Effective Resolution of Systemically Important Financial Institutions

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The FSB's proposed resolution framework aims to minimise, or potentially eliminate, the systemic impact of the failure of any financial institution. All elements of the framework, as well as the framework itself, must be tested against this criterion. The general principle employed within this submission is that any resolution actions within the framework that introduce or increase systemic impacts should either be reworked or removed.

The FSB paper is comprehensive in its coverage, however lacking in necessary detail. In order to move this forward to an operational regime there should be further discussion, analysis, proposals and consultation on the details of specific attributes. The instances where the ABA feels that such an approach is warranted are identified in the body of this submission. Further, the paper introduces new concepts not previously considered in the international resolution debate to date, such as the elimination of cross-default clauses and the harmonisation of depositor preference. These concepts are intricate and as a result immediately raise a number of complex issues. The need for further work and consultation on these aspects is critical to provide the appropriate opportunity to identify and address unintended consequences.

There are three general issues we wish to raise before addressing the specific consultation questions:

- There is no timeline provided other than that for RRPs and G-SIFIs. In addition to resolving details as above, there will be necessary legislative changes required by national jurisdictions (harmonised to avoid cross-border issues). What is the expected timeline and plan of work to implement this ambitious project; –and secondly, how will the FSB manage the risk of jurisdictions moving ahead of timetables and 'gold plating' (especially in the area of ring fencing), and therefore complicating rather than reducing the systemic impact from cross-border issues.

- Until clarity on details, timelines, work plans and implementation is available it will be difficult to implement parts of the framework on a standalone basis, and in general difficult for banks to plan for the changed environment. For example, if resolvability assessments are conducted in the absence of a finalised framework, is it appropriate for banks to be required to make business and organisational changes?

- A major focus of the paper is appropriately cross-border issues and the importance of harmonisation and co-operation. Banks operate in many jurisdictions outside the G20, FSB, and BCBS group. How does the FSB propose to address this in the event that a bank domiciled in an FSB country has a significant interest in a country that chooses not to adopt the framework?

Detailed responses to the consultative document questions are provided below.

Responses to consultation questions

No.	Question	Response
1	Comment is invited on whether **Annex 1: Key Attributes of Effective Resolution Regimes** appropriately covers the attributes that all jurisdictions' resolution regimes and the tools available under those regimes should have.	In terms of dealing with an individual institution the framework appears to cover the key areas required, but in a number of cases at a high principle-only level. However, what is missing is the powers and tools to mitigate the systemic impacts following an individual failure, or if there are multiple contemporaneous failures. Systemic contagion can occur for a variety of reasons. Certainly if a resolution regime prevents destructive loss of value then it will prevent that aspect of contagion. Two related areas are: what happens if following resolution shocks are created through the financial system; and how are fear and panic, perhaps the most pervasive and difficult forms of contagion, to be managed. Therefore, two additional attributes that should be included in the framework are: • Elements to ensure that the failed bank (in its new form with critical functions preserved) can re-enter the system without creating a systemic event and measures to be considered for the financial system as a whole (for example liquidity operations by central banks). The only time system-wide issues are mentioned is in noting some countries may determine that for overall systemic stability reasons direct government involvement may be required. There should be a detailed section on the 'next day' effects. As an example, a liquidity mechanism that would operate to ensure smooth functioning of the system. (This may not necessarily be government sponsored mechanisms – some jurisdictions have proposed 'super senior' status.) Time does not allow the consideration of a comprehensive list; however, a section on next day measures would fill an important gap in the framework. • Contagion through fear can damage both sound and unsound firms and is difficult to control. A key element to control is communication strategy. In order to stem the systemic impacts directly flowing from a bank entering resolution, as well as the general fear that may strike the system, a robust approach to communication is required. (This is also related to the first point.) Therefore, an attribute specifically on communication would also be desirable. The framework only provides a 'how-to' manual for an individual bank entering resolution; it does not provide a framework for managing the systemic risk during and emerging from the resolution phase. Given the overarching goal of reduced systemic impact, the system-wide considerations should be included.

