

Mr Svein Andresen
Secretary General
Financial Stability Board
Bank for International Settlements
Centralbahnplatz 2
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8th December 2014

Email: fsb@bis.org

Dear Mr Andresen

Cross-border recognition of resolution action

The International Banking Federation¹ ('IBFed') welcomes the opportunity to respond to the consultative document on the above topic.

The Financial Stability Board ('FSB') has played an important role in promoting the development of robust resolution regimes through the development of the Key Attributes and related initiatives. The recent progress report provided by the FSB to the G20 provides a useful summary of this work. We note that it finds that jurisdictions have made 'continued progress' towards adopting the tools and powers necessary to resolve failing banks in an orderly manner². Nevertheless, as the report notes, there are outstanding issues to be addressed and we concur that the cross-border recognition of resolution actions must be regarded as a priority.

In this context, we welcome the proposals in the consultation document and see merit in the solutions identified to achieve cross-border recognition. As the paper notes, robust cross-border recognition processes consistent with the 2014 Key Attributes should be the ultimate goal. Whilst contract and other arrangements are alternatives in the interim they should not be regarded a substitute for formal recognition procedures. More formal frameworks, including regulatory, legislative, reciprocal agreements among supervisors, or other jurisdictionally appropriate mechanisms, provide robust and important means of achieving legal and

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The International Banking Federation (IBFed) is the representative body for national and international banking associations from leading financial nations around the world. Its membership includes the American Bankers Association, the Australian Bankers' Association, the Brazilian Federation of Banks 'FEBRABAN', the Canadian Bankers Association, the European Banking Federation, the Japanese Bankers' Association, the China Banking Association, the Indian Banks' Association, the Korean Federation of Banks, the Association of Russian Banks, and the Banking Association of South Africa. This worldwide reach enables the IBFed to function as the key international forum for considering legislative, regulatory, and other issues of interest to the banking industry and to our customers.

² FSB: *Towards full implementation of the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions*, 12th November 2014

commercial certainty for the bail-in of debt instruments and are important for the recognition of asset transfers. We therefore encourage the FSB to promote the development of such frameworks, consistent with Key Attribute 7.5, in order to enhance cross-border legal and commercial certainty for banks and their investors. Financial stability will be enhanced by clarity in relation to the resolution of cross-border banks.

1. Are the elements of cross-border recognition frameworks identified in the report appropriate? What additional elements, if any, should jurisdictions consider including in their legal frameworks?

The elements identified in the report appear appropriate.

2. Do you agree that foreign resolution actions can be given effect in different ways, either through recognition procedures or by way of supportive measures taken by domestic authority under its domestic resolution regime? Do you agree with the report's analysis of these approaches?

We acknowledge that recognition or supportive measures have a role but, as noted above, we have a strong preference for formal recognition proceedings to provide commercial and legal certainty. As such, we encourage the FSB to promote such measures as the more effective means of satisfying Key Attribute 7.5.

We do not, however, support the use of the term “statutory” to describe the broad array of formal structures that may form a country’s resolution authority.³ As described in the Section 7 of the October 2014 *Key Attributes* document, a better term may be “legal framework” to make clear that statutory authority is one mechanism for cross-border recognition of resolution actions.

3. Do you agree that achieving cross-border enforceability of i) temporary restrictions or stays on early termination rights in financial contracts and ii) ‘bail-in’ of debt instruments that are governed by the laws of a jurisdiction other than that of the issuing entity is a critical prerequisite for the effective implementation of resolution strategies for global systemically important financial institutions (G-SIFIs)? Is the effective cross-border implementation of any other resolution actions sufficiently relevant for the resolvability of firms that the FSB should specifically consider ways of achieving their cross-border enforceability?

We acknowledge that the cross-border enforceability of temporary restrictions on termination rights and recognition of bail-in are two key issues.

4. Do you agree that contractual approaches can both fill the gap where no statutory recognition framework is in place and reinforce the legal certainty and predictability of recognition under the statutory frameworks once adopted?

³ *Key Attributes of Effective Resolution Regimes for Financial Institutions* (15 October 2014). *Section 7: Legal Framework Conditions for Cross Border Cooperation* lists acceptable formal processes to include statutory mandate (7.1), legislation and regulation (7.2), national laws (7.4), “transparent and expedited processes...by way of mutual recognition processes or by taking measures under domestic resolution regimes” (7.5), capacity in law (7.6), and “confidentiality requirements and statutory safeguards” (7.7).

As noted above, contractual approaches have a role to play to enhance cross-border recognition but should not be considered a long-term substitute to a formal recognition process due to the enhanced certainty this would provide banks and their creditors. Once legal frameworks are in place there may not be an ongoing need for contractual recognition to “reinforce” legal certainty and predictability.

Nevertheless, contractual measures can rightly fill the gap where there is no more formal recognition framework in place and should be able to achieve legal certainty and predictability.

5. Are the key principles for recognition clauses in debt instruments set out in the report appropriate? What other principles or provisions do you consider necessary to support the exercise of ‘bail-in’ powers in a cross-border context?

The principles set out in the paper appear uncontroversial and reflect current market practice in a number of jurisdictions.

Careful consideration should be given to the scope of any requirements for contractual recognition of bail-in. For example, the proposal to apply such requirements should only apply to debt going forward (not applied retrospectively). Moreover, consideration should also be given to how broad the definition of “debt instruments” for these purposes should be. We suggest that the focus of contractual recognition requirements should be debt instruments that are eligible for Total Loss-Absorbing Capacity (TLAC) and should not encompass contracts of a more operational nature.

Yours sincerely

A handwritten signature in black ink that reads "Sally J Scutt". The signature is written in a cursive style with a large, sweeping initial 'S'.

Sally J Scutt
Managing Director