver under federal or state banking law to facilitate a rapid transfer of the assets and liabilities of the U.S. branch or agency to a foreign bridge bank or other successor may prejudice the prospect of achieving the least costly and least disruptive resolution of the foreign bank. In the realm of resolution, most options will be suboptimal. The lack of appropriate tools in federal and state banking laws for the resolution of branches and agencies of foreign banks contributes to options that are needlessly suboptimal.

NOTES

[1] For the current list of G-SIBs, see FSB, 2013 update of group of global systemically important banks (Nov. 11, 2013), *available at* https://www.financialstabilityboard.org/publications/r_131111.pdf.

[2] *Id.*

[3] FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Oct. 2011, *available at* www.financialstabilityboard.org/publications/r_111104cc.pdf [hereinafter *Key Attributes*].

[4] Pub. L. No. 111-203, Title II, 124 Stat. 1376, 1442-1520 (2010) (codified at 12 U.S.C. §§ 5381-5394).

[5] FSB, Resolution of Systemically Important Financial Institutions: Progress Report (Nov. 2012), *available at* https://www.financialstabilityboard.org/publications/r_121031aa.pdf.

[6] 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).

[7] FDIC, Notice and Request for Comments, The Resolution of Systemically Important Financial Institutions: the Single Point of Entry, 78 Fed. Reg. 76614 (Dec. 18, 2013) [hereinafter FDIC Notice].

[8] 11 U.S.C. § 101 *et seq*. The FDIC has noted that the Dodd-Frank Act still makes bankruptcy the preferred resolution framework in the event of the failure of a financial institution and has described Title II as back-up authority if the resolution of a financial institution under the bankruptcy process would have

serious adverse consequences on U.S. financial stability. *See* FDIC Notice, *supra* note 7, at 76615.

[9] *See* Notice of Filing of Confirmed Modified Second Amended Prepackaged Reorganization Plan, *In re* CIT Group Inc., No. 09-16565 (ALG) (Bankr. S.D.N.Y. Dec. 10, 2009)). *See also* Michael J. de la Merced, *Creditors Back CIT's Bankruptcy*, WALL ST. J., Nov. 2, 2009 (observing that "[b]ankruptcy has long been considered a death knell for lenders, whose very existence depends on the confidence of its creditors and customers").

[10] *See* 12 U.S.C. § 3102(j). *See*, *e.g.,* N.Y. Banking Law § 606(4) (McKinney).

[11] 12 U.S.C. §§ 1821-1823.

[12] *See, e.g.*, N.Y. Ins. Law §§ 7401-7436 (McKinney).

[13] 15 U.S.C. § 78fff(b).

[14] As discussed below, the Board of Governors of the Federal Reserve System has recently finalized a rule that requires certain foreign banking organizations to establish an intermediate holding company in the United States to hold the shares of certain U.S. companies that the foreign banking organization controls. *See* Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations, 79 Fed. Reg. 17240 (Mar. 27, 2014). Many foreign banking organizations have previously established intermediate holding companies in the United States for their own corporate, tax or other business purposes.

[15] 11 U.S.C. § 109(a).

[16] *See, e.g., In re* Israel-British Bank (London) Ltd., 536 F.2d 509 (2d Cir.1976). See also *In re* Globo Comunicacoes e Participacoes, 317 B.R. 235 (S.D.N.Y. 2004); *In re* Aerovias Nacionales de Colombia, 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

[17] *See, e.g., In re* Global Ocean Carriers Ltd., 251 B.R. 31 (Bankr. D. Del. 2000).

[18] *In re* Yukos Oil Co., 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005).

[19] *See, e.g., In re* Yukos Oil Co., 321 B.R. at 400 (dismissing a Chapter 11 case filed by a foreign debtor based on a "totality of circumstances" test under § 1112). Cf. *In re* Avianca, 303 B.R. at 10-14 (declining to dismiss a Chapter 11 case filed by a foreign debtor under § 305); *In re* Globo Comunicacoes e Participacoes 317 B.R. 235 (S.D.N.Y 2004) (discussing the considerations for dismissal under § 305 of an involuntary Chapter 11 petition filed against a foreign debtor).

