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Understanding the Cross-Border Aspects in Bank Insolvency: International Institute for the Unification of Private Law and India

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ABSTRACT

*Bank failures not only impact the global financial systems but also raise questions on the capabilities of cross-border resolution of financial firms/banks.Currently, there are deliberations ongoing at the International Institute for the Unification of Private Law (**UNIDROIT**) Working Group on Bank Insolvency (**WG**) where an international soft law instrument, in the form of a Legislative Guide (**Guide**) covering the key features of bank liquidation proceedings, is being developed. India being elected as Chair of the UNIDROIT General Assembly (2022-2023), and the Reserve Bank of India (**RBI**) being accorded observer status to participate in these deliberations are crucial developments that come at an opportune time to enable us to inform the WG to inculcate, in the forthcoming Guide, the Indian experience of dealing with issues relating to bank resolution – with the Financial Resolution and Deposit Insurance Bill, 2017 (**FRDI Bill**), as a point of reference.*

In this context, this article highlights an important aspect of the ongoing WG deliberations, i.e., Cross-Border Aspects/Foreign Resolution Action. It gives an overview of the elements of cross-border aspects of bank insolvency and dives into the WG discussions on the same. Further, the article draws cross-border aspects from the Indian experience as emanating from the FRDI Bill. Finally, the article pin-points suggestions, in relation to the preceding discussion, which the Guide may benefit from.

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I. INTRODUCTION

The insolvency of a bank that is operating on an international basis raises a separate set of challenges because different jurisdictions approach insolvency from different philosophical perspectives (some jurisdictions are more pro-debtor than others, while some may favour judicial rather than administrative procedures for dealing with the insolvency procedures).[1] Some of the problems that many bank insolvencies may commonly face also include conflicts of laws, differences of procedure, different treatment of assets, sharing of information, confidentiality, or more particularly, challenges pertaining to the recognition and implementation of insolvency proceedings, court orders, or administrative actions in the context of international bank insolvency.

[1] Andrew Campbell, 'Issues in Cross-Border Bank Insolvency: The European Community Directive on the Reorganization and Winding-Up of Credit Institutions' in *Current Developments in Monetary and Financial Law, vol 3* (International Monetary Fund 2005).

These problems persist in such international bank resolution matters and there is a lack of comprehensive guidelines on the same. For that, lessons can be drawn from the collapse of the Bank of Credit and Commerce International in 1991 (which at the time of its collapse was operating in more than seventy jurisdictions),[2] or the 2007 uncoordinated resolution of the Fortis Group (the then Belgium's largest and Europe's fifth largest bank),[3] which impacted the global financial system and drew focus on cross-border bank resolution.

The recent back-to-back collapses of the Silicon Valley Bank, Signature Bank, and First Republic Bank in the United States of America (a few of the biggest banks to fail since the Great Depression of the 1930s[4] and the largest since the 2008 global financial crisis)[5] have shed light on bank failures and have made institutions/governments to revisit and ponder on their current financial stability frameworks. Further, as finance has become significantly globalised,[6] such failures in the future will not only impact the global financial systems but also raise questions on the capabilities of cross-border resolution of financial firms/banks.

[2] Ibid.
[3] Rosalind Z. Wiggins, Natalia Tente and Andrew Metrick, 'European Banking Union C: Cross-Border Resolution–Fortis Group' [2019] 1 Journal of Financial Crises 150 <https://elischolar.library.yale.edu/journal-of-financial-crises/vol1/iss3/9> accessed 29 November 2023.
[4] Dew DeSilver, 'Most U.S. bank failures have come in a few big waves' (*Pew Research Centre*, 11 April 2023) <https://www.pewresearch.org/short-reads/2023/04/11/most-u-s-bank-failures-have-come-in-a-few-big-waves/> accessed 26 October 2023.
[5] Lisa S. Bonsall and others, 'Silicon Valley Bank: What Happens Next?' (*McCarter & English*, 14 March 2023) <https://www.mccarter.com/insights/silicon-valley-bank-what-happens-next/> accessed 26 October 2023.
[6] Legislative Note to the Financial Resolution and Deposit Insurance Bill 2017.

