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# Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap

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# BEYOND THE SEARCH FOR CERTAINTY: ADDRESSING THE CROSS-BORDER RESOLUTION GAP

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**ABSTRACT**

This Article compares the development of cross-border solutions for resolving and reorganizing commercial entities to those solutions available for financial institutions. This Article argues that the resolution regime for financial institutions needs to move forward from the existing international best practices approach, embodied in the Financial Stability Board (FSB) Key Attributes for Resolution Regimes, to a more formal legal framework for cross-border resolution, similar to the United Nations Commission on International Trade Law (UNCITRAL) Model Law for Cross-Border Insolvency. In doing so, this Article identifies a gap in the international infrastructure for resolutions. While UNCITRAL promulgated a model law to provide for cross-border insolvencies in 1997, there has been reluctance to take a similar path with regard to the resolution of international financial institutions, even though the stakes are very high. This Article addresses possible reasons for this reluctance, draws lessons from the commercial sphere, and explores the relevance of the UNCITRAL Model Law framework to financial institutions. This Article also analyzes the recent FSB initiative on cross-border resolution and the recently promulgated International Swaps and Derivatives Association (ISDA) Resolution Stay Protocol that seek to promote certainty in the application of resolution measures across borders. This Article argues that these primarily contract-based initiatives are important contributions to the standardization and improvement of the standards on the treatment of financial contracts in insolvency and resolution. However, the initiatives are still incomplete. Addressing the cross-border gap requires the recognition of goals beyond

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certainty, in the design of a cross-border framework for financial institutions.

## INTRODUCTION

The international legal architecture supporting cross-border insolvency[1] and cross-border resolution[2] is not complete. UNCITRAL in 1997 promulgated its Model Law on Cross-Border Insolvency (the Model Law), a framework for global insolvency and restructuring of international commercial enterprises.[3] The Model Law does not, however, specifically address the cross-border resolution of international financial institutions. More recently, in 2011, an international standard for the resolution of Significantly Important Financial Institutions (SIFIs)—the Key Attributes of Effective Resolution Regimes for Financial Institutions (the Key Attributes)—was promulgated by the FSB.[4] This resolution standard[5] identifies domestic best practices and includes specific principles concerning the cross-border aspects of resolution regimes. However, it does not set forth a detailed cross-border resolution framework with legislative provisions that can be enacted uniformly across countries' legal systems. Since the 2007–2009 financial crisis, there have been urgent calls for action, including by standard-setting institutions, to develop such a framework, and key elements have been proposed by international

1. This Article uses the terms "insolvency" and "bankruptcy" interchangeably to refer to a broad range of insolvency solutions for commercial entities, including reorganization and liquidation.

2. This Article uses the term "resolution" to refer to a broad range of resolution solutions and activities for both bank and non-bank financial institutions in distress, including, reorganization and liquidation. The Article also refers to cross-border resolution of both bank and non-bank financial institutions. Indeed, banking may be the main activity of these international financial institutions, or, their activities may extend beyond simple deposit-taking and lending, covering a full range of non-bank financial activities. Specifically, many "systemically-risky international financial groups are, at their core, investment banks and broker-dealers." IMF, *Resolution of Cross-Border Banks—A Proposed Framework for Enhanced Coordination*, Report by the Legal and Monetary and Capital Markets Departments (June 11, 2010) [hereinafter IMF 2010]. The problem of coordinating resolution action raises similar issues with respect to both bank and non-bank financial institutions. *See id.*

3. *See* U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW]. The Model Law was adopted in 1997, while the Guide to Enactment and Interpretation of the Model Law was revised in 2013.

4. FIN. STABILITY BD., KEY ATTRIBUTES OF EFFECTIVE RESOLUTION REGIMES FOR FINANCIAL INSTITUTIONS (2011) [hereinafter KEY ATTRIBUTES], http://www.financialstabilityboard.org/wp-content/uploads/r_111104cc.pdf?page_moved=1 (the Key Attributes were updated in Oct. 2014 providing, in Annexes, further guidance relating to information sharing and sector-specific guidance that sets out how the Key Attributes should be applied to insurers, financial markets infrastructures, and the protection of client assets in resolution).

5. *See infra* Part I.B.

organizations.[6] Importantly, a recent initiative of the FSB introduced contractual solutions to enhance cross-border recognition of resolution measures, while also emphasizing the need for statutory solutions going forward and delineating principles that can guide legal systems as they develop statutory frameworks.[7] However, the international community and standard-setters have not yet undertaken a project to develop a comprehensive legal framework with legislative provisions for cross-border resolution.

This Article adopts a comparative approach. It draws lessons from the Model Law and seeks to apply them to the resolution regime for financial institutions. Additionally, the Article analyzes both possible reasons and concerns that may have slowed the development of a cross-border resolution framework with regard to financial institutions. In the process, the Article highlights the importance of the most recent initiatives to enhance certainty in the application of resolution measures across borders: the ISDA[8] Resolution Stay Protocol (the Protocol) and the FSB cross-border resolution project. In particular, these initiatives contribute to the development and harmonization of the standard for the treatment of financial contracts in insolvency and resolution.[9] Prior to the FSB initiative and the Protocol, the prevailing insolvency standard[10] had aimed to promote certainty of financial transactions according to the contractual terms (transaction certainty). This standard allowed financial contracts to remain "bankruptcy remote" through the inclusion of early termination and close-out netting provisions, often at the expense of the failing firm.[11] Later developments regarding bank and SIFIs resolution, including the Protocol, stress the certainty of effective resolution measures (resolution certainty) that can briefly stay the termination and close-out netting rights in financial

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6. *See infra* Part I, in particular, the initiatives of the Basel Committee on Banking Supervision and the IMF.

7. *See infra* Part I.

8. ISDA's model contract, the ISDA Master Agreement, governs the vast majority of financial contracts. *See, e.g.*, INT'L SWAPS & DERIVATIVES ASS'N, 2013 MASTER AGREEMENT (2013).

9. A financial contract is an arrangement that takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, repurchase, or other similar individually negotiated transaction commonly entered into by participants in financial markets. A financial contract involves securities, commodities, currencies, interest or other rates, or any other financial or economic interest similar in function. Financial contracts may be defined broadly to encompass a broad variety of contracts and may include contracts entered into between any type of party, not necessarily financial institutions. *See* U.N. COMM'N ON INT'L TRADE L., UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, rec. 107, U.N. Sales No. E.05.V.10 (2005) [hereinafter LEGISLATIVE GUIDE]; *see also infra* Part III (the definition may be narrower and apply to more specific types of financial contracts, or parties).

10. *See infra* Part I.A.

11. Termination and close-out netting entails two steps: first, the termination of all open contracts as a result of the commencement of insolvency/resolution proceedings (close-out); second, the set-off of all obligations arising out of the close-out transactions on an aggregate basis (netting).

contracts. Increasing resolution certainty may in fact derogate from transaction certainty (i.e., the certainty that the financial transaction will be followed according to its terms and termination rights will not be stayed).[12] These developments in the bank and SIFI resolution context have contributed to the rethinking about the underlying goals of the insolvency standard[13] on the treatment of financial contracts, and the strengthening of its rationale by considering goals beyond transaction certainty. Indeed, the different uses and applications of the certainty objective highlighted its elusiveness and limitation as a sole rationale for policy choices in this area. This recognition of the limitation of certainty as a key policy objective has resulted in an emerging standard on the treatment of financial contracts in insolvency that reflects a balance between a wider range of interests that is more consistent across insolvency and resolution regimes. This Article argues that a broad approach and broader goal baseline, beyond the pursuance of certainty (either transaction certainty or resolution certainty) is also required for addressing the cross-border gap.

A focus on resolution certainty alone might constrain further development of a global model for cross-border resolution, since a consideration of a range of interests is required in that context to both ensure stability and contain losses. Other constraints may stem from concerns that the Model Law for commercial entities, from which inspiration could be drawn, is perhaps not sufficiently relevant, as it is arguably based on narrower objectives and different types of enterprise structures. Additionally, there may also be concerns regarding the feasibility of formulating and adhering to a framework solution in the near future. The recognition of the Key Attributes as the standard for resolution regimes may also raise concerns regarding the legitimacy of developing a more rigid international instrument for the cross-border aspects of the regime. This Article examines these constraints and addresses possible concerns regarding the development of a model framework for cross-border resolution.

This Article proceeds as follows. Part I describes the international insolvency and resolution regulatory landscape, and highlights the persistent gap on the resolution side. Part II explains the link between concerns regarding a financial contracts' termination in the event of resolution and the focus of recent initiatives regarding cross-border resolution that are aimed at enhancing certainty of resolution measures. Part III illustrates how the current cross-border resolution initiatives broadened the rationale of the standard on the treatment of financial contracts in insolvency/resolution, and resulted in its rebalancing and increased harmonization. Part IV argues that harmonization of standards would likely

12. *See infra* Part II.
13. *See infra* Part I.A.

improve the standardization of relevant measures across legal systems, thus supporting a cross-border regime. However, such harmonization cannot replace the design of a cross-border resolution framework.

## I. THE GAP IN THE INTERNATIONAL INFRASTRUCTURE FOR RESOLUTION

### A. STANDARDIZATION IN INSOLVENCY AND THE CROSS-BORDER INSOLVENCY FRAMEWORKS

In recent decades, there has been considerable effort to promote the standardization and renovation of insolvency regimes through the development of international best practice standards. UNCITRAL and the World Bank have led the standardization project in this field, and the World Bank Principles on Effective Insolvency and Creditor/Debtor Regimes (the World Bank Principles)[14] together with the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide)[15] constitute the international best practice standard for insolvency regimes (the Insolvency Standard). The Insolvency Standard delineates the key objectives of insolvency regimes, and provides principles and recommendations on core provisions for an effective and efficient insolvency law, including the commencement of the proceedings, the treatment and use of assets, the treatment of contracts, rules regarding set off, financial contracts and netting, rules regarding priorities, reorganization procedures, and so forth. The standard is also used as a basis for the assessment of countries' insolvency regimes by the World Bank through the joint World Bank/International Monetary Fund (IMF) Reports on the Observance of Standards and Codes (ROSC) program.[16]

The World Bank Principles provide certain high-level elements of a cross-border regime, stressing the need for a clear and speedy process for obtaining recognition of foreign insolvency proceedings, for granting relief upon recognition, and for granting access to courts and other relevant authorities. The World Bank Principles also stress the need to include

14. *See* WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR RIGHTS SYSTEMS (2015) [hereinafter WORLD BANK PRINCIPLES], http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015_Revised_ICR_Principles(3).pdf.

15. *See* LEGISLATIVE GUIDE, *supra* note 9; U.N. COMM'N ON INT'L TRADE L., LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, U.N. Sales No. E.12.V.16 (2010) [hereinafter LEGISLATIVE GUIDE PART THREE]; U.N. COMM'N ON INT'L TRADE L., LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART FOUR: DIRECTORS' OBLIGATIONS IN THE PERIOD APPROACHING INSOLVENCY, U.N. Sales No. E.13.V.10 (2013).

16. *See* *Insolvency ROSC Assessments*, WORLD BANK: GLOBAL INSOLVENCY LAW DATABASE, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:22095878~menuPK:64873784~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html (last visited Oct. 10, 2015).

measures for cooperation between courts and insolvency representatives, and to ensure nondiscrimination between foreign and domestic creditors in international insolvency proceedings.[17]

The Insolvency Standard contemplated in the Legislative Guide explicitly recognizes the need for a global cross-border insolvency framework and provides that countries' insolvency regimes should enact rules on cross-border insolvency by adopting the Model Law.[18] Indeed, the Model Law provides the detailed global framework for cross-border insolvency that countries can enact in their laws.[19] It was endorsed in 1997 by UNCITRAL and thus far has been adopted in forty States.[20] It provides a set of model provisions that address key private international law aspects related to insolvency. In particular, it articulates provisions regarding access to foreign jurisdictions, recognition of foreign proceedings, assistance to foreign courts and foreign representatives, relief to foreign representatives, and cooperation between courts and foreign representatives.[21]

The Model Law applies to "debtors," individuals, or legal persons. It guides countries to designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime or that the State may wish to exclude from the Model Law.[22] The Model Law does not explicitly address the cases of enterprise groups, but UNCITRAL is

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17. *See* WORLD BANK PRINCIPLES, *supra* note 14, at 23.

18. *See* LEGISLATIVE GUIDE, *supra* note 9, para. 14, rec. 5.