[20] 11 U.S.C. § 109(b)(2). For a detailed discussion of the background on the exclusion of a domestic bank from the Bankruptcy Code, see Richard M. Hynes & Steven D. Walt, *Why Banks are Not Allowed in Bankruptcy*, 67 Wash. & Lee

L. Rev. 985 (2010).

[21] 11 U.S.C. § 109(b)(3)(B).

[22] For a discussion of the background of the exclusion of a foreign bank with a branch or agency from the Bankruptcy Code, 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). Although federal and state banking law contain specialized liquidation regimes for branches and agencies, they do not generally contain specialized liquidation regimes for "representative offices." Under applicable banking law, a representative office is not authorized to engage directly in the provision of banking services and instead can engage only in representational and administrative functions, such as soliciting new business or acting as a liaison between a foreign bank's head office and customers in the United States. *See*, *e.g.*, 12 C.F.R. § 211.1(v).

[23] 11 U.S.C. § 1501(c)(1). At least two courts had permitted a representative of a foreign bank that operated a branch or agency in the United States to commence an ancillary proceeding under prior Section 304 of the Bankruptcy Code, the predecessor to Chapter 15. *See In re* Deposit Insurance Agency, 482 F.3d 612 (2d Cir. 2007), *aff'g*, 313 B.R. 561 (S.D.N.Y. 2004); *In re* Smouha, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (1992). Section 109(b)(3)(B) was added to the Bankruptcy Code in 2005 to clarify that a foreign bank with a branch or agency in the United States is not eligible to be a debtor under Chapter 7 or Chapter 11 of the Bankruptcy Code. Section 1501(c)(1) was added at the same time and extended the exclusion to Chapter 15.

[24] *See* Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors, *In re* Arcapita Bank B.S.C.(c), No. 12-11076 (SHL) (Bankr. S.D.N.Y. June 17, 2013)

[25] 11 U.S.C. § 1501(a).

[26] *Id*.

[27] 11 U.S.C. § 1515.

[28] *See, e.g., In re* Awal Bank, 455 B.R. 73 (Bankr. S.D.N.Y. 2011) (Chapter 15 case commenced by the foreign representative for a Bahraini bank placed into administration by the Central Bank of Bahrain and whose only asset in the U.S. was a potential recovery on a claim against a U.S. bank for an alleged improper set-off of a deposit); *In re* Intern'l Banking Corp., 439 B.R. 614 (Bankr. S.D.N.Y. 2010) (Chapter 15 case commenced by the foreign representative of a Bahraini bank that was placed into administration in Bahrain by the Central Bank of

Bahrain and that sought to vacate prior state-court orders of attachment of its funds in New York); *In re* JSC BTA Bank, 434 B.R. 334 (Bankr. S.D.N.Y. 2010) (Chapter 15 case commenced by the foreign representative for a Kazakhstani bank that was in a restructuring proceeding in Kazakhstan and that sought to protect accounts with correspondent banks in New York from attachment by creditors).

[29] 11 U.S.C. § 1520(a).

[30] *See* Order (i) Approving the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances and Interests, (ii) Approving the Form and Manner of Sale Notice, (iii) Applying Sections 365 and 502(c) of the Bankruptcy Code for Purposes of This Motion, (iv) Approving the Assumption and Assignment of Certain Executory Contracts and the Form and Manner of Notice Thereof, and (v) Granting Related Relief, *In re* Irish Bank Resolution Corp., No. 13-12159 (CSS) (Bankr. D. Del. Feb. 14, 2014).

[31] 11 U.S.C. § 1521(a).

[32] The most recent information compiled by the Federal Reserve Board indicates that there are more than 170 foreign banks that maintain a branch or agency in the United States, including virtually all the largest foreign banks. *See* Federal Reserve Board, Structure Data for the U.S. Offices of Foreign Banking Organizations (as of Sept. 30, 2013), *available at* http://www.federalreserve.gov/releases/iba/201309/bycntry.htm.

[33] This fact pattern could arise if the foreign bank has a state-licensed branch or agency in the United States. As discussed below, a receiver appointed under state banking law would not have authority to take possession of assets of the foreign bank located in other states unless those assets appear on the books and records of the licensed branch or agency. *See, e.g.*, N.Y. Banking Law § 606(4)(a). This fact pattern would not arise if the foreign bank has a federally licensed branch or agency because the applicable provisions of federal law require the Comptroller of the Currency to take possession of all the assets of the foreign bank in the United States. *See* 12 U.S.C. § 3102(j)(1).