After the 2008 global financial crisis, the Financial Stability Board's (**FSB**) Key Attributes of Effective Resolution Regimes for Financial Institutions of 2014 (**FSB Key Attributes**) called for an effective resolution regime to be in place in all jurisdictions. These FSB Key Attributes are the international standard for resolution regimes.[7] They provided the resolution authorities with a wide range of powers, tools, and options to resolve a variety of firms that are no longer viable and have no reasonable prospect of becoming so. The FSB Key Attributes also recommend a framework for overcoming national legal hindrances, barriers, and obstacles and improving the effectiveness of cross-border resolution measures.

India has experienced a prolonged period of strong economic growth since the introduction of structural reforms and economic liberalisation in 1991. Today, India is the most populous country in the world and developments in India have significant global and regional implications, including spill-overs through international trade and global supply chains.[8] In this context, it becomes important to note that India's economic development has been impacted by external and domestic shocks, some of which were directly related to the financial sector such as the Asian financial crisis (1997), the global financial crisis (2008), and more recently, the devastating impact of the COVID-19 pandemic

[7] Reserve Bank of India, Report of the Working Group on Resolution Regime for Financial Institutions, [1.8] (January 2014) <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/RWG020514_FL.pdf> accessed 29 November 2023 (Report on Resolution Regime for Financial Institutions).
[8] Alfred Schipke and others, 'Macro-financial Setting and Overview' in *India's Financial System: Building the Foundation for Strong and Sustainable Growth* (International Monetary Fund 2023) 3.

(2020), and the war in Ukraine (2022).[9] However, currently in India, there is no specific law so far for the resolution of financial firms and the existing provisions are covered across different laws. For example, the Banking Regulation Act, 1949 empowers the RBI to wind up or amalgamate a scheduled commercial bank (except those public-sector banks whose statutes prohibit such actions, apart from by the Central Government) and also lays down provisions for compulsory merger/reconstruction by the RBI, winding up by High Court, and voluntary merger. Further, the RBI & the Registrar of Co-operative Society (State) regulate co-operative banks that are in a single state (for instance, the Gujarat State Co-operative Bank Limited); and the Multi-State Co-operative Societies Act, 2002, regulates co-operative banks operating in multiple states. Even Public Sector Financial Institutions are regulated by their respective statutes i.e., the State Bank of India Act, 1955, thereby exempting the State Bank of India from laws relating to winding-up of companies.[10]

In India, recommendations for a separate framework dealing with bank resolution can be traced back to the RBI Report of the Working Group on Resolution Regime for Financial Institutions (2014) (**2014 Report**) and the Ministry of Finance Report of Committee to Draft Code on Resolution of Financial Firms (2016) (**2016 Report**). The said reports took into consideration the principles laid down in the FSB Key Attributes. The 2016 Report recommended setting up a Financial Resolution and Deposit Insurance Corporation (**FRDIC)** to resolve financial firms. This

[9] Ibid [4].
[10] Pratik Datta, Varun Marwah and Ulka Bhattacharyya, 'Resolving Financial Firms in India: The Way Forward' (2020) 13 NUJS L Rev 1.

gave birth to the FRDI Bill, which sought to create a consolidated framework for monitoring financial firms, pre-empt risks to their financial position, and resolve them if they were bankrupt.[11] It contained several noteworthy provisions for the resolution of banks, and together with the Insolvency and Bankruptcy Code, 2016 (**IBC**), the FRDI Bill was expected to provide a comprehensive resolution mechanism for the economy.[12] However, the FRDI Bill was withdrawn in August 2018 due to the apprehensions raised by stakeholders regarding its provisions.[13] As of today, in the Indian legal system, there is an absence and, thus, a need for an integrated holistic legal framework for resolving banks/financial firms. The 2014 Report, the 2016 Report and the FRDI Bill, all delved into introducing and strengthening arrangements for domestic and cross-border cooperation in dealing with failing financial institutions in the Indian ecosystem.