19. In addition to the global framework for cross-border insolvency, certain frameworks govern cross-border insolvencies within regions—notably the EU Insolvency Regulation that applies directly to all EU Member States, except Denmark who opted out. *See* Council Regulation 1346/2000, of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC) [hereinafter EU Insolvency Regulation]. Following previously failed attempts to agree on a treaty, the EU Insolvency Regulation was enacted in 2000. The Regulation applies to debtors other than insurance undertakings, credit institutions, investment undertakings that provide services involving the holding of funds or securities for third parties, and collective investment undertakings. *See id.* art. 1(2). The EU Insolvency Regulation was recently reviewed to enhance the effectiveness of cross-border insolvency and pre-insolvency solutions in Europe. *See* Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19. EU Banks have been subject to a separate cross-border insolvency regime since 2001, pursuant to the Winding-Up Directive. *See* Council Directive 2001/24/EC, of the European Parliament and Council on the Reorganization and Winding-up of Credit Institutions 2001 O.J. (L 125) 15.

20. Australia, Canada, Chile, Colombia, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Philippines, Poland, Republic of Korea, Romania, Serbia, Seychelles, Slovenia, Uganda, Great Britain, British Virgin Islands, United States of America, Vanuatu, Kenya, and the seventeen OHADA countries that have recently adopted legislation based on the Model Law. *See* UNCITRAL, STATUS: UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997) [hereinafter UNCITRAL STATUS], http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Sept. 12, 2015).

21. *See generally* Jenny Clift, *The UNCITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 319–26 (2004); CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW (Look Chan Ho ed., 2012).

22. *See* MODEL LAW, *supra* note 3, art. 1(2).

currently working to expand the Model Law to provide additional tools for such enterprises.[23]

### B. STANDARDIZATION EFFORTS IN THE GLOBAL RESOLUTION CONTEXT

The financial crisis of 2007–2009 highlighted the need to design and standardize the operation of specific regimes applicable to resolution of financial institutions across borders. In 2011, the G-20 endorsed the Key Attributes as a new international standard specifically designed to address the particular objectives of resolution of SIFIs (the Resolution Standard).[24] The Key Attributes are a non-binding standard that countries are encouraged to implement and comply with over time. The Key Attributes call for resolution authorities to be given a comprehensive toolkit of powers. They also state the objective of effective resolution regimes and delineate the key elements of such regimes, including: the designation of resolution authorities; the entry into resolution; the type of resolution powers that should be available in the regime; rules regarding set-off, netting, collateralization, and segregation of client assets; safeguards for creditors; and funding of firms in resolution.

Similar to the Insolvency Standard, the Resolution Standard contemplated in the Key Attributes also recognizes the importance of establishing a cross-border resolution framework. Indeed, the Resolution Standard applies to financial institutions that are systemically significant and whose failure would likely create systemic risk.[25] As such, the Resolution Standard is specifically relevant to complex financial organizations that would often have a significant volume of cross-border operations.[26] Thus, addressing cross-border aspects of the resolution regime is a critical component of the Resolution Standard. Specific Attributes of the Resolution Standard delineate a set of main elements that the resolution regime should adopt in order to enhance the effectiveness of cross-border resolution.[27] In particular, the Attributes state that national resolution regimes should empower and strongly encourage the resolution authorities to act to achieve a cooperative solution with foreign resolution authorities, empower the resolution authorities to share information with their foreign counterparts, and provide for transparent and expedited processes to give effect to foreign resolution measures. However, unlike the Insolvency

23. *See infra* Part IV.

24. *See* Press Release, Fin. Stability Bd., FSB Issues International Standard for Resolution Regimes 1 (Nov. 4, 2011), http://www.financialstabilityboard.org/wp-content/uploads/pr_111104dd.pdf?page_moved=1.

25. KEY ATTRIBUTES, *supra* note 4, § 1.1.

26. *See* Monica Marcucci, *World Bank, Law, Justice and Development Week* (2014) (unpublished presentation notes) (on file with author) [hereinafter Marcucci Presentation Notes].

27. KEY ATTRIBUTES, *supra* note 4, §§ 7–9, 12.

Standard, the Resolution Standard does not refer to a specific global model that countries should adopt to give effect to such measures. Indeed, such a generic or harmonized model for cross-border resolution does not exist.

### C. THE STATE OF AFFAIRS OF CROSS-BORDER RESOLUTION IN COUNTRY REGIMES AND IN PRACTICE

Implementation of the cross-border aspects of the Resolution Standard contemplated in the Key Attributes has been uneven and slow. A peer review conducted by the FSB in 2013 found that implementation of the core aspects of the Key Attributes within the FSB's membership is in an early stage.[28] In particular, "[w]ith respect to cross-border cooperation, only a few jurisdictions had established robust mechanisms to give effect to foreign resolution measures, or gave their resolution authorities clear statutory mandates to cooperate or to share information with foreign resolution authorities."[29] An IMF paper from 2014 further indicates that achieving progress with recovery and resolution planning for individual cross-border groups has proven challenging, and "[f]irm-specific Cooperation Agreements . . . coverage remains limited to procedural aspects of cooperation, such as exchange of information, and does not include details on resolution strategies to be pursued."[30]

There is an indication of some progress. The most notable development occurred in May 2014, with the adoption of the Bank Recovery and Resolution Directive (BRRD) by the European Parliament, which applies alongside the Winding-Up Directive.[31] Further, some other national regimes, such as Singapore and Switzerland, have adopted measures in their legislations aimed to address aspects of cross-border bank insolvency and resolution. However, there are considerable differences in the regimes prescribed even between the few countries that have independently enacted cross-border provisions and the BRRD regime. For example, the BRRD does not entail supportive measures, but rather recognition and means of cooperation. Between Member States, the BRRD and Winding-Up Directives are based on automatic recognition of a home country's

28. FIN. STABILITY BD., THEMATIC REVIEW ON RESOLUTION REGIMES, PEER REVIEW REPORT 8 (2013) [hereinafter THEMATIC REVIEW], http://www.financialstabilityboard.org/wp-content/uploads/r_130411a.pdf?page_moved=1.

29. *See* IMF, *Cross-Border Bank Resolution: Recent Developments*, IMF Board Paper 9 (June 2, 2014) [hereinafter IMF 2014], https://www.imf.org/external/np/pp/eng/2014/060214.pdf.

30. *Id*.

31. *See* Directive 2014/59, of the European Parliament and of the Council, of 15 May 2014 Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council, 2014 O.J. (L 173) 190. The BRRD establishes a common EU-wide regime for the recovery and resolution of credit institutions and investment firms in distress across all 28 Member States.

resolution measures. The framework is very different in relation to non–Member States where safeguards as conditions to recognition are broad (and, as noted elsewhere, potentially politically biased).[32] Although the Swiss legislation provides for recognition of foreign bank insolvency proceedings or measures, the recognition period envisaged is long.[33] Following the recognition of foreign bank insolvency proceedings or measures, concurrent proceedings may be opened in Switzerland or assets may be transferred to the home jurisdiction, subject to certain safeguards. On the other hand, Singapore's framework supports only certain foreign measures, that is, the "transfer [of] the business or shares of a financial institution or . . . [the] restructure or . . . issuance of shares, in support of a foreign resolution action."[34] More specifically, it provides for a limited form of assistance, and it also requires Ministerial approval to exercise the power of transfer of shares.[35]

Indeed, the 2007–2009 global financial crisis brought with it a series of collapses of global financial institutions. These have been resolved in a regulatory vacuum, resulting in outcomes that have been less than optimal and even value destructive. In the case of Lehman Brothers, numerous insolvency proceedings were opened around the world against Lehman's entities, followed by costly engagements in trying to reach ad-hoc agreements on the coordination of proceedings. As a result, a multilateral cross-border protocol was agreed upon and approved by the bankruptcy judge presiding over the U.S. proceedings. However, not all subsidiaries signed up and cooperated.[36] The general cross-border Model Law for insolvency of commercial enterprises lacked sufficient measures to address a large geographically spread and decentralized group enterprise.[37] Additionally, no specific cross-border resolution framework exists for international financial institutions. In other cases of failing international financial groups, like that of Fortis or the failure of the Icelandic banks, governments took unilateral decisions based on territorial interests and failed to cooperate, resulting in an overall loss of value.[38]

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32. *See infra* Part II (ISDA response to the FSB Consultative Document on cross-border recognition of resolution action).

33. "The recognition proceedings generally take about two months, but may take longer depending on the complexity of the case and the speed with which the necessary documents are provided to [the Swiss Financial Market Supervisory Authority]." FIN. STABILITY BD., CROSS-BORDER RECOGNITION OF RESOLUTION ACTION: CONSULTATIVE DOCUMENT 7 (2014) [hereinafter FSB CONSULTATIVE DOCUMENT], http://www.financialstabilityboard.org/wp-content/uploads/c_140929.pdf.

34. *Id.* at 7.

35. *See id.*

36. *See* Hon. James M. Peck, *Cross-Border Observations Derived from My Lehman Judicial Experience*, 30 BUTTERWORTHS J. INT'L BANKING & FIN. L. 131, 132 (2015).

37. *See id.* at 133.

38. Jonathan M. Edwards, *A Model Law Framework for The Resolution of G-SIFIs*, 7 CAP. MKTS. L.J. 122, 131–33 (2012).

### D. CALLS TO ADDRESS THE CROSS-BORDER RESOLUTION GAP

The Key Attributes attempted to address the need for international resolution standards following the urgent calls for action in the aftermath of the 2007–2009 global financial crisis. Yet, as noted above, they did not provide a uniform framework for cross-border resolution. There have been additional initiatives aimed at addressing the cross-border resolution gap, notably the works of the Basel Committee on Banking Supervision[39] and of the IMF that proposed measures for enhanced coordination.[40] UNCITRAL, (through Working Group V on Insolvency) also considered proposals in 2010 and again in 2013 to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions.[41] UNCITRAL noted that thus far no legal framework at a global level had been developed for global financial institutions, despite the widely acknowledged importance of the issue.[42] Yet, the proposals have not reached the level of consensus on actions promoting the development of a global framework. An IMF paper from 2014 continued to stress the high priority given to developing an effective cross-border resolution framework, noting that "[d]eveloping an effective framework for cross-border resolution is a key priority in international regulatory reform."[43]

A recent FSB initiative on cross-border recognition of resolution actions (that commenced in 2013) offers additional solutions in the form of contractual and statutory approaches in order to enhance legal certainty in

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39. BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, REPORT AND RECOMMENDATIONS OF THE CROSS-BORDER BANK RESOLUTION GROUP 1 (2010) [hereinafter BASEL REPORT], http://www.bis.org/publ/bcbs169.pdf.

40. This was in response to the calls of the G-20 leaders in 2009 to design an international framework. *See* IMF 2010, *supra* note 2, at 4–5.

41. *See* U.N. Comm'n on Int'l Trade Law, Insolvency Law: Possible Future Work: Addendum, Proposal by the Delegation of Switzerland for Preparation of a Study on the Feasibility of an Instrument Regarding the Cross-Border Resolution of Large and Complex Financial Institutions, U.N. Doc. A/CN.9/WG.V/WP.93/Add.5, at 1 (2010); U.N. Comm'n on Int'l Trade Law, Insolvency Law: Possible Future Work, Further Proposal by the Delegation of Switzerland for Preparation by the UNCITRAL Secretariat of a Study on the Feasibility and Possible Scope of an Instrument Regarding the Cross-Border Resolution of Large and Complex Financial Institutions, U.N. Doc. A/CN.9/709, at 3 (2010); U.N. Comm'n on Int'l Trade Law, Insolvency Law: Insolvency of Large and Complex Financial Institutions, Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.109, at 2, (2012) [hereinafter UNCITRAL, Insolvency of Financial Institutions]; U.N. Comm'n on Int'l Trade Law, Insolvency Law: Background Information on Topics Comprising the Current Mandate of Working Group V and Topics for Possible Future Work, Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.117, at 8 (2013); U.N. Comm'n on Int'l Trade Law, Insolvency Law: Recent Developments Concerning the Global and Regional Initiatives Regarding the Insolvency of Large and Complex Financial Institutions, U.N. Doc. A/CN.9/WG.V/WP.118, at 2 (2013).

42. *See* sources cited *supra* note 41.

43. *See* IMF 2014, *supra* note 29, at 1.

cross-border resolution.[44] However, the initiative does not include a uniform legal framework.