[34] A literal reading of § 1501(b)(1) and § 1509(c) of Chapter 15 might lead to the conclusion that Chapter 15 is now the exclusive source of any judicial assistance to a foreign representative. Nevertheless, several commentators have suggested that Chapter 15 should not be read to foreclose common law assistance for a foreign proceeding that does not qualify for Chapter 15 recognition. *See*, *e.g.*, Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter* 15, 83 Am. Bankr. L.J. 165, 177-178, (2009) (arguing

that the common law provision of judicial assistance should be available to foreign proceedings excluded from Chapter 15 by Section 1501(c); Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L.J. 269, 301 (2008) (concluding that entities excluded from Chapter 15 by Section 1501(c) may seek comity from courts other than bankruptcy courts).

[35] *See* H.R. Rep. No. 109-31, pt. 1, at 106 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 170.

[36] A branch is an office authorized to engage in the business of banking, including accepting deposits (generally of more than $250,000 in amount). *See*, *e.g.*, 12 C.F.R. § 28.11(h) (defining scope of activities of a federal branch). An agency is an office authorized to engage in lending and other banking activities, but is not permitted to take deposits from citizens or residents of the United States. *See*, *e.g.*, 12 C.F.R. § 28.11(g) (defining the scope of activities of a federal agency).

[37] For a survey of state banking law provisions governing the liquidation of foreign branches and agencies, *see* Kathleen A. Scott, *State Regulation of Foreign Banks*, REGULATION OF FOREIGN BANKS & AFFILIATES IN THE UNITED STATES ch. 5 § 5.9 (Randall D. Guynn ed., Thomson Reuters Westlaw, 7th ed. 2013).

[38] For a general discussion of the multiple regimes applicable to foreign bank operations in the United States, *see* Steven L. Schwarcz, *The Confused U.S. Framework for Foreign-Bank Insolvency: An Open Research Agenda*, 1 REV. OF L. & ECON. 81 (2005). *See also* Thomas C. Baxter, Jr. et al., *Two Cheers for Territoriality: An Essay on International Insolvency Law*, 78 AM. BANKR. L.J. 57 (2004); J. Virgil Mattingly et al., *United States*, in INTERNATIONAL BANK INSOLVENCIES: A CENTRAL BANK PERSPECTIVE 259 et seq. (Mario Giovanoli & Gregor Heinrich eds., KluwerLaw International 1999).

[39] 12 U.S.C. § 3102(a)(1). *See* Conf. of State Bank Super. *v.* Conover, 715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) (construing § 3102(a)(1) as permitting the licensing of a federal branch or agency unless state law expressly prohibits the establishment of a branch or agency office of a foreign bank in the state.)

[40] 12 U.S.C. § 3102(i) and (j).

[41] 12 U.S.C. § 3102(i). The IBA also provides that the Federal Reserve Board may recommend to the Comptroller that the license of a federal branch or agency be terminated if the Board has reasonable cause to believe that the foreign bank has *inter alia* committed a violation of law or is engaged in an unsafe or unsound practice in the United States. 12 U.S.C. § 3105(e)(5).

[42] 12 U.S.C. § 3102(j)(1). The National Bank Act provides general authority

for the Comptroller to appoint a receiver for a national bank. 12 U.S.C §191. The principal powers of a receiver appointed for a national bank are provided in the receivership sections of the National Bank Act. 12 U.S.C. §§ 192-200. Additional powers, such as the power to void transfers made in contemplation of insolvency, are found in other provisions of the National Bank Act. *See*, *e.g.*, 12 U.S.C. § 91.

[43] Section 4(j)(1) does not provide a definition of the term "insolvent."

[44] The Bank Conservation Act (codified at 12 U.S.C. §§ 201-212) authorizes the Comptroller to appoint a conservator for "any national banking association or any other financial institution chartered *or licensed* under Federal law and subject to the supervision of the Comptroller." 12 U.S.C. § 202 (emphasis added).

[45] 12 U.S.C. § 206(a). *See, e.g.*, Smith v. Witherow, 102 F.2d 638 (3rd Cir. 1939); Davis Trust Co. v. Hardee, 85 F.2d 571 (D.C. Cir. 1936).

[46] *See, e.g.*, First Nat. Bank & Trust, Wibaux, Mont. *v.* Department of the Treasury, 63 F.3d 894 (9th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996) (appointment of a conservator for a national bank).