In consonance with the above, currently, there are deliberations ongoing at the UNIDROIT WG, wherein it was observed that the design of bank liquidation laws (for small and medium-sized banks) is left purely to domestic legislation and differs substantially across the globe. Thus, the WG is aiming to address this current gap in the international legal architecture, by developing an international soft law instrument,[14]in the

[11] Legislative Note to the Financial Resolution and Deposit Insurance Bill 2017.
[12] Joint Committee on Bills, *Report of the Joint Committee on the Financial Resolution and Deposit Insurance Bill, 2017* (LS 2018).
[13] Ministry of Finance, 'Clarification on FRDI Bill' (27 July 2020) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1641568> accessed 1 November 2023.
[14] UNIDROIT, 'Bank Insolvency' (https://www.unidroit.org/) <https://www.unidroit.org/work-in-progress/bank-insolvency/> accessed 29 November 2023.

form of a Guide,[15]covering the key features of bank liquidation proceedings. The said work-in-progress Guide is scheduled to be adopted by 2024.

With that background, it becomes pertinent to point out that India has been elected as Chair of the UNIDROIT General Assembly (2022-2023).[16] In addition to this, the RBI has also been accorded observer status to participate in the ongoing WG deliberations. This is a crucial development and comes at an opportune time to enable us to inform the WG to inculcate, in the forthcoming Guide, the Indian experience of dealing with issues relating to bank resolution. As already mentioned above, since the FRDI Bill was introduced as a comprehensive framework for the resolution of banks, this article focuses on the regulatory framework as proposed by the FRDI Bill as a point of reference in aiding the ongoing WG deliberations.

In this context, this article highlights an important aspect of the ongoing WG deliberations, i.e., Cross-Border Aspects/Foreign Resolution Action. It gives an overview of the elements of cross-border aspects of bank insolvency and dives into the discussions that took place at the UNIDROIT WGs on the same. Further, the article draws cross-border aspects from the Indian experience as emanating from the FRDI Bill and captures the essence of the elements identified as key in conducting

[15] UNIDROIT Working Group on Bank Insolvency, 'Summary Report of the third session' (October 2022) 4 <https://www.unidroit.org/wp-content/uploads/2023/01/Website-version_Study-84-W.G.-3-Doc.-6-Draft-Summary-Report.pdf> accessed 29 November 2023 (Summary Report).

[16] '81st session of General Assembly' *UNIDROIT* (Rome, 16 December 2022) <https://www.unidroit.org/81st-session-of-the-general-assembly/> accessed 2 November 2023.

cross-border insolvency cases under the proposed framework of IBC. Finally, the article pin-points suggestions, in relation to the preceding discussion, which the Guide may benefit from.

II. CROSS-BORDER ASPECTS IN BANK INSOLVENCY – AN OVERVIEW

Globally, and in India, cases involving cross-border insolvency proceedings are amplifying in number. These cases cannot be handled by domestic courts and tribunals by solely applying their domestic insolvency law, without co-ordination and co-operation with foreign courts/authorities. Hence, dedicated provisions dealing with cross-border aspects, within the larger insolvency regulatory framework, are important.

Internationally, there is well-recognised guidance on cross-border aspects of insolvency for corporate debtors and banks. The FSB Key Attributes set out twelve essential features that should be part of the resolution regimes of all jurisdictions[17] which includes the legal framework conditions for cross-border cooperation. According to the FSB Key Attributes, jurisdictions should have in place a resolution regime that provides the resolution authority with a broad range of powers and also provides a mandate in law for "co-operation, information exchange, and co-ordination" domestically and with relevant foreign resolution authorities before and during a resolution.[18]It

[17] Financial Stability Board, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (October 2011) <https://www.fsb.org/wp-content/uploads/r_111104cc.pdf> accessed 29 November 2023.
[18] Ibid.

also enlists elements such as *"recognition, non-discrimination against creditors, and confidentiality*".[19]In addition to the FSB Key Attributes, the FSB Principles for Cross-border Effectiveness of Resolution Actions (2015) set out statutory and contractual mechanisms that jurisdictions should consider including in their legal frameworks to give cross-border effect to resolution actions in accordance with the FSB Key Attributes.[20]