## II. THE FINANCIAL CONTRACTS CONUNDRUM AND ITS IMPACT ON CROSS-BORDER RESOLUTION ENDEAVORS

### A. THE FSB INITIATIVE ON THE RECOGNITION OF RESOLUTION MEASURES

In 2013, the FSB took steps towards enhancing the effectiveness of cross-border resolutions. The aim was to remove obstacles to cross-border resolution and promote cooperation.[45] More specifically, the FSB's statements reflect recognition that the early termination of financial contracts, protected under earlier international instruments, might prevent effective resolutions and that the utilization of bail-in measures should also be enhanced, to avoid bail-outs. Thus, the main concern has been preventing large-scale termination of contracts that could lead to the inevitable failure of the institution and the need for government rescue.[46] Accordingly, the initiative envisaged the development of proposals for contractual or statutory approaches that prevent large-scale early termination of financial contracts and enhance certainty of resolution measures.[47]

### B. INCONSISTENCY OF PRINCIPLES

The concerns with large-scale termination of financial contracts were realized in the recent global financial crisis of 2007–2009. With the rapid expansion of derivative markets, there has been an evolution of legal protections to financial contracts and encouragement by regulatory authorities of the use of termination rights and close-out netting provisions in such transactions. These protections were perceived important to the stability of the financial system in order to avoid systemic risk in a failure situation and have been embraced by the Insolvency Standard, as explained below. Yet, the financial crisis of 2007–2009 revealed that the mechanisms developed and promoted to prevent systemic risk could lead, in a situation of general distress, to an accelerated systemic crisis, and to the inability to

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44. *See* FIN. STABILITY BD., PROGRESS AND NEXT STEPS TOWARDS ENDING "TOO-BIG-TO-FAIL", REPORT OF THE FINANCIAL STABILITY BOARD TO THE G-20, at 3, 6 (2013) [hereinafter FSB TBTF Report], http://www.financialstabilityboard.org/wp-content/uploads/r_130902.pdf?page_moved=1; FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 1–2; FIN. STABILITY BD., PRINCIPLES FOR CROSS-BORDER EFFECTIVENESS OF RESOLUTION ACTION 5 (2015) [hereinafter FSB CROSS-BORDER PRINCIPLES], http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf.

45. *See* FSB TBTF Report, *supra* note 44, at 3.

46. *Id.* at 13–14.

47. *Id.* at 15–16.

resolve a SIFI in financial difficulties.[48] In the case of Lehman Brothers, the large multinational investment bank that almost brought down the world's financial system when it collapsed in 2008, the early termination of many of Lehman's assets (that were considered financial contracts) precluded a resolution of the failed international financial group through a going concern sale to another bank.[49]

This realization of the adverse effect of financial contracts' termination led to developments in principles concerning the treatment of financial contracts, especially in the resolution context. Yet, the protections to financial contracts in bankruptcy as envisaged in the Insolvency Standard and the treatment of financial institutions under the newer Resolution Standard could result in significant inconsistency, both domestically and internationally, creating obstacles to effective resolutions. Thus, the Insolvency Standard, proclaimed in the Legislative Guide, recommends that close-out netting provisions in financial contracts, broadly defined, should be completely "immunized" from fundamental bankruptcy rules, including the bankruptcy stay that stops individual enforcement of pre-insolvency acquired rights—reflecting the original thinking about the financial contracts rule.[50] The Resolution Standard proclaimed in the Key Attributes, however, specifies that counterparties should be restricted from exercising early termination rights that arise only by reason of, or in connection with, a firm's entry into resolution and, where such rights exist, resolution authorities should have the power to stay counterparties temporarily from exercising them. Under this Resolution Standard, following a successful resolution action, counterparties will not be able to exercise their rights against the financial institution that was under resolution.[51] Additional relevant principles include the International Institute for the Unification of Private Law (UNIDROIT) Principles on Close-Out Netting published in 2013 that limit the scope of the protected financial contracts to contracts where one of the counterparties is a financial institution or a public authority. The UNIDROIT Principles also take into account the possibility

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48. *See* Marcucci Presentation Notes, *supra* note 26; Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 588 (2011); Stephen J. Lubben, *The Bankruptcy Code Without Safe Harbors*, 84 AM. BANKR. L.J. 123 (2010); Rizwaan J. Mokal, *Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts*, 10 BROOK. J. CORP. FIN. & COM. L. 15 (2015).

49. *See* Edward J. Janger, Riz Mokal & Robin Phelan, *Treatment of Financial Contracts in Insolvency—Analysis of the ICR Standard: For Discussion at World Bank Insolvency and Creditor/Debtor Regimes Task Force Meeting* (World Bank Discussion Paper, Oct. 24, 2014) [hereinafter Task Force Discussion Paper 2014], http://siteresources.worldbank.org/EXTGILD/Resources/WB_ICR_TaskForce_2014_FinancialContractsInInsolvency_DiscussionPaper.pdf.

50. *See infra* Part III (discussion of the insolvency standard in the treatment of financial contracts in insolvency and its development); *see also* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 493–94 (2010).

51. KEY ATTRIBUTES, *supra* note 4, at 4.

that the domestic law will impose a stay on termination of financial contracts in the context of its bank resolution regime, but also refer to the broad protections and the exemption afforded to financial contracts from the bankruptcy stay adopted in the Insolvency Standard.[52] The EU Directive on Financial Collateral Arrangements permits exemptions from immunities of financial contracts to which one or more of the parties are neither a financial market participant nor a public authority.[53] Finally, the Bank Resolution and Recovery Directive[54] provides a resolution regime that includes contractual termination rights.

Implementation of the measures contemplated in the Resolution Standard concerning the treatment of financial contracts is a work in progress.[55] Assessment of legal systems and implementation of standards has also been a somewhat protracted endeavor since the interplay between banking and insolvency law differs between jurisdictions. Legal regimes applicable to failing financial institutions may be a mix of general insolvency law complemented by special provisions applicable to banks and other financial institutions.[56] Alternatively, the regime may treat banks and other financial institutions in the same way as any other type of entity without providing a special resolution regime. Thus, a different international standard might apply to different aspects of the law relevant to the resolution framework, leading to inconsistent implementation of rules regarding the treatment of financial contracts, and less likelihood of a coherent approach in cases of a cross-border resolution.[57] For example, in the United States, there is a special resolution regime for banks and SIFIs, but non-bank, non-SIFI financial institutions must be resolved under the Bankruptcy Code.[58]

Countries are also keen to ensure that their legal regimes adhere and respect the dominant transactional standard in the over-the-counter (OTC) derivative markets, the ISDA Master Agreement. Under the ISDA Master Agreement, the insolvency of a derivatives' counterparty, or the

52. PRINCIPLES ON THE OPERATION OF CLOSE-OUT NETTING PROVISIONS, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW 56 (2013), http://www.unidroit.org/english/principles/netting/netting-principles2013-e.pdf.

53. Directive 2002/47, of the European Parliament and of the Council of 6 June 2002, 2002 O.J. (L 168) 43, 46.

54. FSB CONSULTATIVE DOCUMENT, *supra* note 33.

55. *See* FSB TBTF Report, *supra* note 44, at 11.

56. The insolvency law may apply to banks as *lex generalis*, while special rules (*lex specialis*) or exemptions from the general regime may apply where called for by the specifics of bank insolvency. *See* Eva H.G. Hüpkes, *Insolvency: Why a Special Regime for Banks?*, 3 CURRENT DEV. MONETARY & FIN. L. 471 (2005).

57. *See* Task Force Discussion Paper 2014, *supra* note 49, at 14–15 (noting that the asymmetric treatment of financial contracts in bankruptcy and resolution contexts might be path dependent but in any event it can create a variety of problems).

58. Edward J. Janger & John A.E. Pottow, *Implementing Symmetric Treatment of Financial Contracts in Bankruptcy and Bank Resolution*, 10 BROOK. J. CORP. FIN. & COM. L. 155 (2015).

commencement of resolution actions against it, can trigger certain close-out rights—including termination of the swap, foreclosure on collateral and claim for payments.[59] The need to comply with the industry's unified contractual approach created a further layer of inconsistency and a confused implementation of emerging standards regarding the treatment of financial contracts.

### C. RESOLUTION UNCERTAINTY

The myriad of principles and standards, differing countries' approaches to the treatment of financial contracts, and no cross-border resolution framework in place has created uncertainty concerning the recognition and enforcement of stay measures. The FSB peer review of resolution regimes from April 2013 found that the vast majority of resolution authorities do not currently have powers to give effect to foreign resolution measures in their jurisdiction in an expedited manner, and restrictions on termination rights as required by the Key Attributes have not yet been widely applied.[60] Therefore, it is unclear to what extent stays on termination rights under a particular resolution regime would be enforceable against financial contracts' counterparties of a banking firm or group, located in different jurisdictions and transacting under multiple laws.[61]

A global approach to cross-border resolution could, and perhaps should, be universalist in nature.[62] One approach could direct host countries, in which the failing institution may have branches or subsidiaries, to defer to the resolution-related laws of the home country that administer the main resolution process. However, in the absence of a cross-border framework that would subscribe to such a regime, countries may take different approaches, and in particular may apply local laws and local measures with lesser regard to the central process, taking place in the home country. Thus, courts or authorities supervising resolutions may or may not defer to home country laws regarding the treatment of financial contracts, with greater uncertainty arising where the contract prescribes rights that are not recognized by the host jurisdiction, or where the contract subjects the

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59. The Master Agreement contains standard legal obligations including provisions addressing events of default, termination events and immunity issues. *See* John Biggins & Colin Scott, *Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform*, 13 EUR. BUS. ORG. L. REV. 309, 327, 345 (2012) (noting that the ISDA Master Agreement is a strong, highly developed standard-setting regime, albeit a contractual mechanism).

60. *See* THEMATIC REVIEW, *supra* note 28; *see also* IMF 2014, *supra* note 29 (noting that resolution regimes were generally more developed for banks than for other types of financial institutions, but, even for banks, they lacked important powers such as bail-in or the ability to temporarily suspend early termination rights under financial contracts).

61. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 3–4.

62. *See* Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000) (in the context of cross-border insolvency). *See also infra* Part IV.

parties to a different system. The home country itself may lack measures for staying the termination of financial contracts. The case of Lehman Brothers is once again a telling example. Lehman's financial contracts portfolio was subject to different regimes, and different systems attempted to apply their laws regarding the same contracts, ending with conflicting decisions regarding the validity of the termination clauses included in the contracts.[63]

### D. CONTRACTUAL AND STATUTORY SOLUTIONS

Against this backdrop, an FSB expert group conducted surveys among its members to identify the current obstacles to greater certainty regarding the recognition of resolution measures. The expert group confirmed and noted that most jurisdictions do not currently have statutory powers to recognize and give legal effect to foreign resolution measures, and that particular challenges arise in respect to stays on early termination rights under financial contracts and the write-down and conversion of debt instruments governed by foreign law.[64] As a result, the FSB expert group set out, in a consultative document, a package of considerations and policy measures to address the legal uncertainties about the cross-border effectiveness of resolution measures (the Consultative Document).[65] The Consultative Document generally recognized the importance of developing a statutory regime that would address the obstacles. Indeed, the proposed measures included elements of a statutory approach for cross-border recognition, namely measures that countries may include within their statutory resolution regimes.[66] However, the Consultative Document considered a statutory solution a long-term, complex endeavor, and acknowledged that statutory solutions require more work by the standard-setter.[67] Thus, in an effort to promote certainty, the FSB recommended that contractual approaches to cross-border recognition be rapidly developed. Specifically, the contractual solution aimed to make temporary stays of early termination rights in financial contracts, and write-downs or conversion of debt instruments in resolution, effective in a cross-border

63. *See* Perpetual Tr. Co. v. BNY Corp. Tr. Servs. Ltd., [2009] EWCA (Civ) 1160 (Eng.); Lehman Bros. Special Fin. Inc. v. BNY Corp. Tr. Servs. Ltd., 422 B.R. 407 (Bankr. S.D.N.Y. 2010).

64. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 3, 11.

65. *See id.* at 4–15.

66. *See id.* at 4–11.

67. *Id.* at 8, 11.

context.[68] The Consultative Document was developed into final principles in November 2015 (the FSB Cross-Border Principles).[69]

### E. THE RESOLUTION STAY PROTOCOL AND ADDITIONAL REGULATORY MEASURES

The response to the resolution certainty concern, through the adoption of contractual solutions, has been primarily directed at reviewing the design of financial contracts, in particular through addressing the ISDA Master Agreement. Indeed, the FSB Too-Big-To-Fail Report stated that the G-20 authorities might encourage ISDA and other industry bodies to review contract provisions to help prevent large-scale early termination of financial contracts.[70] Accordingly, in November 2014, ISDA published a Resolution Stay Protocol that it prepared in consultation with home authorities of global significantly important banks.[71] The Protocol contractually opts adhering parties into provisions within specific qualifying special resolution regimes that limit the exercise of termination rights.[72]

Further policy measures discussed in the Consultative Document and delineated in the FSB Cross-Border Principles focus on enhancing the contractual approach through developing regulatory measures, namely official measures to support the adoption of contractual stay provisions, thereby making the contractual solution more effective and widespread. It was acknowledged that any contractual solution binds only the parties that agree to it. This limitation is particularly relevant in the context of contractual agreements to stay or limit the exercise of early termination

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68. *See id.* at 4, 8. *See also Public Responses to the September 2014 Consultative Document 'Cross-border Recognition of Resolution Actions'*, FIN. STABILITY BD. (Dec. 12, 2014), http://www.financialstabilityboard.org/2014/12/public-responses-to-the-september-2014-consultative-document-cross-border-recognition-of-resolution-actions/.