[47] As discussed in Part I of this article, the Key Attributes envision that home country authorities will develop recovery and resolution plans for all G-SIBs. The requirements for recovery and resolution plans are discussed *infra* at the text accompanying notes 112-123.

[48] *See* 12 C.F.R. § 28.15 (capital equivalency deposit requirement) & § 28.20 (asset maintenance requirement).

[49] *See* Ernest T. Patrikis, *Role and Functions of Authorities: Supervision, Insolvency Prevention and Liquidation*, in INTERNATIONAL BANK INSOLVENCIES: A CENTRAL BANK PERSPECTIVE 291 (Mario Giovanoli & Gregor Heinrich eds., KluwerLaw International 1999):

> In the case of [Bank of Credit and Commerce International], it was not a case of good luck but of good supervision. In January 1991, the New York Fed recommended to the New York Banking Department that it ratchet up the asset-maintenance requirement to 120 percent of liabilities to unaffiliated persons. The result was no creditor loss [when the BCCI agency in New York was subsequently closed and liquidated].

Further support for the use of ex ante supervisory measures may be gleaned from Baxter, *supra* note 38, at 77 (observing that "territorial branch insolvencies will at least recover 100 cents on the dollar, as have occurred in every foreign bank insolvency proceeding subject to United States laws in the postwar era.").

[50] Enhanced Prudential Standards for Bank Holding Companies and Foreign

Banking Organizations, 79 Fed. Reg. 17240 (Mar. 27, 2014) (hereinafter "Enhanced Prudential Rules").

[51] Section 165 of the Dodd-Frank Act requires the Federal Reserve Board to impose various enhanced prudential standards on large bank holding companies and foreign banking organizations, including a requirement for annual supervisory stress tests. The Enhanced Prudential Rules as made applicable to large foreign banking organizations require that the foreign banking organization be subject to a capital stress testing regime by its home country supervisor. A foreign banking organization that is not subject to a home country stress testing regime meeting the requirements of the Enhanced Prudential Rules will be subject to an asset maintenance requirement applicable to all its U.S. branches and agencies of either 105 percent or 108 percent, depending upon the size of its combined U.S. assets. 79 Fed. Reg. at 17326 and 17337 (to be codified at 12 C.F.R. § 252.146(c) and § 252.158(d)). The imposition of an asset maintenance requirement by the Federal Reserve Board would not pre-empt any asset maintenance requirement imposed by the Comptroller on a federal branch or agency or by a state banking authority on a state branch or agency. 79 Fed. Reg. at 17307.

[52] It appears that at the present time only one foreign G-SIB, UBS, operates both federal and state branches in the United States.

[53] 12 U.S.C. § 3102(j)(2).

[54] The reference in Section 4(j)(2) to the possible appointment of the FDIC as a receiver is presumably intended to encompass the fact pattern involving the receivership of an insured federal branch. The IBA originally provided for the possibility of FDIC insurance for foreign branches. An amendment to the IBA in 1991 eliminated the provision for FDIC insurance for foreign branches, but grandfathered the existing FDIC insurance coverage for foreign bank branches with such insurance on December 19, 1991. On that date there were 52 insured branches of foreign banks. The group of grandfathered FDIC-insured branches has subsequently been significantly reduced. As of December 2012, there were only 3 insured federal branches. *See* JOHN C. DUGAN, MARK E. PLOTKIN, KEITH A. NOREIKA, AND MICHAEL NONAKA, *FDIC Insurance and Regulation of U.S. Branches of Foreign Banks*, in REGULATION OF FOREIGN BANKS ch. 9 § 9.2 (Randall G. Guynn, ed., Thomas Reuters Westlaw, 7th ed. 2013). If the Comptroller had to appoint a receiver for such an insured branch, the Comptroller would be required to appoint the FDIC. *See* 12 U.S.C. § 1821(c)(2)(A)(ii) & 12 U.S.C. § 1813(c)(4). The FDIC would then conduct the receivership in accordance with the provisions of the FDIA. *See* OCC Interp. Ltr. No. 768 (Oct. 4, 1995).