No.	Question	Response
2	Is the overarching framework provided by **Annex 1: Key Attributes of Effective Resolution** specific enough, yet flexible enough to cover the differing circumstances of different types of jurisdictions and financial institutions?	In general the framework does not provide sufficient detail for banks, investors, and other stakeholders to assess how they should operate in the new environment. Two examples are: • Scope – is the capture of an entity as being systemically important and therefore subject to a resolution regime ex-ante or ex-post. If ex-ante who determines and on what basis? This will provide clarity to stakeholders before an event; however, it may not capture all systemic institutions and therefore, fall short of its goal. If ex-post uncertainty will prevail as to whether an institution will be subject to the regime, and on what basis will systemic importance be assessed • Entry into resolution – very little guidance is provided, or definitions of terms such as "likely to be no longer viable". This could prove very problematic in determining the risks inherent in a firm, and therefore, for creditors to appropriately price, particularly given the subjective nature of the use of the term "likely". Therefore, given that there are a number of attributes that are only covered at a very high level, it is recommended that the next phase be to establish working groups and consultation processes for these specific aspects, so that prior to implementing these issues have been clarified.
3	Are the elements identified in **Annex 2: Bail-in within Resolution: Elements for inclusion in the Key Attributes** sufficiently specific to ensure that a bail-in regime is comprehensive, transparent and effective, while sufficiently general to be adaptable to the specific needs and legal frameworks of different jurisdictions?	In general it would appear the necessary topics are covered, however, as noted above, create uncertainty through the lack of detail, and therefore the comments under Q1 & Q2 apply here as well. However, whilst the key attributes are covered, we remain concerned that bail-in powers may increase rather than reduce systemic risk from a contagion point of view. That is, there may be system wide impacts from the use of a bail-in, and as under Q1, the framework does not address the 'next day' or system wide impacts. Annex 2 notes that the framework does not prevent a firm issuing contractual instruments that can either be written off or converted into equity based on a trigger. The ABA supports this as it may prove to be a useful tool for firms to manage their creditor hierarchy and provide greater comfort to general unsecured creditors. Therefore, the ABA encourages the retention of this flexibility in the final framework.

No.	Question	Response
4	Is it desirable that the scope of liabilities covered by statutory bail-in powers is as broad as possible, and that this scope is largely similarly defined across countries?	In general, reducing systemic impact should be the paramount goal in utilising a bail-in tool within resolution. Further, creditor hierarchies should be respected where possible. These criteria should apply when determining the scope of liabilities. General unsecured uninsured creditors are a single class and therefore, in a resolution should be in principle dealt with equally. There are a number of liabilities for which it could be argued that a bail-in would increase that systemic risk. Some examples might be retail deposits, or wholesale demand deposits. This may lead to the conclusion that they should be excluded. However, in contrast, by carving out some liabilities and haircutting others, the accepted creditor hierarchy has explicitly been altered and a new tier created. Further, this may create rather than reduce moral hazard, a stated goal of resolution frameworks. These issues and competing priorities are complex and should be addressed before moving forward on bail-ins. Additionally, it is difficult to reach concrete conclusions without knowing the overall framework. Therefore, we strongly recommend that once the overall resolution and bail-in framework is agreed, attention must turn to this critical detail of the policy and bail-ins should not be implemented until such time as this stand-alone issue has been addressed. (Similar to Q2 above, but of critical importance in this case.) To the extent that, following the suggested further analysis above, it is decided to exclude classes of liability (and thereby altering traditional hierarchies) this should be harmonised across jurisdictions as with other elements of the framework in accordance with the strong emphasis throughout the document. This would ensure creditors across jurisdictions are not unfairly treated.
5	What classes of debt or liabilities should be within the scope of statutory bail-in powers?	The starting point should be that traditional hierarchies are observed, and detailed analysis and consultation should be provided and considered prior to any decision to separate the general class of senior unsecured uninsured creditors. If a decision is made to exclude classes of liability the definitions of those classes must be harmonised and unambiguous across jurisdictions to remove uncertainty and ensure equality of treatment.