69. FSB CROSS-BORDER PRINCIPLES, *supra* note 44. The FSB Cross-Border Principles include contractual as well as statutory elements for cross-border recognition and support with an aim toward enhancing the effectiveness of resolution actions, as proposed in the Consultative Document. Similar to the Consultative Document, the Principles stress that the contractual approach can offer "a workable solution until comprehensive statutory regimes for giving cross-border effect to resolution action[s] are adopted." *Id.* at 6–7.

70. *See* FSB TBTF Report, *supra* note 44, at 6. In addition to addressing the ISDA Agreement and developing other contractual measures regarding stays, the FSB identified a set of key principles for recognition clauses in debt instruments that should support the exercise of bail-in powers in a cross-border context. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 14.

71. ISDA 2014 RESOLUTION STAY PROTOCOL (INT'L SWAPS & DERIVATIVES ASS'N 2014) [hereinafter 2014 RESOLUTION STAY PROTOCOL], http://assets.isda.org/media/f253b540-25/958e4aed.pdf. ISDA relaunched the resolution stay protocol in November 2015. The new "Universal Resolution Stay Protocol" updates and extends the 2014 Protocol to cover a wider universe of financial contracts. *See* Press Release, Int'l Swaps & Derivatives Ass'n, Major Banks Sign Relaunched ISDA Resolution Stay Protocol (Nov. 12, 2015) [hereinafter Relaunched ISDA Protocol], http//www2.isda.org/news/major-banks-sign-releunched-isda-resolution-stay-protocol.

72. The Protocol also provides for a stay that would apply in the context of a U.S. Bankruptcy Code proceeding in relation to a financial holding company, whereby a recapitalization occurs and the operating entities of the holding company remain viable going concerns. *See id.*

rights since, in order to be effective, such provisions would have to be adopted by both sides of the trade.[73] Thus, it was recommended that global, significantly important banks and, where appropriate, other firms with significant derivatives exposures, be required to use contractual language that replicated statutory stays of early termination rights under derivatives and other similar financial contracts. This was particularly important when parties traded with counterparts in jurisdictions that did not have statutory recognition regimes.[74] ISDA also announced that while the first phase of the Protocol adoption involved adherence by major banks and certain of their subsidiaries and affiliates who adhered to the Protocol on a voluntary basis, the need for adoption by other institutions will likely depend upon the scope of regulations that may be issued.[75]

At the same time, it was also recognized that regulatory measures to enhance the contractual approach entail limitations in regards to reaching non-regulated firms and ensuring their adherence to contractual solutions. Regulatory powers through prudential rules may not be available in relation to market participants that are not subject to requirements for resolution planning and resolvability assessments.[76] Many counterparties of prudentially regulated firms, such as asset managers and non-financial corporates, are not subject to prudential regulation. International financial institutions are often organized as groups, where some of the entities in the group may not be regulated.[77] The options for reaching unregulated entities by regulatory or other official action might be reduced to indirect means through requirements on firms that are subject to prudential regulation or direct requirements through market-based regulation.[78]

Implementation of the contractual solution has already been very successful. First, the Protocol has been both drafted and launched. Second, it has been adopted by an initial set of global systemically important banks

73. It is generally acknowledged that the contractual approach might entail certain limitations. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 11; FSB CROSS-BORDER PRINCIPLES, *supra* note 44, at 8. The enforceability of contractual recognition provisions have yet to be tested in the courts, and as a result, limitations on their enforceability may still exist (i.e., public policy as a basis for nonenforcement). *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 11. Furthermore, it is noted in the Consultative Document that where the contractual drafting differs from statutory provisions, foreign counterparties may not be subject to precisely the same standards as domestic counterparties. *See id. Cf.* Steven L. Schwarcz et al., *Comments on the September 29, 2014 FSB Consultative Document, 'Cross-Border Recognition of Resolution Action'* (Ctr. for Int'l Governance Innovation, CIGI Paper No. 51, Dec. 3, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537600&download=yes (arguing that the contractual approach has limited utility because it only binds the parties to the contract and even then its enforceability is questionable).

74. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33.

75. ISDA stated that it may publish amendments to the Protocol to reflect these regulations in due course. *See* 2014 RESOLUTION STAY PROTOCOL, *supra* note 71.

76. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 12–13.

77. *See* IMF 2010, *supra* note 2, at 6.

78. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 12–13.

and other large dealer banks. Third, it now governs existing and new OTC derivative contracts between the adopting banks since the beginning of 2015.[79] Fourth, FSB Members have also "agreed to act in a coordinated manner to promote . . . broad adoption of the contractual approach to making temporary stays of early termination rights . . . in financial contracts effective in a cross-border context."[80] Finally, the approach has also contributed to increased harmonization across insolvency and resolution and to the rethinking of the Insolvency Standard regarding the treatment of financial contracts, as discussed in the next section.

## III. THE CONTRIBUTION OF THE CROSS-BORDER RESOLUTION INITIATIVES TO THE DEVELOPMENT OF THE FINANCIAL CONTRACTS STANDARD

The contractual approach and generally the FSB cross-border resolution and the Protocol projects discussed above are particularly important to the understanding and development of the Insolvency Standard regarding financial contracts. Although the initiatives aimed to address cross-border issues rather than substantive laws, they highlighted the fact that the existing Insolvency Standard regarding financial contracts has become outdated and lacks a coherent rationale. Importantly, new thinking about the standard is leading to the emergence of a more consistent and harmonized approach to the treatment of financial contracts across insolvency/resolution.

### A. INSOLVENCY STANDARD ON THE TREATMENT OF FINANCIAL CONTRACTS: TRANSACTION CERTAINTY

The Insolvency Standard covers within its scope the insolvency regimes of business entities. The Insolvency Standard does not address the particular issues pertaining to financial institutions. However, it does cover and serve as a basis for assessment of any rules in the insolvency system that may also be applicable to these types of institutions. It was noted above with regard to the treatment of financial contracts that the Legislative Guide recommends a complete immunity for a broad range of financial contracts from fundamental bankruptcy principles.[81] "Financial contracts should . . . encompass existing varieties of financial contract[s] and . . . accommodate new types of financial contract[s] as they appear,"[82] and exemptions

79. The relaunch of the ISDA Protocol in November 2015 increased the types of covered financial contracts. *See* Relaunched ISDA Protocol, *supra* note 71.

80. *Id.* at 2.

81. Specifically, the commentary to the Guide explains that financial contracts include "among other things, securities contracts, commodities contracts, forward contracts, options, swaps, securities repurchase agreements, master netting agreements and other similar contracts." LEGISLATIVE GUIDE, *supra* note 9, at 156.

82. *Id.* rec. 107.

"should apply to all transactions that are considered to be 'financial contracts,' whether or not one of the counterparties is a financial institution."[83] Insolvency laws should recognize contractual termination rights that permit the termination of those contracts promptly after the commencement of insolvency proceedings. Where the insolvency law stays the termination of contracts or limits the enforceability of automatic termination clauses upon commencement of insolvency proceedings, financial contracts should be exempted from such limitations.[84] The Legislative Guide further directs insolvency regimes to permit counterparties to financial contracts to net or set-off obligations under the terminated contract,[85] "to enforce and apply their security interest to obligations arising out of financial contracts,"[86] and to protect the finality of the netting, clearing and settlement, and exempt transfers from preference or other avoidance laws.[87]

The World Bank Principles, prior to their recent amendment (discussed below), also recognized the automatic termination, netting, and close-out provisions contained in financial contracts, as an exception to the general rule on the treatment of contracts in insolvency proceedings. In general, and in order to achieve the insolvency objectives, the relevant principle provides that it should be allowed to interfere with the performance of contracts which may imply continuation, rejection, or assignment of contracts. In particular, in order to gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Provisions that provide for termination of a contract upon either an application for commencement or the commencement of insolvency proceedings should be unenforceable. Yet, the termination of financial contracts has been a special exception.[88]

This same complete immunity approach—which allows financial contracts to remain remote from fundamental bankruptcy implications—can be seen in the U.S. Bankruptcy Code's "safe harbors" that exempt financial contracts from the automatic stay and from voidable transactions provisions.[89] As noted elsewhere, the approach adopted in the Bankruptcy Code reflects a desire to preserve the liquidity of securities markets, even at

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83. *Id.* rec. 106.
84. *Id.* rec. 101.
85. *Id.* rec. 102.
86. *Id.* rec. 103.
87. *Id.* rec. 104–05.
88. *See* WORLD BANK PRINCIPLES, *supra* note 14, at 21.
89. Similar to the exemptions suggested in the Legislative Guide, the U.S. Bankruptcy Code exempts financial contracts from the automatic stay, and thus, "ipso facto" or "termination" clauses can be enforced upon bankruptcy, providing that obligations arising out of transactions between counterparties can be set-off on an aggregate basis, and that any collateral securing the contract or contracts could be sold. The transactions are also treated as final and exempt from preference or other later avoidance for any reason other than intentional (or "actual") fraud. *See* 11 U.S.C. §§ 362(b)(6), (7), (17), (27), 546(e), (f), (g), 555, 556, 559, 560, 561 (2012).

the expense of an insolvent firm and its non-financial creditors. Indeed, the effect of the safe harbors provisions was to allow certain creditors (i.e., counterparties to financial contracts), to make themselves "bankruptcy remote," while reducing the distribution to other claimants. Thus, the operation of close-out netting and other early termination rights in bankruptcy provided preferential treatment to the financial contracts' counterparties of the insolvent firm. This adversely affects the position of the general unsecured creditors of the insolvent entity, and allows a significant derogation from the fundamental principle of equal treatment of creditors in insolvency.[90] Furthermore, the exclusion of the financial assets that are subject to termination and netting rights that would otherwise be available for use by the debtor, in the form of cash collateral, results in limiting or eliminating the possibility for successful reorganization or a going concern sale.[91]

Similarly, the Insolvency Standard had lesser regard for the consequences of the exemptions afforded to financial contracts in terms of fairness to the body of creditors, the likelihood that a restructuring can be achieved, or the prospects of a going concern sale or orderly/coordinated liquidation. The goal of the Insolvency Standard in regards to financial contracts was to promote the certainty of (financial contract) transactions to better ensure the stability of financial markets.[92] The commentary to the Legislative Guide notes that because of the way financial contract transactions are structured and documented, it is imperative that there be certainty as to what happens when one of the parties to such contracts fails to perform, including for reasons of insolvency. Debtors often enter into multiple financial contracts with a given counterparty in a single course of dealing and the availability of credit is enhanced if rights under those contracts are fully enforceable in accordance with their terms. The commentary further explains that permitting close-out netting after the commencement of insolvency is an important factor in mitigating systemic risk that could threaten the stability of financial markets. Otherwise, a debtor's failure to perform its contract could result in the counterparty being unable to perform its related financial contracts with other market participants. The insolvency of a significant market participant could then result in a series of defaults in back-to-back transactions, potentially causing financial distress to other market participants and, in the worst case, resulting in the financial collapse of other counterparties, including regulated financial institutions.[93]

90. Task Force Discussion Paper 2014, *supra* note 49, at 1–3.

91. *See* Mark J. Roe & Stephen D. Adams, *Restructuring Financial Firms in Bankruptcy: Lessons from Lehman* (Harvard Law School, Discussion Paper No. 796, 2014).

92. *See* LEGISLATIVE GUIDE, *supra* note 9, recs. 101–07.

93. *Id.* at 156–57.