There has been some suggestion that the elliptical reference to the FDIC in Section 4(j)(1) might also allow the Comptroller to appoint the FDIC as a receiver for an uninsured federal branch. The FDIA grants the FDIC general power "[t]o act as receiver." 12 U.S.C. § 1819(a)(Ninth). However, virtually all the other provisions in the FDIA refer to the FDIC acting as a receiver for an insured depository institution. *See*, *e.g.*, 12 U.S.C § 1821(c)(1), (2), (3) & (4). It seems unlikely that the FDIC has the authority to act as a receiver for an uninsured federal branch. Even if the FDIC were to conclude that it had the authority to act as a receiver for an uninsured federal branch, it would presumably not have the full set of powers available to it when it operates as a receiver for an insured depositary institution and instead would merely have the narrower set of powers of a receiver under the National Bank Act. *See* OCC Interp. Ltr. No. 768 (Oct. 4, 1995).

[55] Laws of New York c. 369 § 27 & § 57 (1914).

[56] *See* Department of the Treasury and Board of Governors of the Federal Reserve System, Subsidiary Requirement Study 3 (1992):

> For purposes of protecting safety and soundness, measures other than a subsidiary requirement may also be applied to branches of foreign banks experiencing financial difficulties. These include asset maintenance requirements and restrictions on transactions between a branch and the foreign bank's other offices that "wall-off" or "ring-fence" the activities of the branch from those of the troubled foreign bank without imposing the unnecessary costs and inefficiencies associated with a broader subsidiary requirement.

See also In the Matter of the Liquidation of the New York Agency and Other Assets of the Bank of Credit and Commerce International, 155 Misc. 122, 587 N.Y.S. 2d 524 (Sup. Ct. N.Y. County 1992) (discussing the purpose of § 606 and noting that it provided an alternative to requiring subsidiarization).

[57] Foreign banks have historically supported the theory that a branch or agency should be treated as if it were a separate legal entity because they have benefitted from this theory for many other purposes of U.S. law. *See*, *e.g.*, Securities Issued or Guaranteed by United States Branches or Agencies of Foreign Banks, SEC Interpretive Release No. 33-6661, 51 Fed. Reg. 34,460 (Sept. 29, 1986); Status Under the Investment Company Act of 1940 of United States Branches and Agencies of Foreign Banks Issuing Securities, SEC Investment Company Act Release No. 17,681, 55 Fed. Reg. 34,550 (Aug. 23, 1990).

[58] Laws of New York c. 664 § 57-a (1930). For a discussion of the liquidation process of a foreign agency before enactment of § 57-a, see *In re* Lee Hoyn Ton,

150 Misc. 5, 268 N.Y.S. 381 (Sup. Ct. 1933); Yokohama Specie Bank v. Chinese Merchants Bank, 219 A.D. 256, 219 N.Y.S. 732 (App. Div. 1st Dept. 1927).

[59] Laws of New York c. 65 § 1 (1946); Laws of New York c. 553 § 33 (1960).

[60] The failure of the German bank, Bankhaus I.D. Herstatt, in 1974 provided the occasion for bankers and policy makers to discuss international regimes for bank insolvency. *See, e.g.,* Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U.L. Rev. 1 (1977). These discussions were merely inchoate at the time of the enactment of the IBA.

[61] Laws of New York c. 496 §§ 7, 9, 13 & 15 (1993). Laws of New York, c.84 § 1 (1999); Laws of New York, c.567, §§ 6, 7, 8 & 15 (2000).

[62] The receivership provisions of the FDIA were revised extensively in 1989, adding among other things detailed provisions for the treatment of qualified financial contracts. These provisions are codified at 12 U.S.C. § 1821(e)(8), (9), (10) & (11). *See* Pub. L. 101-73 (1989).

[63] *See, e.g.*, New York Banking Law §§ 618-a & 619 (McKinney); Fla. Stat. Ann. §§ 663.171-174.

[64] OCC Interp. Ltr. No. 748 (Sept. 13, 1996); OCC Interp. Ltr. No. 768 (Oct. 4, 1995).

[65] 12 C.F.R. § 28.24. This regulation provides greater specificity as to the grounds for the termination of the authority to operate a federal branch or agency than the provisions of Section 4(i) itself. This regulation incorporates grounds specified in 12 U.S.C. § 191, which in turn incorporates the grounds specified in 12 U.S.C. § 1821(c)(5). As noted above, the Board may also separately recommend to the Comptroller pursuant to 12 U.S.C. § 3105(e)(5) that the license of a federal branch or agency be terminated.