With regard to the cross-border insolvency issues faced by corporate debtors experiencing severe financial distress or insolvency, similar elements, as enlisted under the FSB Key Attributes, emanate from the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Cross-Border Insolvency (1997) (**Model Law**). The Model Law has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues with respect to corporate debtors. It focuses on four elements identified as key to the conduct of cross-border insolvency cases, namely – "*access, recognition & relief (assistance), co-operation & co-ordination, and public policy*".[21]

Regarding bank insolvency, the International Monetary Funds' (**IMF**) Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination (2010) advocated a framework for enhanced cross-border co-ordination regarding the resolution of international

[19] Ibid.
[20] Financial Stability Board, 'Principles for Cross-border Effectiveness of Resolution Actions' (November 2015) <https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf> accessed 29 November 2023.
[21] UNCITRAL, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (*https://uncitral.un.org/en*, 30 May 1997) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 29 November 2023.

financial groups.[22] The Core Principles for Effective Banking Supervision of the Basel Committee on Banking Supervision (**BCBS**) also serve as the *de facto* minimum standard for sound prudential regulation and supervision of banks and banking systems. The Report and Recommendations of the Cross-Border Bank Resolution Group (2010) of the BCBS sets out ten recommendations to address the challenges arising in the resolution of a cross-border bank, on the basis of a stocktaking exercise of legal and policy frameworks and lessons learned from the financial crisis.[23]

In addition to the above, the upcoming UNIDROIT Guide will consolidate the best practices on the resolution of banks with a focus on cross-border aspects of bank insolvency. Currently, the WG discussions on the Guide have concluded that jurisdictions often lack a reliable and comprehensive framework for cross-border recognition of bank liquidation proceedings.[24]

In India, expert committees have recommended adopting a cross-border insolvency law based on the Model Law.[25] This has been reflected in the proposed framework for cross-border insolvency under the IBC, called Draft Part-Z, which is drafted based on the Model Law. While the

[22] UNIDROIT Working Group on Bank Insolvency, 'Secretariat's Report' (March 2023) para 58 <https://www.unidroit.org/wp-content/uploads/2023/06/Study-84-W.G.-4-Doc.-2-Secretariats-Report_rev.pdf> accessed 29 November 2023 (Secretariat's Report).
[23] Ibid [59].
[24] Ibid [102].
[25] Insolvency Law Committee, 'Report of Insolvency Law Committee on Cross Border Insolvency' (October 2018) <https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pd> accessed 29 November 2023.

elements of the Model Law have been captured under the proposed Draft Part-Z under IBC, the Model Law has not been adopted in India yet, which would apply to cases dealing with cross-border insolvency of corporate debtors.

However, for the resolution of banks, the FRDI Bill has made several notable additions to the aspect of foreign resolution action. These elements may aid and assist in developing a law on bank resolution, with a focus on cross-border resolution of banks.

A. UNIDROIT Legislative Guide on Bank Insolvency – WG Discussions

The WG discussions are focussed on formulating concrete recommendations, to assist in creating a cross-border framework on bank liquidation. These recommendations are intended to minimise divergences between the private international law aspects of bank liquidation across jurisdictions.[26] Pending finality, currently the discussions are ongoing with regard to the Guide. The fifth session of the WG took place at the premises of UNIDROIT in Rome in October 2023; the next session of the WG is scheduled to take place in March 2024. The future instrument would be relevant for countries irrespective of their legal tradition and would aim to help countries make their bank liquidation frameworks more effective. The primary addressees of the future instrument are legislators and policymakers seeking to reform or

[26] UNIDROIT Working Group on Bank Insolvency, 'Issues Paper' (April 2022) para 93 <https://www.unidroit.org/wp-content/uploads/2022/07/Study-84-W.G.-2-Doc.-2-Revised-Issues-Paper.pdf> accessed 29 November 2023.

refine their bank liquidation regime.[27] The WGs have discussed aspects such as the treatment of banking groups in the insolvency process and cross-border issues such as co-ordination, recognition, and support.