No.	Question	Response
6	What classes of debt or liabilities should be outside the scope of statutory bail-in powers?	See response to Q5 above Additionally, given that attribute 12.1 states that bail-in powers should apply to all existing liabilities, there from now exists the potential for funding market volatility until such point as the framework is finalised, communicated and understood by investors. This creates a difficult imperative in contrast perhaps to the need for further analysis and consultation on elements of the framework. That is that in the interest of a fully informed market and to minimise transition impacts there is a need to provide clarity to the market. However, this could be possible if the principles of statutory bail-in were to be agreed prior to the further detailed work being completed.
7	Will it be necessary that authorities monitor whether firms' balance sheet contain at all times a sufficient amount of liabilities covered by bail-in powers and that, if that is not the case, they consider requiring minimum level of bail-in debt? If so, how should the minimum amount be calibrated and what form should such a requirement take, for example,: (i) a certain percentage of risk-weighted assets in bail-inable liabilities, or (ii) a limit on the degree of asset encumbrance (for example, through use as collateral)?	In the event that the scope remains broad this problem is minimised. The issue of insufficient bail-inable liabilities would arise primarily if the scope of exclusion was such that for a given firm, following the preparation of its resolution plan and resolvability assessment, the CMG felt that the stock of bail-inable liabilities presented an impediment to effective resolution. In that regard, and given that each firm is different there should not be a blanket requirement for a minimum quantum of bail-inable liabilities, but rather as a result of a resolvability assessment one of the options available to the authorities to address the impediment may be to mandate a minimum requirement amongst other possible outcomes. In the event that the level of asset encumbrance presented a resolvability impediment then a similar firm specific approach should be adopted.

No.	Question	Response
8	What consequences for banks' funding and credit supply to the economy would you expect from the introduction of any such required minimum amount of bail-inable liabilities?	Ratings agencies have already indicated in specific instances that the establishment of an effective resolution framework will be considered a negative credit event. In fact, it was observed in Denmark that the use of a bail-in framework in the resolution of Amagerbanken led to a ratings downgrade across all Danish banks. Such an impact will necessarily increase the cost and reduce the availability of debt financing for banks. Whilst over time investors, the financial system and the economy will adjust to the new normal it is impossible to predict the length of such a transition period, and in the interim there can be no doubt that the pricing and provision of credit to the general economy will be impacted, with the potential for either isolated or generalised shocks to occur.
9	How should a statutory duty to cooperate with home and host authorities be framed? What criteria should be relevant to the duty to cooperate?	Independent actions in a resolution situation can damage the outcome. One specific example that has gained some recent attention under Dodd-Frank is 606.4 of the New York Banking law which ring fences all assets on the books of the New York branch, and subordinates all intra-group payments to all US claims. Further, a pre-emptive decision to initiate a resolution of a subsidiary or branch on the basis that it is "likely" to fail and the concern of protecting domestic interests may threaten the entire group. Such an action would create a systemic issue in the home country. As proposed in the document, there should be a statutory requirement. However, for national interest reasons this may be very difficult to obtain. At a minimum it should include a requirement to co-operate in recovery or resolution. It should also have a requirement for regular information sharing and consultation to consider what might happen in practice and the decisions to be taken.
10	Does **Annex 3: Institution-specific Cross-border Cooperation Agreements** cover all the critical elements of institution-specific cross-border agreements and, if implemented, will the proposed agreements be sufficiently reliable to ensure effective cross-border cooperation? How can their effectiveness be enhanced?	Again, as above, the general framework appears to cover the required attributes. However, once the general framework is agreed much work is required on the detail before the framework could be considered ready to implement. It is unclear where this sits – RRP are Recovery first (business runs this) and Resolution after (Regulator runs this – business management not involved). Further, Annex 3 outlines an agreement between authorities but does not include the bank in this cross-border agreement. It may be advantageous to include the bank in this agreement. ('Parties' is defined as home and host regulator.) It remains unclear if the proposal will be reliable. Even with signatures from both parties, the agreement may not stand up in a court of law, and national priorities in a crisis situation may lead to agreements being ignored. To increase the effectiveness of the proposal it may be advantageous to include, in both home and host countries, government agencies such as Treasury/ Finance and Foreign Affairs.