[66] 12 C.F.R. §§ 28.22 & 28.23.

[67] *See, e.g.*, 12 U.S.C. §§ 192-200.

[68] OCC Interp. Ltr. No. 748 (Sept. 13, 1996). The other interpretative letter reaches the same type of conclusion. OCC Interp. Ltr. No. 768 (Oct. 4, 1995).

[69] 12 U.S.C. § 1821(e)(10)(B)(i).

[70] 12 U.S.C. § 4406a(a).

[71] *Id.*

[72] 12 U.S.C. § 4406a(a) makes the provisions of paragraph 9 of Section 11(e) of the FDIA relating to the transfer of qualified financial contracts applicable to a receivership of an uninsured federal branch or agency. Section 4406a(a), however, does not make the provisions of paragraph 2(G) of Section 11(d) of

the FDIA, which authorizes a receiver to transfer any asset or liability without an approval, assignment or consent from a counterparty, applicable to a receivership of an uninsured federal branch or agency. Thus, there may be some uncertainty whether consent or other assignment requirements under the terms of a qualified financial contract would apply to any transfer by a receiver for an uninsured federal branch or agency.

[73] *See, e.g.*, In the Matter of American City Bank & Trust Co., 402 F. Supp. 1229 (E.D. Wis. 1975) (discussing the common use of purchase and assumption transactions in FDIC receiverships).

[74] 12 U.S.C. § 1821(d)(2)(G)(i)(II) & (n)(1)(B) & (3)(A)(iv). Prior to an amendment in 1989, the FDIA provided that a transfer by the FDIC as receiver to a bridge bank required court approval. *See* 12 U.S.C. § 1821(i)(3)(A) (1988). The amendment in 1989 added the provisions now codified at § 1821(d)(2)(G)(i)(II) and (n)(3)(A)(iv).

[75] 12 U.S.C. § 5390(a)(G)(i) & (h)(1)(B) & (5)(D).

[76] The NBA provides that a receiver under the direction of the Comptroller may, upon an order of a court of competent jurisdiction, sell the real and personal property of a national bank upon such terms as the court may direct. 12 U.S.C. § 192. Some cases have held that the court approval required by §192 may be given on an ex parte basis. *See, e.g.*, In the Matter of the Liquidation of American City Bank & Trust Co., 402 F. Supp. 1229 (E.D. Wis. 1975); In the Matter of the Liquidation of Franklin National Bank, 381 F. Supp. 1390 (E.D.N.Y. 1974). An ex parte approach was adopted in these cases to facilitate an expeditious approval of a P&A transaction involving the FDIC as receiver.

[77] *See, e.g.*, Ex parte Moore, 6 F.2d 905 (E.D.S.C. 1925). *See also* Jackson v. McIntosh, 12 F.2d 676 (5th Cir.), *cert. denied*, 273 U.S. 697 (1926). *Cf.* 11 U.S.C. § 363(f)(2) (providing for a sale of property free and clear of any interest in the property if the entity holding such interest consents).

[78] *See Key Attributes*, *supra* note 3, Key Attributes 3.2(vi) & 3.3.

[79] *See* Baxter, *supra* note 38, at 77. *See also* In the Matter of the Liquidation of the New York Agency and Other Assets of Bank of Credit and Commercial International, 90 N.Y.2d 410, 683 N.E. 2d 756, 660 N.Y.S.2d 850 (1997) (discussing the ring-fencing provision in New York Banking Law that has allowed creditors of New York State branches or agencies to be paid in full in the liquidation of such entities).

[80] *See* John C. Dugan, Mark E. Plotkin, Keith A. Noreika & Michael Nonaka, *Forms of Entry, Operation, Expansion, and Supervision of Foreign Banks*

in the United States, in REGULATION OF FOREIGN BANKS & AFFILIATES IN THE UNITED STATES ch. 1 § 1:3 at 53-54 (Randall D. Guynn ed., Thomson Reuters Westlaw, 7th ed. 2013).

[81] *Id.* at 61.

[82] N.Y. Banking Law § 606(4) (McKinney).

[83] N.Y. Banking Law § 606(1) (McKinney).