### B. CONSIDERATION OF BROADER GOALS AND HARMONIZATION OF STANDARDS

Other instruments concerning close-out netting provisions, financial collateral arrangements, and resolution regimes are more nuanced in their treatment of financial contracts (compared with the Insolvency Standard in its original form), as they have drawn lessons from the financial crisis.[94] These developments fueled a debate regarding the adequacy of the Insolvency Standard concerning the treatment of financial contracts.[95] It has become apparent that there is significant inconsistency between the Insolvency Standard and the Resolution Standard.[96] The recent developments in the area of cross-border resolution have been particularly instrumental to the debate.[97] As previously noted, the contractual approach developed in the context of the FSB cross-border resolution initiative aimed principally at dealing with the financial contracts conundrum. Yet, the approach entailed certain inevitable limitations, especially in terms of its possible reach to different types of entities, including those that are not prudentially regulated and entities within a group that may be subject to the bankruptcy regime. The limitations of the contractual and regulatory reach of the contractual solution emphasized the importance of greater consistency of the standard regarding financial contracts across the sections of the law, particularly to ensure that the stay measure is widely applicable in appropriate circumstances.

Importantly, the FSB cross-border resolution initiative prompted the rethinking of the rationale underlying the Insolvency Standard, in particular the appropriateness of the standard's focus on ensuring certainty of financial contracts' transactions as a means to promote stability. The different uses of certainty as a rationale for the design of insolvency/resolution standards highlighted the elusiveness and limitation of certainty as a sole objective. Indeed, in the context of the cross-border

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94. *See supra* Part II.

95. *See* discussions of the World Bank, "Insolvency and Creditor/Debtor Regimes Task Force Meeting" in January 2011 and November 2013. *See GILD*, WORLD BANK: GLOBAL INSOLVENCY LAW DATABASE, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,menuPK:64873782~pagePK:4789692~piPK:4789698~theSitePK:5807555,00.html (last visited Oct. 10, 2015); Comm'n on Int'l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Forty-Fourth Session, U.N. Doc. A/CN.9/798, at 8–9 (2014) [hereinafter UNCITRAL Working Group V].

96. *See* Janger & Pottow, *supra* note 58.

97. *See* discussions from the World Bank, "Law, Justice and Development Week, Panel on the Resolution of Financial Institutions" in October 2014. *See Law, Justice and Development (LJD) Week 2014: Financing and Implementing the Post-2015 Development Agenda*, WORLD BANK, http://www.worldbank.org/en/events/2014/10/20/law-justice-and-development-week-2014 (last visited Oct. 10, 2015); *Insolvency and Creditor/Debtor Regimes Task Force Meeting on the World Bank Principles on the Treatment of Financial Contracts*, WORLD BANK: GLOBAL INSOLVENCY LAW DATABASE, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:23633430~menuPK:9713419~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html (last visited Oct. 10, 2015).

resolution work, the key aim has been increasing resolution certainty rather than transaction certainty, namely ensuring the effectiveness of authorities' resolution measures and increasing certainty in the application of such measures in multiple jurisdictions. Thus, contracts should be subject, through recognition clauses, to laws that are compliant with the Resolution Standard and that impose the temporary stay. This shift in the goal to ensuring the effectiveness of authorities' resolution stay measure, including at the expense of transaction certainty, reinforced the importance of pursuing goals beyond transaction certainty with regard to the treatment of financial contracts.

Transaction certainty is an important aspect in the goal of enhancing efficiency, including upholding pre-insolvency acquired rights in the course of insolvency proceedings, promoting commerce and the grant of credit, and avoiding perverse incentives at times approaching insolvency.[98] Yet, generally, certainty and economic efficiency must be pursued with regard to rules that are justified on a broader fairness basis that seek to accommodate all interests involved.[99] Indeed, any creditor would wish to be certain that their dealing with a business would be respected according to the transaction terms and would not be affected by the business' insolvency. However, insolvency requires the consideration of other interests and objectives, including: the possibility of rescuing a business; achieving a result in the course of the insolvency process that is beneficial for the creditors as a whole; and ensuring equitable treatment of creditors.[100] Thus, independent enforcement may be stayed in insolvency, transactions may be cancelled if they entail a preference to certain creditors at the expense of other creditors, and the distribution of the insolvency estate may take into account policy considerations leading to a degree of redistribution of pre-acquired rights.[101]

The Insolvency Standard delineated in the Legislative Guide, in its general proclamation on objectives of insolvency systems, in fact embraces such a broad approach to insolvency goals, and emphasizes the need to balance a range of interests in the design and application of insolvency

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98. *See, e.g.*, Douglas G. Baird, *A World Without Bankruptcy*, 50 L. & CONTEMP. PROBS. 173 (1987); Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 580–82 (1998); Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209 (1989); IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 10 (2d ed. 2005) (noting the respect of security interests created prior to the onset of insolvency as an internationally recognized fundamental principle, crucial for a system of credit).

99. *See, e.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 811 (1987); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 781 (1991); VANESSA FINCH, CORPORATE INSOLVENCY LAW 40–41 (1st ed. 2002); RIZWAAN J. MOKAL, CORPORATE INSOLVENCY LAW: THEORY AND APPLICATION 24–25 (1st ed. 2005).

100. *See* sources cited *supra* note 99.

101. These are fundamental aspects of insolvency regimes recognized in the insolvency standard. *See* LEGISLATIVE GUIDE, *supra* note 9, paras. 7, 13.

laws. Thus, the Legislative Guide states that one key objective of insolvency systems is enhancing certainty in the market to promote economic stability and growth. Yet, it also explains that other objectives should be pursued in a balanced manner. Insolvency laws should enable reorganizations, and pursue such solutions when on balance of interests it can be the most fair and efficient result and ensure equitable distribution to creditors.[102] However, the standard rule that seeks to ensure complete bankruptcy remoteness of financial contracts is based heavily on (transaction) certainty, and fails to take account of all relevant interests and implications of the contemplated immunities. Certainty of transaction is upheld, and the risk of contagion and market instability considered, yet there is little regard to the impact of the immunities on the stakeholders as a whole in the event of insolvency, and the chances to rescue the business following the close-out netting of the financial contracts.

This one sided approach to the treatment of financial contracts in insolvency is changing. In view of the newer developments and, in particular, the emphasis of the cross-border resolution initiative on imposing restrictions on parties' rights, certainty of transaction may no longer be viewed as a sole, leading goal. At the end of 2014, the World Bank Global Task Force on Insolvency and Creditor-Debtor Regimes, which regularly reviews the World Bank Principles, decided to analyze the existing principle on the treatment of financial contracts with a view of ensuring that it is based on a coherent justified rationale.[103] Importantly, the limitation of certainty as a lead goal in the design of insolvency/resolution rules and the need to consider the interests of the collective body of creditors, while also taking into account market stability concerns, has been acknowledged in discussions of the Task Force's expert group.[104]

The World Bank expert group accordingly proposed certain amendments to the original principle that has been a component of the Insolvency Standard on financial contracts. The World Bank expert group acknowledged the possibility of imposing a temporary stay on termination and close-out netting, particularly in order to accomplish the orderly transfer of contracts to a solvent counterparty, and setting forth criteria for determining which contracts should be accorded this special treatment.[105] The articulated goal of revising the principle was to enable the standard to reflect and facilitate implementation of post-crisis norms (i.e., to increase

102. *See id.* ch.1, sec. B.

103. *See* World Bank, Working Group Meeting Notes, *Insolvency and Creditor/Debtor Regimes Principles: The Treatment of Financial Contracts in Insolvency* (Dec. 17, 2014), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:23659444~menuPK:9771000~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html (follow "Expert Group Meeting Notes"). The author has led the Task Force in her capacity as senior counsel at the World Bank.

104. *See id.*

105. *See id.* para. 6.

harmonization).[106] Accordingly, the view was that the principle on financial contracts should be revised to allow assessors of legal systems to recognize jurisdictions that are in compliance with best practice standards and within the scope of permitted approaches, including those contemplated in the Resolution Standard.[107] The revised principle now takes into account such newer developments and, importantly, it bridges the gap between the previously differing approaches to insolvency/resolution.[108]

## IV. PROGRESSING TO A FRAMEWORK SOLUTION FOR CROSS-BORDER RESOLUTION

### A. ADDRESSING THE CRITICAL GAP IN THE INTERNATIONAL INFRASTRUCTURE FOR RESOLUTIONS

The deliberations coordinated by the FSB for addressing obstacles in regard to cross-border resolution, is an opportunity to fill the important gap in the international financial infrastructure concerning cross-border insolvency and resolution (i.e., the absence of a global framework for resolution). The effort to enhance standardization and harmonization through effective implementation of the Key Attributes (i.e., the Resolution Standard) is instrumental to the development of a cross-border resolution framework. Indeed, the improvement of the Insolvency Standard regarding the treatment of financial contracts and the increasing cross-sector consistency of best practice standards are likely to accelerate harmonization of national resolution-related laws, which in turn can support a cross-border resolution framework.

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106. *See id*. para. 7.

107. *See id.*; *Insolvency and Creditor/Debtor Regimes Task Force (May 27, 2015)*, WORLD BANK: GLOBAL INSOLVENCY LAW DATABASE, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:23659444~menuPK:9771000~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html (last visited Oct. 10, 2015).

108. The principle was revised by Professor Janger at the request of the World Bank Insolvency and Creditor/Debtor Regimes Task Force and was endorsed by the Task Force in May 27, 2015. *See* Rodrigo Rodriguez, *Task Force Meeting: Insolvency and Creditor/Debtor Regimes Rapporteur's Synopsis*, WORLD BANK (May 27, 2015), http://siteresources.worldbank.org/INTGILD/Resources/ICR_Task_Force_2015_Rapporteur_Synopsis_Rodriguez.pdf; *see also* WORLD BANK PRINCIPLES, *supra* note 14. The part of the standard provided in the UNCITRAL Guide has not been revised yet, and is still in its original 2004 form. However, Working Group V of UNCITRAL has resolved to address the issue in future deliberations as a matter of priority. *See* UNCITRAL Working Group V, *supra* note 95; U.N. Comm'n on Int'l Trade Law, Insolvency Law: Treatment of Financial Contracts and Netting; Sovereign Debt Restructuring, Note by the Secretariat, U.N. Doc. A/CN.9/851 (2015). The Commission has not yet provided the Working Group with a mandate to pursue the revision, noting that for now the Working Group should focus on the topics currently before it. *See* U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/70/17, at para. 359 (2015).

Standardization and harmonization of measures for resolution improve the infrastructure for a cross-border resolution regime and may instill greater mutual trust among the key players, including the supervisory and resolution authorities. The need to reach a high quality convergence in order for a cross-border regime to operate effectively has been stressed by standard-setters. The IMF 2010 report noted that the legal framework for the authorities involved in global group-wide resolution would need to share certain key features, in particular concerning nondiscrimination against foreign creditors, effective intervention tools, appropriate creditor safeguards, and sufficiently harmonized rules on priority.[109] Harmonization and convergence is also one of the manners envisaged by the Resolution Standard for achieving cross-border effectiveness and cooperation.[110]

However, notwithstanding the import of harmonization, and the necessity of a degree of convergence for an effective operation of a cross-border resolution framework, a cross-border framework itself should be created in order to address the private international aspects pertaining to resolution. Harmonization is a slow process and indeed progress has been mixed.[111] Additionally, it is not likely that full harmonization will ever be achieved. Furthermore, complete harmonization may not be desirable due to possible impeding effects on the local developments of resolution regimes. Domestic resolution regimes may evolve over time and countries may develop certain new concepts and measures to address new challenges. Indeed, it is through such experiences and developments that the regulatory landscape may remain modern and fit for purpose.[112] Finally, even if resolution regimes are fully harmonized, a cross-border framework would still be required. Such a framework could prescribe the degree of coordination in implementing the (harmonized) measures and the manner of cooperation or centralization—in particular whether a certain authority takes the lead in the initiation and conduct of measures.

This Part seeks to address possible constraints and concerns that may impede the further development of cross-border solutions and their transformation into a global framework. This discussion draws from the experiences of developing and implementing international standards and

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109. *See* IMF 2010, *supra* note 2, at 19–21; s*ee also* Eva H.G. Hüpkes, *Rivalry in Resolution, How to Reconcile Local Responsibilities and Global Interests?*, 7 EUR. COMPANY & FIN. L. REV. 216 (2010).

110. *See* KEY ATTRIBUTES, *supra* note 4, at 4. The Key Attributes state that "in order to facilitate the coordinated resolution of firms active in multiple countries, jurisdictions should seek convergence of their resolution regimes through the legislative changes needed to incorporate the tools and powers set out in these Key Attributes into their national regime." *Id.*

111. An IMF 2014 report also warns that implementation of the Key Attributes would only partially align divergent national interests and incentives that work against cooperative cross-border resolution strategies. *See* IMF 2014, *supra* note 29, at 23.