The WGs have developed a Master Copy, a confidential and preliminary consolidated draft of the future Guide.[28]In the Master Copy, out of the ten chapters, one chapter is dedicated to cross-border aspects of bank insolvency. This updated draft structure of the Guide, pertaining to the cross-border aspects, now reflects the elements such as co-operation and allocation of competencies between home and host authorities, recognition of foreign proceedings and cross-border actions, recognition and giving effect to specific measures, parallel proceedings, safeguards or grounds for refusing recognition/support/co-operation, and non-discriminatory treatment of creditors based on the jurisdiction of nationality, location, or payability of claims.[29]

B. The Indian Regulatory Framework under the FRDI Bill

Since the introduction of the proposed Draft Part – Z dealing with cross-border insolvency for corporate debtors, several discussions have been carried out for the implementation of the same. Even the budget speech of 2022-23 highlighted that necessary amendments in IBC would be carried out to enhance the efficacy of the resolution process and facilitate

[27] Summary Report (n 15), [22].
[28] Secretariat's Report (n 22), [3].
[29] Ibid [103].

cross-border insolvency resolution.[30] However, the same is yet to be implemented.

Further, regarding bank insolvency, as aforementioned, the laws governing the resolution of banks are scattered across different legal frameworks.[31]

In relation to the cross-border aspects of bank resolution, the 2014 Report has made recommendations about cross-border co-operation, co-ordination, and information sharing based on the framework given under the FSB Key Attributes. It has emphasised the need for elements such as co-operation, co-ordination, recognition of foreign resolution measures, access to information, and information sharing as key to dealing with cross-border aspects of bank insolvency. In addition to the elements recognised by the 2014 Report, the 2016 Report recommended that information sharing must be done on a reciprocal basis[32] keeping in mind the interest of consumers in India and the need to protect India's financial framework.

The recommendations of the FSB Key Attributes and expert committees have been reflected in the FRDI Bill which lays down provisions for Foreign Resolution Action. The FRDI Bill recognises certain elements, key to conducting cross-border insolvency cases. These elements are: *first,* empowering the Central Government to "enter into agreements"

[30] Nirmala Sitharaman, 'Budget 2022-2023' (Speech of Minister of Finance, 1 February 2022) <https://www.indiabudget.gov.in/doc/Budget2022_23/Budget_Speech.pdf> accessed 29 November 2023.
[31] Datta, Marwah and Bhattacharyya (n 10).
[32] Report on Resolution Regime for Financial Institutions (n 7).

with foreign countries;[33] *second,* "sharing of information", between the resolution authority i.e., the Resolution Corporation (RC) and international organisations, "on a reciprocal basis";[34] *third,* maintenance of "confidentiality";[35] *fourth,* empowering the Adjudicating Authority to "issue a letter of request to foreign courts" for evidence or action relating to assets abroad;[36] *fifth,* recognition and enforcement of foreign resolution actions;[37] *sixth,* "refusal of recognition or enforcement" of foreign resolution actions on specified grounds;[38] *seventh,* granting "first charge on the assets of the Specified Service Provider (**SSP**) to the creditors of such SSP";[39] and *last,* empowering the regulator to initiate resolution against a branch office of a body corporate incorporated outside India, whose Indian branch office is an SSP.[40]

C. Recommendations/suggestions from the Indian experience

The WG discussions capture many essential aspects of the cross-border resolution of banks in line with the existing international instruments. However, from the Indian experience, and specifically from the FRDI Bill, the following aspects can be seen as meaningful additions to the upcoming Guide:

[33] Financial Resolution and Deposit Insurance Bill 2017, cl 95(1).
[34] Financial Resolution and Deposit Insurance Bill 2017, cl 95(2).
[35] Financial Resolution and Deposit Insurance Bill 2017, cl 95(3).
[36] Financial Resolution and Deposit Insurance Bill 2017, cl 95(7).
[37] Financial Resolution and Deposit Insurance Bill 2017, cl 96.
[38] Ibid.
[39] Financial Resolution and Deposit Insurance Bill 2017, cl 97.
[40] Ibid.