[84] N.Y. Banking Law § 606(4)(a) (McKinney). Section 606(4)(c) defines the phrase "business and property in this state" as including but not limited to "all property of the foreign banking corporation, real, personal or mixed, whether tangible or intangible, (1) wherever situated, constituting part of the business of the New York agency or branch and appearing on its books as such, and (2) situated within this state whether or not constituting part of the business of the New York agency or branch or so appearing on its books." *See* In the Matter of the Liquidation of the New York Agency and Other Assets of Bank of Credit and Commerce International, 90 N.Y.2d 410, 683 N.E.2d 756, 660 N.Y.S.2d 850 (1997) (noting the efficacy of § 606(4)(c) in allowing the superintendent to seize all the assets of the foreign bank in New York so all creditors of a foreign branch can be paid in full with a surplus available for the foreign liquidator).

The reach of § 606(4)(a) does not extend to property situated outside New York State unless the property is part of the business of the New York branch or agency and appears on its books as such. In contrast, the reach of § 4(j) of the IBA extends to all the property and assets of the foreign bank anywhere in the United States. For a discussion of the authority to seize the assets of a head office or other foreign branch of a foreign bank in New York, *see* In the Matter of the Liquidation of the New York Agency and Other Assets of Bank of Credit and Commerce International, 90 N.Y.2d 140, 683 N.E.2d 756, 660 N.Y.S.2d 850 (1997). *See also* In the Matter of the Liquidation of the New York Agency and Other Assets of Bank of Credit and Commerce International, 155 Misc. 2d 122, 587 N.Y.S.2d 524 (Sup. Ct. N.Y. County 1995).

[85] N.Y. Banking Law § 606(4)(a) (McKinney).

[86] *Id.*

[87] N.Y. Banking Law § 606(4)(b) (McKinney).

[88] *Id.* *See* In the Matter of Siebert, 135 Misc. 2d 1093, 517 N.Y.S. 2d 358 (Sup. Ct. N.Y. County 1987) (construing the provisions of § 606 (4)(b)).

[89] The liquidation of the Bank of Credit and Commerce International agencies in New York and California spawned a host of litigation and challenges. For a summary of the complex litigation surrounding this liquidation, *see* U.S. v.

BCCI Holdings (Luxembourg), 69 F. Supp. 2d 36 (D.C.D. 1999). *See also In re* Smouha, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (1992).

[90] Section 618-a has also been the subject of interpretive letters issued by the New York State Banking Department. *See* Letter from Kathleen A. Scott, Ass't Counsel, New York State Dept. of Banking (Aug. 22, 1997) (construing § 618-a(2)(d); Letter from Christine R. Cardi, Assoc. Attorney, New York State Dept. of Banking (June 21, 2000) (construing § 618-a(2)(d); Letter from Rosanne Notaro, Ass't Counsel, New York State Dept. of Banking (Mar. 17, 2003) (construing § 618-a(2)(d)).

[91] Section 618-a(c) provides that upon the termination of a multibranch master netting agreement, the net termination amount is calculated on both a global and New York-only basis, reflecting the ring-fencing approach in § 606(4)(a). The global net amount is the amount owed by or to the foreign bank based on all transactions across all branches subject to the multibranch netting agreement (the "Global Net Payment Obligation" or the "Global Net Payment Entitlement"). The New York or local net amount is the amount owed by or to the foreign bank after netting only the transactions entered into by the New York branch or agency (the "Branch/Agency Net Payment Obligation" or "Branch/Agency Net Payment Entitlement"). The Superintendent, as receiver of the branch, is only liable to pay to a non-defaulting counterparty the lesser of the Global Net Payment Obligation and the Branch/Agency Net Payment Obligation. When a counterparty owes a net amount pursuant to a repudiated or terminated qualified financial contract, the Superintendent can demand from the counterparty a payment for the lesser of the Global Net Payment Entitlement and the Branch/Agency Net Payment Entitlement. Section 618-a(d) further provides that a party to a qualified financial contract that has a perfected security interest in collateral may retain all such collateral and upon termination of the qualified financial contract may apply the collateral to satisfy claims up to the amount of the Global Net Payment Obligation. This complex provision clarifies how a multibranch netting agreement operates in the context of the ring-fencing approach incorporated in Section 606(4)(a).

[92] *See* In the Matter of Siebert, 99 Misc. 2d 32, 415 N.Y.S.2d 589 (Sup. Ct. Queens County 1979).