112. *See* Luca Enriques & Matteo Gatti, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, 27 U. PA. J. INT'L ECON. L. 939 (2006).

cross-border solutions in the commercial context. Additionally, this discussion seeks to highlight the relevance of the enterprise cross-border model framework to the deliberations on a framework for financial institutions. This Part does not attempt to provide detailed proposals of model provisions for cross-border resolutions. Specific models for cross-border resolutions have been proposed in other studies,[113] yet so far, such proposals have not been taken fully on board. Therefore, this Part aims to promote the idea of a framework solution and argues for the relevance of an equivalent framework for commercial entities. Indeed, central to the motivation for putting these ideas forward is the concern that without fully acknowledging the importance and adequacy of a framework approach for financial institutions' resolution, proposals for specific models will not materialize into concrete action.

### B. CONSTRAINTS DERIVING FROM A FOCUS ON CERTAINTY

The recent initiatives on recognition of resolution measures (the FSB initiative and the Protocol) discussed above aimed to promote certainty in the enforcement and effectiveness of resolution measures when they are applied, specifically a stay on the financial contracts. The focus on resolution certainty has been important in view of the financial contracts conundrum. The initiatives sought to mitigate and rebalance earlier inclinations to focus merely on certainty of the financial transactions according to their terms. The initiatives also assisted in the development and harmonization of the standards across the resolution and insolvency fields.

Yet, to fully address the cross-border gap, a broad set of goals should be considered, and solutions should aim to ensure stability and contain losses through a fair and effective cross-border regime. For that purpose, the range of interests relevant to the design of a cross-border regime should be taken into account, in particular the benefits that may ensue from centralized or coordinated solutions and the possible concerns regarding local interests if resolutions are handled or coordinated from outside host jurisdictions. In other words, a cross-border regime should promote a solution that provides the level of a desired global approach to multinational default, beyond the certainty of recognition of specific measures. A focus on certainty problems alone may impede the development of a framework solution that relies on a broad consideration of goals.

To the extent that the cross-border resolution policymaker would seek to achieve a sufficient level of universality in cross-border resolution cases, it would need to design a uniform approach for resolution that seeks to harmonize private international aspects pertaining to resolution. The higher degree of universalism sought, the higher level of uniformity and the higher

113. *See infra* note 134.

level of centralization that would be required, in terms of deference to a foreign forum and foreign laws. Universalism is founded on the idea of "unity of bankruptcy;" for every given debtor there would be a unified process of administration of the estate in the event of insolvency.[114] This corresponds with the assertion that, as insolvency should entail a collective process, an effective insolvency system should be symmetrical with the market, covering all or nearly all transactions and stakeholders in that market.[115] In resolution, a universal solution may need to include obligations related to key issues such as selection of a lead authority and burden sharing.

Territorialism, on the other hand, stresses state sovereignty and emphasizes the importance of, and unique distinctions between, national legal regimes. It strives to ensure minimum interference with domestic policies. It also suggests that nations may be concerned about subordinating their own bankruptcy laws and policies to the laws and policies of another jurisdiction.[116] In the resolution context, a territorial approach may entail the de-globalization of financial institutions. Thus, under a territorialist system, institutions would function as stand-alone subsidiaries, separately within each jurisdiction.[117]

A middle-ground approach, so called "modified universalism," seeks to promote global solutions while giving due regard to local expectations and concerns.[118] In the resolution context, a middle-ground approach advocates enhanced coordination between resolution authorities as a balanced solution between universality and territoriality.[119]

A cross-border regime and the elements it would comprise of, including the recognition of various resolution measures, should be based on this fundamental policy choice between universality and territoriality, reflecting the wide consideration of relevant goals. Decisions regarding both the type of instrument sought, in particular whether it is a more coherent uniform model, or merely guidelines for national legislatures, and regarding the content of the regime should reflect this policy choice.

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114. *See* FLETCHER, *supra* note 98, at 11–12.

115. *See* Westbrook, *supra* note 62, at 2277. The concept of collectivism in insolvency is widely accepted in bankruptcy theory. *See* FLETCHER, *supra* note 98, at 8–10; Andrew T. Guzman, *International Bankruptcy: In Defence of Universalism*, 98 MICH. L. REV. 2177 (2000).

116. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218–20 (2000) (Professor LoPucki developed a mitigated version of territorialism known as "cooperative territorialism" that encourages cooperation based on agreements between the appointed insolvency representatives); *see also* Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 8–9, 12 (2003); Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001).

117. *See* IMF 2010, *supra* note 2, at 15.

118. *See* Westbrook, *supra* note 62, at 2277.

119. *See* IMF 2010, *supra* note 2, at 15.

Indeed, the emergent consensus has been that a middle-ground approach that facilitates a degree of global approach in cross-border resolution is most appropriate and most realistic.[120] In both restructurings and liquidations, a global approach is paramount to containing the systemic impact of the bank failure and to realizing coordination benefits.[121] Yet, regard should be given to the impact of the resolution solution on the interests of local creditors and the country's financial stability.[122] The Basel Committee advocated in 2010 for an enhanced coordination approach among resolution authorities as a middle ground solution that balances between territoriality and universality.[123] It recommended that national authorities develop procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures. The IMF 2010 report proposed possible elements of a framework that would underpin the middle-ground approach, to facilitate coordination across borders without requiring a surrender of national sovereignty. The Resolution Standard contemplated in the Key Attributes also reflects a policy choice that would encourage maximum cooperation and support, while safeguarding local interest.[124]

To give full effect to the middle-ground choice, a uniform instrument in the form of a concrete agreement on a global scale is required. High-level principles cannot guarantee the desired level of coordination, support, assistance, and conflict avoidance. Observing the experience of the development of private international tools for commercial cross-border insolvency is telling. In that context, it has been acknowledged that a universal approach can promote effective and fair solutions for failing global enterprises by avoiding the dismemberment of a business and by considering the interests of the collective body of creditors wherever located. At the same time, creditors may have localized expectations that require consideration, particularly in view of limited harmonization of laws.[125] Modified universalism seemed to be the preferred approach, but attempts to achieve such approach through country-by-country development of private international law rules has been futile. In fact, it increased conflicts and resulted with greater territorialism, even though countries have attempted to design such laws in order to resolve the problem of conflict

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120. *See id. at* 16–17.

121. *See id.* at 12. The report mentions the cases of Fortis and Lehman Brothers that demonstrated how the existing territorial approach had failed to realize coordination benefits.

122. *See id.* at 18.

123. *See* BASEL REPORT, *supra* note 39.

124. *See* KEY ATTRIBUTES, *supra* note 4, at 7.

125. *See* FLETCHER, *supra* note 98, at 445; Harry Rajak, *The Harmonization of Insolvency Proceedings in the European Union* (World Bank Glob. Forum on Insolvency Risk Mgmt. 2003); Westbrook, *supra* note 62, at 2277.

created by differing national insolvency regimes.[126] International fragmentation of policy and approach to cross-border insolvency issues has had negative effects and eventually led to the development of framework solutions.[127]

Indeed, standards and principles regarding cross-border aspects of insolvency or resolution regimes can mitigate diversity of private international law rules. Yet, their implementation is still prone to fragmentation and cherry picking of specific principles, resulting in continuing conflicts and even asset-grabbing.[128] It is also difficult to create a structured framework through implementation of standards. Standards may specify aspects of the cross-border system and provide key concepts on what it should include. However, only a model framework could provide the required precision and delineation of steps in the process. The design of a complete set of uniform provisions that would be implemented as is, could as a whole, prevent fragmentation and significantly mitigate the risk of incompatible and conflicting rules.

Contractual solutions of the sort promulgated in the recent cross-border resolution initiatives that require recognition of certain measures may enhance certainty of application of those measures. The statutory approach that encourages inclusion of recognition and support measures in each country's laws pursuant to assisting principles, may further increase the certainty that measures can be recognized and supported in other countries.[129] However, such solutions are insufficient for addressing the cross-border gap that requires a broader goal baseline, namely, a framework that would reflect the middle-ground approach between universality and territoriality. Thus, each country, in compliance with principles delineating elements of statutory solutions, may attempt to provide greater clarity within the national regime regarding the recognition and support measures available. However, clarity and availability of recognition measures within each regime might not result in a uniform adoption of the relevant rules across jurisdictions, and might not ensure that the rules themselves would adequately reflect the desired balance between universality and territoriality.[130]

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126. *See* FLETCHER, *supra* note 98, at 7. Professor Fletcher refers to the "familiar paradox of the subject of private international law, namely that the rules which have been developed within each system of law for the purpose of accommodating the conflicting effects of different national laws have somehow contrived to perpetuate, albeit at a different level and in a different way, the very syndrome of diversity which originally inspired them." *Id.*

127. *Id.*

128. *See* Bob Wessels, *Giving Legal Effect to Foreign Resolution Measures in the Financial Sector*, 28 INSOLVENCY INTELLIGENCE 44 (2015).

129. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 8–11 (elaborating on the statutory approach); FSB CROSS-BORDER PRINCIPLES *supra* note 44, at 11–13.

130. Indeed, the FSB Consultative Document and the FSB Cross-Border Principles mention that the elements of statutory regimes delineated in the documents are not intended to be comprehensive; each jurisdiction will need to consider what is required in the context of its own

Indeed, if the middle-ground approach is pursued, an international agreement is required on a range of matters, including: the timeframe and conditions for recognition or for refusal to grant recognition, whether recognition would relate to the proceedings or to specific measures, and whether support or relief would be automatic or discretionary. A cross-border regime would need to be designed accordingly and with sufficient detail, so that it can be implemented as a complete framework in different legal systems. Only then would the cross-border regime be compatible with its goal, as it would provide the desired degree of universality while taking due account of local concerns.

### C. CONCERNS ABOUT THE RELEVANCE OF THE MODEL LAW

Recent important proposals for addressing cross-border resolutions have referred to and built on the Model Law.[131] Indeed, the Model Law is the only global model available for cross-border insolvency and hence an expected point of reference. The Model Law for commercial entities has been designed with the view of providing a high level of uniformity in the application of private international law aspects, while safeguarding local creditor expectations and allowing host countries to retain some control in the administration of cross-border insolvency. Thus, the Model Law facilitates the recognition of a main proceeding and the granting of relevant assistance and relief to such proceedings. It also accommodates the possibility that additional non-main or limited proceedings concerning local assets might be opened in other jurisdictions, while promoting cooperation and coordination in such cases. It also provides a level of flexibility in the granting of a range of relief to the main, or non-main, proceedings, following their recognition.[132] There are also specific provisions regarding interpretation of the model provisions, requiring taking into account the international origin of the framework in its implementation, in order to promote uniformity.[133]

Yet, notwithstanding the frequent reference to the Model Law in the discussions of the problem of cross-border resolution, there is a level of

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legal system for the recognition framework to be effective. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 1; FSB CROSS-BORDER PRINCIPLES, *supra* note 44, at 5–6.

131. *See* IMF 2010, *supra* note 2, at 32–33 (drawing largely on the Model Law for the content of the proposals); *see also* Jonathan M. Edwards, *A Model Law Framework for The Resolution of G-SIFIs*, 7 CAP. MKTS. L.J., 122 (2012); Rosa M. Lastra, *Northern Rock, UK Bank Insolvency, and Cross-Border Bank Insolvency*, 9 J. BANKING REG. 165, 175–77 (2008); Jay L. Westbrook, *SIFIs and States*, 49 TEX. INT'L L.J. 327 (2014); Schwarcz, *supra* note 73 (criticizing the contractual approach contemplated in the consultative document and suggesting focusing on a statutory approach, referring to the UNCITRAL Model Law as a "practical alternative" to a treaty that "has proved successful in a related context").

132. Except for the stay of proceedings and enforcement, which is automatic upon recognition of main proceedings, other relief (e.g., entrusting the realization of the debtor assets located in the host state to a foreign representative) is discretionary. *See* MODEL LAW, *supra* note 3, arts. 20–21.

133. *See* MODEL LAW, *supra* note 3, art. 8.

skepticism about the Model Law's relevance to the financial institution context. It has been noted that the Model Law was designed for corporate non-bank enterprises, and it did not address group structures, which are the prevalent form of global financial institutions.[134] Financial institutions are arguably more complex and the model law approach might be too simplistic in that context.