a. Facilitating execution of Memorandum of Understanding (**MoU**):

Governments around the world have varying obligations and challenges pertaining to disclosure of information and to achieve uniformity in this regard should be the ideal goal. However, from the Indian experience, as highlighted by the Ministry Reports and the FRDI Bill, it may be considered that the Guide may empower national governments to enter into MoUs/agreements with other countries and consider laying down provisions and methods that enable jurisdictions to enter into sharing information and co-operation agreements on a reciprocal basis.[41]India has entered into several such agreements with countries to promote greater co-operation and information sharing, such as the MoU on Supervisory Cooperation and Exchange of Supervisory Information between the RBI and Financial Services Authority (2012), the agreement between RBI and the National Bank of Belgium (2013), RBI and Bank of Israel (2016), RBI and the Bank of Thailand (2017), etc. The aim of the agreements is for the regulators to commit to deepen relations between both central banks and strengthen the exchange of information and cooperation in the area of central banking, amongst other agendas.[42]

[41] Ministry of Finance, 'Report of Committee to Draft Code on Resolution of Financial Firms' (September 2016) < https://dea.gov.in/sites/default/files/report_rc_sept21_1.pdf> accessed 29 November 2023 (Report on Resolution of Financial Firms).

[42] Bank Indonesia, Bank Indonesia and Reserve Bank of India Agree to Expand Cooperation in Payment Systems, Digital Financial Innovation, and Anti Money Laundering and Combating the Financing of Terrorism (AML-CFT) (16 July 2022) <https://www.bi.go.id/en/publikasi/ruang-media/news-release/Pages/sp_2419022.aspx> accessed 29 November 2023.

The Guide may also highlight the need for, and importance of, maintaining confidentiality[43] in cross-border issues and enable the issuance of letters of request to seek evidence or undertake actions relating to assets located abroad.

From an Indian perspective, this will better manage cross-border resolution of banks while keeping in mind the interests of Indian consumers, and the need to protect the stability and resilience of India's financial system.

b. Safeguarding rights of local creditors:

The Guide would benefit from containing provisions dealing with the rights of local creditors. Indicatively, the Guide could contain provisions wherein a concerned domestic regulator is empowered to initiate a resolution against a branch office of a body corporate incorporated abroad. This could also imply that when the resolution of a branch is triggered, where the parent entity is failing, domestic creditors may get precedence in the claims over the assets of the branch located in India. This may be particularly important to protect the interests of consumers and local creditors in India[44] and is contemplated under the FRDI Bill.

III. CONCLUSION & WAY FORWARD

Today, keeping in mind the global outreach of India and increasing cross-border cases, there is a need for an effective and comprehensive cross-

[43] Financial Resolution and Deposit Insurance Bill 2017, cl 86.
[44] Report on Resolution of Financial Firms (n 33) 26.

border law to enable coordinated and efficient insolvency proceedings in relation to corporate debtors as well as financial firms. The elements of the shelved FRDI Bill and the proposed cross-border framework under IBC can serve as a beacon to pave the way for a complete law on insolvency.

With that in mind, the ongoing WG discussions at UNIDROIT represent an important milestone in international deliberations on bank liquidation and insolvencies. This is because the proposed Guide, once adopted, will not only serve as an international soft law standard but also have considerable influence and be considered authoritative guidance on the design of bank insolvency regimes globally. India's experience with framing regulation on bank resolution spotlights unique concerns, which can play a vital role in developing best practices with regard to bank resolution, ultimately setting the bar higher for financial regulation. Accordingly, it becomes useful to identify certain aspects of India's bank resolution framework, flowing from the FRDI Bill, for India to advocate its own unique interests, in the matter of bank insolvencies, particularly in the cross-border context. The elements of foreign resolution action under the FRDI Bill are in line with the established international frameworks/principles. Thus, showcasing the example of the future-facing approach adopted by the FRDI Bill for cross-border aspects of bank resolution serves as a critical opportunity for India to shape the future of financial regulation in its own way, and contribute actively to the WG discussions on the upcoming Guide.