[93] As noted above, the FDIA expressly provides that the FDIC as receiver for an insured depository institution may transfer any asset or liability without any approval, assignment, or consent with respect to the transfer. 12 U.S.C. § 1821(d)(2)(G)(i). Comparable authority is provided to the FDIC as receiver

under Title II. 12 U.S.C. § 5390(a)(G)(i).

[94] Section 634 provides that the Superintendent may without court approval sell or assign all or part of the assets of the *branch* or *agency* of a foreign banking organization. Section 634 does not refer to *other* assets of the foreign bank in New York.

[95] The implications of the provisions in Section 606(4) directing the Superintendent to take possession of all the assets in New York of a foreign bank are discussed in In the Matter of Siebert, 135 Misc. 2d 1093, 517 N.Y.S.2d 358 (Sup. Ct. N.Y. County 1987). One case has placed a broad reading on the authority of the Superintendent on the basis of the language in § 606(4)(a) that upon taking possession "the superintendent shall liquidate or *otherwise deal with*" the business and property of the foreign banking corporation (emphasis added). The case allowed the Superintendent without a court order to release certain property of a foreign bank in the possession of the Superintendent to a foreign liquidator for the foreign bank before the Superintendent commenced the claims process under § 606(4)(b). *See* Monter Joint Stock Co. v. Superintendent of Banks, NY Slip. Op. 32113[u] (N.Y. Sup. Ct. Sept. 14, 2009) (unpublished).

[96] Cal. Fin. Code §§ 601-691.

[97] Cal. Fin. Code §§ 1831-1833.

[98] Cal. Fin. Code § 1831.

[99] Cal. Fin. Code § 1835(a).

[100] Cal. Fin. Code § 1835(c).

[101] Cal. Fin. Code § 1810(b).

[102] Cal. Fin. Code § 1835(d).

[103] Cal. Fin. Code § 672(d).

[104] 205 Ill. Comp. Stat. Ann. 645/1 *et seq.*

[105] 205 Ill. Comp. Stat. Ann. 645/12.

[106] *Id.*

[107] 205 Ill. Comp. Stat. Ann. 5/53.

[108] Fla. Stat. Ann § 663.01 *et seq.*

[109] Fla. Stat. Ann. §§ 663.16-663.17.

[110] Fla. Stat. Ann. §§ 663.171-175.

[111] Fla. Stat. Ann. § 658.82.

[112] *Key Attributes*, *supra* note 3, Key Attribute 11.2.

[113] *Id.* Key Attribute 11.8.

[114] 12 U.S.C. § 5365(d)(1).

[115] *See* Resolution Plans Required, 76 Fed. Reg. 67323 (Nov. 1, 2011) (codified

at 12 C.F.R. Parts 243 and 381).

[116] FDIC and Federal Reserve Board, Guidance for 2013 § 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Initial Resolution Plans in 2012, *available at* http ://www.ic.gov/regulations/reform/foreignguidance.pdf.

[117] *See* 76 Fed. Reg at 67332.

[118] *See*, *e.g.*, BNP Paribas, 165(d) Resolution Plan: Public Section 14-15 (July 1, 2013), http://www.federalreserve.gov/bankinforeg/resolution-plans/bnp-paribas-2g-20130701.pdf.

[119] UniCredit S.p.A., Public Section 10 (2013), http://www.federalreserve.gov/bankinforeg/resolution-plans/unicredit-bk-3g-20131231.pdf.

[120] Barclays, Resolution Plan: Public Section 26-27 (Oct. 2013), http://www.federalreserve.gov/bankinforeg/resolution-plans/barclays-plc-lg-20131001.pdf.

[121] Deutsche Bank, Bank Resolution Plan: Section 1: Public Section 28-29 (June 29, 2012), http://www.federalreserve.gov/bankinforeg/resolution-plans/deutsche-bank-lg-20120702.pdf.

[122] Deutsche Bank, Bank Resolution Plan: Section 1: Public Section 28-29 (Oct. 1, 2013), http://www.federalreserve.gov/bankinforeg/resolution-plans/deutsche-bank-lg- 20131001.pdf.

[123] *Id*.

[124] *See* Press Release, FDIC, Federal Deposit Insurance Corporation, Bank of England, German Federal Financial Supervisory Authority and Swiss Financial Market Supervisory Authority Call for Uniform Derivatives Contracts Language (Nov. 5, 2013), *available at* http://www.fdic.gov/news/news/press/2013/pr13099.html.