### 1. The Model Law's Bearing on Financial Institutions

The Model Law is a general model for cross-border insolvency. It is applicable to any debtor, including individual persons and legal entities. As previously noted, the Model Law allows jurisdictions to exclude certain entities, such as banks, that are subject to special insolvency regimes, from the scope of the framework. It does not exclude, though, such entities outright from its scope, and does not envisage that the regime it proposes would be completely irrelevant to such entities. In fact, the Model Law notes in its Guide to Enactment that it is not advisable to exclude all cases of insolvency of credit institutions.[135]

At the same time, the Model Law takes into account the fact that financial entities may be subject to special regimes. Indeed, it is widely acknowledged that the regulation and treatment of bank insolvency has certain specific objectives, and therefore bank insolvency requires special rules. It has been argued in this respect that because of the need to consider objectives other than maximization of the estate value, most countries have chosen to treat bank insolvencies differently from ordinary commercial insolvencies.[136] In addition to creditor and debtor interests, bank insolvency law must consider the public interest, and in certain circumstances, this consideration may justify a departure from the "pari passu" principle, which holds in general insolvency law.[137] It is further argued that the differences between general insolvency law and bank regulatory rules are even more striking in the international context since national insolvency rules are based predominantly on the principle of territoriality, whereas in banking regulation the principles of consolidated supervision are applicable.[138] With

134. *See, e.g.*, Edwards, *supra* note 38, at 124–25, 135 (specifically noting the failure of the Model Law to address groups and to satisfy the universalist benefits); EVA H.G. HÜPKES, THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY 379 (Henry Peter, Nicolas Jeandin, Jason Kilborn eds., Verlag Schulthess 2006). The FSB Consultative Document also notes that the Model Law is generally not applicable to financial firms and does not include specific rules regarding enterprise groups. *See* FSB CONSULTATIVE DOCUMENT, *supra* note 33, at 7. The IMF 2010 paper notes the great relevance of the Model Law, but also notes the fact that it does not address groups. *See* IMF 2010, *supra* note 2, at 32–33.

135. *See* MODEL LAW, *supra* note 3, paras. 58–59.

136. *See* Hüpkes, *supra* note 56, at 13. Hüpkes also notes the distinct features of bank insolvency (i.e. the involvement of the bank supervisor and the deposit protection agency). *See also* Edwards, *supra* note 38, at 140.

137. *See* Hüpkes, *supra* note 56, at 12.

138. *Id.* at 28.

regard to systemically important global financial institutions, it is further stressed that the complexity of such institutions presents specific challenges. Countries' incentives to achieve multinational solutions in cases of failure of globally important financial institutions need to be aligned through prescribing country roles in default scenarios and establishing burden-sharing arrangements.[139]

Notwithstanding the specific concerns and special goals of resolving international banks and particularly globally systemically important financial institutions (G-SIFIs), it is also important to acknowledge the significant commonalities in terms of the goals baseline to appreciate the relevance of drawing lessons from cross-border insolvency. As indicated in Part III above,[140] international proclamations of insolvency objectives have emphasized goals beyond certainty of transaction and beyond value maximization for existing creditors. There is a consensus that an insolvency regime should balance between a range of interests, and may pursue social policies such as encouraging the development of an entrepreneurial class and protecting employment.[141] An insolvency regime may therefore allow the redistribution of pre-insolvency acquired rights,[142] or take on board to encourage a reorganization even if existing creditors would prefer a liquidation.[143] In regards to cross-border insolvency, it is agreed that pursuing the broad range of goals requires coordination between jurisdictions, facilitation of the provision of assistance to foreign proceedings, and recognition of foreign proceedings, by adopting the Model Law in national regimes.[144] The Model Law aims to achieve a wide range of goals, including promotion of cooperation, greater legal certainty, fair and efficient administration of cross-border insolvency proceedings, maximization of the value of the estate, facilitation of rescue of distressed businesses, protecting investment, and preserving employment.[145]

Thus, the Model Law for commercial entities supports broad objectives of insolvency systems, and it is specifically designed to depart from pure territorialism. It facilitates fair and effective solutions of cross-border insolvency cases through the provision of a uniform framework that carefully balances universality advantages and territorial concerns, allowing for a wide range of insolvency or restructuring solutions. It provides an ex ante pre-defined regime that specifies the steps that can be taken by those in control of the process to ensure that there is a sufficient degree of coordination and a global approach over the multinational default. A special

139. Edwards, *supra* note 38, at 125, 143–45.
140. *See infra* Part III.B.
141. *See* LEGISLATIVE GUIDE, *supra* note 9, para. 3.
142. *See id.* para. 13 ("equitable treatment may be modified by social policy on priorities").
143. *See id.* para. 3.
144. *See id.* para. 14, rec. 5.
145. *See* MODEL LAW, *supra* note 3, pmbl.

regime for international financial institutions may seek to achieve similarly broad goals by the use of a similar instrument, adjusting it to fit the peculiarities of cross-border resolution.

#### 2. Skepticism About The Model Law's Relevance to Group Structures

A key skepticism about the Model Law and commercial insolvency's relevance to financial institutions is related to the treatment of enterprise groups. Global financial institutions tend to operate as groups, and supervision is often on the group level. While in the bankruptcy scenario the group might be split into the various legal entities, an entity-by-entity approach might not be effective given the intertwined activities within a financial institution group and the potential for spillover effects from other companies in the group. In particular, it is noted that there is a tendency for foreign subsidiaries and branches to centralize core operational capacity at the head office in their home jurisdiction, and that an international framework should acknowledge such structures.[146] The key problem with the current state of affairs is that financial groups operate globally, while the frameworks for addressing their distress and failure are still local and apply to distinct parts of the group rather than to the group as a whole.[147] The relevance of the universalism-territorialism debate has also been questioned in view of the prevalence of group structures in global financial institutions.[148]

The similarities of challenges concerning cross-border insolvency/resolution are striking, though, even when considering the "group problem." In the commercial enterprises' context too, enterprises increasingly tend to operate as groups, especially when conducting cross-border businesses. Similar issues of disconnect between the way the enterprise has been operating in the ordinary course of business, as an integrated enterprise, and the way it might be addressed when insolvent, fragmented to the entities, arise in the general insolvency context.[149] In the recent Nortel saga, the primary struggle has been how to achieve a fair and efficient solution for the highly integrated global enterprise group. Multiple proceedings were opened in multiple jurisdictions. An initial agreement resulted in pooling the assets of the group entities together. A prolonged and costly legal battle on the allocation of the proceeds ensued, eventually resulting in dual decisions of the US and Canadian courts concerning pro

146. *See* Hüpkes, *supra* note 56, at 31; IMF 2010, *supra* note 2, at 7.
147. *See* IMF 2010, *supra* note 2, at 8.
148. *See id.* at 15.
149. *See generally* IRIT MEVORACH, INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS (2009).

rata distributions among all creditors of the group.[150] Thus, the need to treat an international group as a unit, in order to maximize its value, minimize costs of multiple uncoordinated processes, and avoid conflicting decisions, is an important aspect of both commercial entities' and financial institutions' cross-border regimes.

Admittedly, a key deficiency of the Model Law has been the absence of explicit rules regarding groups. The Model Law addresses and provides provisions on access, recognition, and relief to foreign proceedings of debtors, not groups, and on cooperation and coordination in cases of multiple proceedings regarding the same debtor. However, and importantly, the Model Law does not exclude groups from its scope. Notably, the practice shows that many cross-border insolvency cases of groups have been addressed effectively under the Model Law. In many group cases, proceedings regarding affiliated entities have been centralized in a single jurisdiction, often at the headquarters from where the group entities were managed, and recognition was granted to that jurisdiction, thus facilitating group solutions.[151] Courts could have acknowledged in these cases that the center of main interests (COMI)[152] of all entities, regarding which recognition was sought, was in the same place. Recent revisions to the Guide to Enactment of the Model Law enhanced this approach by clarifying that the presumption that COMI is at the entity's registered office can be rebutted, primarily by a finding concerning the location of the entity's central administration (headquarters), as ascertainable by third parties.[153] The headquarters of entities in an integrated group are often at a single location, where the group is centrally controlled.[154] Thus, the Model Law has been applied in a manner consistent with the modified universalist paradigm that seeks to promote global solutions to multinational default, in a group context too, facilitating value maximization through seeking global group solutions.

### 3. Addressing The Model Law's "Group-Gap"

The more difficult scenarios that were not always properly addressed under the existing scheme of the Model Law have been those where groups were structured with greater decentralization, such as in cases like Nortel

150. *See* Nortel Networks Corp. (Re), [2015] ONSC 2987 (Can. Ont. Sup. Ct.); *In re* Nortel Networks, Inc., 469 B.R. 478 (Bankr. D. Del. 2012).

151. *See* Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 517, 537–43 (2011).

152. The center of main interests is the jurisdictional test and basis for recognition of foreign proceedings as foreign main proceedings under the Model Law. *See* MODEL LAW, *supra* note 3, arts. 2, 16.

153. *See id.* para. 145.

154. *See* Irit Mevorach, *The Home Country of a Multinational Enterprise Group Facing Insolvency,* 57 INT'L & COMP. L.Q. 427, 440–45 (2008).

and Lehman Brothers.[155] UNCITRAL therefore tasked itself to address the "group gap" and to expand the Model Law (possibly through adding a supplement to the Model Law) to include additional tools to facilitate group solutions in cross-border cases. Deliberations acknowledge the fact that the existing Model Law may already apply in certain group scenarios (i.e., where the group was sufficiently centralized and a mutual COMI can be identified). Consideration is given to allowing a degree of centralization or at least coordination of group proceedings, in addition to cooperation measures, also in circumstances where entities had separate centers in different countries. Thus, entities belonging to the same enterprise group, or to an integrated part thereof, may commence coordinated proceedings in a forum where at least one of the entities that is an important and integral part of the group solution is centered. In that forum, a joint group solution may be developed and implemented in the jurisdictions of the separate entities. Consideration is given to providing additional measures to avoid the opening of proceedings in host jurisdictions, subject to safeguarding the rights of local creditors.[156] Such solutions may assist in resolving more effectively cases of large, widespread, and decentralized enterprise groups.

This initiative on cross-border insolvency of groups, which is still in progress, is linked to previous work that was concluded in 2010, when UNCITRAL adopted a set of recommendations that were added to the Legislative Guide on matters pertaining to enterprise groups in insolvency. Thus, the Legislative Guide now includes recommendations on measures such as procedural coordination, substantive consolidation, intra-group post-commencement finance, voidable intra-group transactions, and joint reorganization plans. It provides important background information and recommendations on how to resolve the difficult dilemma between the need to respect the corporate form and the need to take into account the economic realities of groups.[157] Indeed, resolving group insolvency effectively requires that domestic regimes have in their systems certain specific measures for the treatment of groups. For example, in certain circumstances, groups might be so highly integrated in terms of their assets and liabilities that attempting to unscramble the estates would involve disproportionate costs. In such circumstances, the applicable insolvency law

155. *See* Jay L. Westbrook, *Coordination in International Corporate Insolvencies*, *in* Lastra, *supra* note 131, at 187.

156. *See generally* U.N. Comm'n on Int'l Trade Law, Insolvency Law: Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups, U.N. Doc. A/CN.9/WG.V/WP.128 (2015); U.N. Comm'n on Int'l Trade Law, Insolvency Law: Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Key Principles, Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.133 (2015); U.N. Comm'n on Int'l Trade Law, Insolvency Law: Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Revised Draft Legislative Provisions, Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.134 (2015). The deliberations are still ongoing and the work was not yet finalized at the time this Article went to print.

157. *See* LEGISLATIVE GUIDE PART THREE, *supra* note 15.

should allow consolidation of the estates.[158] The definition of "enterprise" for the purpose of these recommendations provides that specially regulated entities not covered by the insolvency law are not intended to be included. Yet, it has also been noted that banks often form part of a multinational enterprise group.[159] Indeed, similar concepts and measures may be important for resolution of banking groups and financial institutions, and may require further development of attributes to this effect to ensure the availability, in a standardized manner, of relevant solutions. As aforementioned, the current focus of the ongoing work by UNCITRAL on multinational group insolvency is on the strengthening of the cross-border framework. That work, in conjunction with the previous additions to the Legislative Guide concerning groups, might be of particular relevance to the development of a special cross-border regime for resolutions of financial institutions where group structures are dominant.

Thus, the Model Law is becoming increasingly relevant and can be usefully analyzed and considered in the process of closing gaps in the cross-border insolvency/resolution infrastructure, while bearing in mind both the specialness of resolutions and the imperfectness of any currently available cross-border regime.[160] In the process of analyzing and transposing cross-border concepts, it might become apparent that some of the issues addressed in the Model Law can be more easily and effectively addressed in a cross-border resolution model, contrary to the impression that the financial institutions case is more complex. For example, the determination of the home country jurisdiction that would coordinate a cross-border process might be simpler in a financial institution context, both in single entity and group cases.[161]

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158. Consolidation may be full or partial; for example, certain assets, claims, or entities may be excluded from the consolidation. Consolidation may also be allowed in circumstances of fraud. *See id.* recs. 219–31. The well-known example of a global substantive consolidation approach is an international banking group, *BCCI*, where the main entities were inextricably intermingled. The insolvency representatives agreed on substantive consolidation in protocols approved by the relevant courts. *See* Mevorach, *supra* note 149, at 215–35; EVA H.G. HÜPKES, LEGAL ASPECTS OF BANK INSOLVENCY: A COMPARATIVE ANALYSIS OF WESTERN EUROPE, THE UNITED STATES AND CANADA, STUDIES IN COMPARATIVE CORPORATE AND FINANCE LAW 139–51 (1st ed. 2000).

159. *See* LEGISLATIVE GUIDE PART THREE, *supra* note 15, glossary, para. 4(b), and sec. 1, para. 9; UNCITRAL, Insolvency of Financial Institutions, *supra* note 41, para 60.

160. Another gap recently identified in the Model Law concerns the uncertainty regarding the extent to which insolvency-related judgments can be recognized and enforced under its scheme. *See* Rubin v. Eurofinance SA [2012] UKSC 46. UNCITRAL is therefore currently deliberating on providing additional tools (possibly a separate but related Model Law) on recognition and enforcement of insolvency related judgments. *See also* U.N. Comm'n on Int'l Trade Law, Insolvency Law: Cross-Border Recognition and Enforcement of Insolvency-Related Judgments, Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.130 (2015). Another issue identified by UNCITRAL as requiring further work is the issue of unifying choice of law rules. *See* UNCITRAL Working Group V, *supra* note 95, at 8.

161. *See* Edwards, *supra* note 38, at 141–43 (noting that unlike commercial entities, global financial institutions are significantly regulated by one country on a consolidated basis, making it easier to design a rule that predictably identifies the home country of the enterprise group in the

### D. CONCERNS ABOUT FEASIBILITY

Another concern with regard to the development of global agreements or models is that any such uniform framework solution might not be feasible because it might require excessive surrender of state sovereignty and control. Additionally, a uniform global model might also undermine territorial concerns that are critical in the context of the default of banks. Furthermore, global solutions would run contrary to countries' inclination to ring-fence assets and to focus on local interest. The result is that without a binding agreement, a uniform framework is not feasible, yet such a binding agreement is arguably unlikely to be achieved at least in the near future.[162]

Similar concerns have been expressed in the enterprise context. It has long been the general view that nations tend to be concerned about surrendering sovereignty in insolvency matters and apply a "grab rule" approach in practice.[163] If given the possibility and the flexibility, countries would opt for territorialist insolvency solutions. It is also argued that even with the introduction of the cross-border insolvency Model Law, courts still feel bound by their local system, and are likely to continue practicing their inherent territorialist inclinations.[164] The territorialist inclination might even be particularly evident in cases of enterprise groups, especially with respect to local subsidiaries, where courts may disallow "relocation" of local entities to centralized proceedings abroad.[165]

However, notwithstanding these difficulties, in 1997, deliberations between country representatives, NGOs, and inter-governmental organizations resulted in a detailed global model for cross-border insolvency, as it was acknowledged that such a model is required for a cross-border regime to work effectively.[166] A significant number of

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country that regulates and supervises the global institutions' holding company on a consolidated basis). *See* Westbrook, *supra* note 155, at 192.

162. *See, e.g.*, Hüpkes, *supra* note 56, at 30; Lastra, *supra* note 131, at 184 (arguing in favor of an international convention on cross-border bank insolvency, yet acknowledging that this may take some time for political and legal reasons and is likely to require a step-by-step approach).

163. Territorialists have generally stressed that a territorial regime—allowing the opening of separate territorial proceedings in the different countries where the international enterprise has presence—not only maintains the unique distinctions between legal regimes, but also corresponds with sovereignties' tendency to insist on applying their own insolvency laws to domestic assets and claimants. *See* LoPucki, *supra* note 116, at 2216; Avi-Yonah, *supra* note 116, at 8–9, 12; Tung, *supra* note 116, at 31.

164. *See* LoPucki, *supra* note 116, at 700.

165. Indeed, territorialists suggest that a territorial approach is a better fit with the way enterprises operate—through local subsidiaries organized in different legal regimes with assets in the country where they operate. *Id.* at 750.

166. Westbrook, who actively participated in the design of the UNCITRAL Model Law, has noted that "reformers active in the insolvencies of multinational corporations have had to overcome much the same sort of skepticism and parochialism that impede current efforts to achieve international cooperation in resolving the crises of financial institutions." Westbrook, *supra* note 155, at 186.

countries endorsed and adopted the Model Law.[167] In fact, it has been somewhat easier and more feasible to see progress in the area of cross-border insolvency than with regard to implementation of standards on substantive measures. Since the Model Law was formulated, it has been gradually implemented quite robustly and uniformly in a significant number of countries. On the other hand, the adoption of standards provided in the Legislative Guide has been a more protracted process, making the tracking and assessment of compliance more difficult. The Model Law has also been usually applied in accordance with a modified universalist vision, both in single and group cases.[168]

The concerns about state sovereignty and local control should not be underestimated, yet they can and should be addressed by the model itself, rather than impede an agreement on a framework. The design of a model for cross-border resolution is required in order to achieve the needed level of universality. However, the regime will need to include the appropriate safeguards and a level of host country control to comply with the so-called middle-ground approach. The adoption of a model law instrument can also overcome a (presumably) more difficult process of implementing a treaty, and the absence of other legal mechanisms for creating supranational regimes that countries would be obliged to implement, or that would be applicable in national systems.[169] Although a model law is not binding until it is enacted, and although it may allow some degree of flexibility in implementation, it can provide the method for enacting the complete framework in the law, creating a regime that works almost like a treaty or like directly applicable regulation. It also has the advantage of being applicable in cases where one or more of the jurisdictions involved in a

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167. Until recently, twenty-two countries adopted the Model Law, including significant economies such as the US, UK, Japan, and Mexico. Recently, eighteen more countries adopted legislation based on the Model Law (the OHADA countries and Kenya). *See* UNCITRAL STATUS, *supra* note 20.

168. Empirical studies evidence that the Model Law framework has largely managed to promote a level of universalism. Thus, most countries that adopted the Model Law enacted it almost verbatim, although a few countries did deviate from some of its provisions, or included other provisions (e.g., South Africa also included a reciprocity requirement). The Model Law's recognition provisions are usually speedily applied and with limited litigation, and courts tend to provide a range of relief tailored to the specific case. *See* Mevorach, *supra* note 151, at 517; Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247 (2013); *cf.* Jeremy Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WISC. INT'L L.J. 110 (2011).

169. Indeed, there has been limited positive experience with treaties in cross-border insolvency, even within the EU. The changed nature of the EU cross-border insolvency instrument from a treaty to regulation has been important as it bypassed an otherwise lengthy process of ratification by each state that might have lasted years. EU regulations, on the other hand, are governed by the main EC Treaty and their provisions are binding and directly applicable. For further background, see FLETCHER, *supra* note 98, at 339–58. The methods of directly applicable regulation, or directives that oblige countries to implement uniform solutions, require a legal infrastructure that is not available on the global level.

cross-border case did not enact the framework, since it might not require reciprocity. In this respect, the framework can have a wider application compared with a treaty (if the latter is not signed by all countries).[170] Thus, for example, under the Model Law for commercial entities, administrators from countries that did not adopt the Model Law can invoke its recognition and relief provisions adopted by another jurisdiction where there are assets or a branch of the entity under insolvency.[171]

### E. CONCERNS ABOUT LEGITIMACY

One might also question the legitimacy of developing the principles proclaimed in the Key Attributes (and in the more recent FSB initiative) into a more rigid model, now that the Key Attributes have been recognized as the standard in the resolution field. It might be argued that the Key Attributes have already determined the degree of universalism to be pursued, by choosing the form of principles rather than model provisions. Thus, the concern might be that progressing to a uniform framework will not be consistent with the recognized Resolution Standard.

Yet, the Key Attributes should not be seen as an obstacle to the development of a uniform framework. The Key Attributes appropriately addressed the wide range of issues pertaining to resolution, including private international aspects, even though there is a limitation to what a general standard could achieve in terms of providing a private international law framework. Regarding the cross-border issues, the Key Attributes set the general objective of achieving maximum cooperation and support, reflecting the middle-ground approach, i.e. a level of universalism while taking into account territorial concerns. As a general Resolution Standard with a set of principles, the Key Attributes cannot do more than that. Yet, the Key Attributes do not preclude the development of a uniform framework that could achieve the standard's objectives concerning cross-border resolutions.

In this respect too, it is useful to refer to the commercial enterprise context where, like the Key Attributes, a legislative guide provides standards regarding the broad spectrum of issues pertaining to insolvency, including recommendations regarding cross-border issues.[172] Cross-border aspects are included in the Legislative Guide as it covers and sets the standard regarding the broad range of aspects pertaining to insolvency

170. The Model Law has the force of law in the enacting state. Following adoption, it is binding and enforceable.

171. Empirical evidence shows that, for the most part, recognition and relief has been granted by jurisdictions that have adopted the Model Law to foreign proceedings and foreign representatives from a wide range of jurisdictions. *See* Mevorach, *supra* note 151, at 536; Westbrook, *supra* note 168, at 254.

172. *See* LEGISLATIVE GUIDE, *supra* note 9, recs. 30–34; LEGISLATIVE GUIDE PART THREE, *supra* note 15, recs. 239–54.

regimes, and may be a useful instrument to any country that may reform and renovate its laws, whereas a model law requires specific adoption of a framework in a uniform manner. Yet, the Legislative Guide also recommends enacting the Model Law to provide for a modern, harmonized, and fair framework that can effectively address instances of cross-border insolvency.[173]

## CONCLUSION

International organizations have made significant efforts in recent years to advance international cooperation in both insolvency and resolution and promote the renovation and convergence of relevant laws. Nonetheless, the international legal infrastructure for multinational entities in distress is still incomplete. Both the general legal regime for commercial enterprises and the specific regime for financial institutions require improvements. Yet, the regime for cross-border resolution still lacks the overarching framework for recognition and relief that can be applied uniformly, as is and as a whole, in different countries, avoiding fragmentation and divergence. In that regard, the general cross-border regime, with its cross-border model that has been adopted in a significant number of countries and has been in operation for more than a decade, can serve as a relevant point of departure. While acknowledging the special characteristics of multinational financial institutions, the similarities between the challenges facing both commercial entities and financial institutions in situations of cross-border defaults should also be born in mind. The general cross-border regime, like the one that may be envisaged for financial institutions, aims to streamline cross-border processes, align incentives to cooperate, facilitate speedy action and provide tools for cooperation and coordination, in order to promote fair and efficient cross-border solutions that can maximize value through liquidation or reorganization.

The need to address the damaging effect that the termination of large volumes of financial contracts had in the recent financial crisis demanded the focused attention of international organizations that had to rethink and to harmonize standards regarding the treatment of these contracts. It is critical for the effective operation of resolution regimes that termination and close-out netting of contracts can be temporarily stayed, and that a stay is given effect across borders. The work on enhancing recognition of the stay measure is also likely to increase standardization in this area and alleviate some uncertainty regarding recognition of some of the critical measures for effective resolution. Standardization is also likely to enhance the coverage of resolution actions beyond prudentially regulated entities and parties to the resolution stay protocol. The next step should be the creation of a framework for cross-border resolution. Such a framework should expand its

173. *See* LEGISLATIVE GUIDE, *supra* note 9, para. 14, rec. 5.

objectives-base beyond certainty (of transaction or of resolution measures) and have regard to the general goal of promoting stability and containing risk through a fair and effective cross-border resolution regime. Accordingly, it should comprehensively address the private international issues concerning the operation of the range of resolution measures across borders and be applicable to all entities relevant to a resolution solution. This approach, which would be based on a certain degree of universalism (i.e., a global approach to multinational default), would rely on uniform application of the private international laws pertaining to resolution.

By drawing from the experience of developing a cross-border insolvency regime for commercial entities, this Article argued that the development and adoption of a uniform framework for cross-border resolution is both feasible and legitimate. The Article did not attempt to propose the details of such a framework, but rather to provide justifications for taking the model framework approach. Various specific proposals for the design of such models have been put forward in other works. Yet, the concern is that without a conviction that a model approach is appropriate, proposals will not be developed into actual legislative reform. This Article argued that enactment of a uniform structured framework is in fact simpler than transforming general principles into domestic laws. In addition, the general cross-border regime already provides a platform for further deliberations, and certain private international concepts that have been developed in the general regime are likely to be easier to implement in the resolution context. The principles contained in the Resolution Standard (the Key Attributes of effective resolution regimes) should not be seen as constraining the development of a more concrete structured framework for cross-border resolution.