No.	Question	Response
11	Who (i.e., which authorities) will need to be parties to these agreements for them to be most effective?	At a minimum the authorities in each jurisdiction where the local operations could be considered systemic and therefore subject to a resolution action by the host authorities. There is a strong argument for considering a broader range of parties, for example, as highlighted above, a wider range of government agencies and banks themselves. Especially when putting a branch in resolution will effectively put the parent into default and resolution. However, again, this depends on issues such as entry criteria, scope etc. that need more detail before this question can be fully answered.
12	Does **Annex 4: Resolvability Assessments** appropriately cover the determinants of a firm's resolvability? Are there any additional factors to be considered in determining the resolvability of a firm?	The definition of resolvability necessarily involves a significant amount of subjective conclusions based on a range of assumptions. As noted under Q1 – focussing on one firm assuming, ceteris paribus, or a general level of stress may lead to different conclusions being reached. As such, the framework should also consider multiple resolutions and/or a system under substantial stress. Moreover, forcing restructuring and separation of functions on a firm may not reduce systemic stress in a resolution. However, it will certainly increase inefficiencies for the firm and across the industry, providing a more costly, less efficient, and less comprehensive banking system to consumers.
13	Does **Annex 4** identify the appropriate process to be followed by home and host authorities?	With no real test case to follow, it is difficult to make a meaningful evaluation of the appropriateness of the process. However, from the available information, it appears that the authorities undertake the assessment and then present to the firm the conclusions and monitor the remediation efforts. Given that the authorities reach their conclusions independently of the firm the framework should at least allow for the firm to have a "right of reply" to correct any misunderstandings, provide further information, or offer alternative solutions for remediation. Further, it is important to define who is in charge, what authority has the final say, and how to ensure that favouring of the home country is not a factor.
14	Does **Annex 5: Recovery and Resolution Plans** cover all critical elements of a recovery and resolution plan? What additional elements should be included? Are there elements that should not be included?	Yes, we consider that Annex 5 covers all the critical elements of a RRP and there are no additional elements that we can suggest for inclusion. It should be noted, however, that section 3.1 within Annex 5 states that firms should identify the criteria (both quantitative and qualitative) which would trigger the implementation of an RCP. We believe the use of quantitative triggers may give rise to potential unintended consequences (for example recovery actions triggered inappropriately) unless subject to a qualitative overlay. Therefore it is critical that any quantitative triggers are used in conjunction with a qualitative overlay. Consistent with Q20 (below), focus should be on the capital and liquidity aspects of Basel and not pushing through RRP's on a quicker timescale.

No.	Question	Response
15	Does **Annex 5** appropriately cover the conditions under which RRPs should be prepared at subsidiary level?	Annex 5 does not appear to specifically outline where RRPs should be prepared at subsidiary level. Annex 5 notes that the CMG should work co-operatively regarding the preparation of RRPs. Therefore, to the extent that a host country determines that a subsidiary is of systemic importance and requires its own RRP, this should be co-ordinated by the home country through the CMG to avoid unnecessary duplication and inconsistency of requests and assessments.
16	Are there other major potential business obstacles to effective resolution that need to be addressed that are not covered in **Annex 6**?	Each firm is different and therefore "obstacles" will vary from firm to firm, so having a defined list may prove counterproductive.
17	Are the proposed steps to address the obstacles to effective resolution appropriate? What other alternative actions could be taken?	Again each firm and each jurisdiction is different. Steps taken for one firm may be inappropriate for another. The alternative process (and hence action) is that any perceived resolvability issues are presented to the firm along with remediation steps suggested by the authorities and, in conjunction with the response to Q13 above, within a defined time period the firm could respond with alternative solutions specific to the firm that meet the regulatory objectives. One specific comment: The proposed framework includes the requirement that "firms should ... consider eliminating or seek alternatives to cross-default clauses". This would entail a significant change to the current fundamental operation of capital markets. Given the shortness of the consultation period and the fundamental change being requested it is not possible to consider this question fully. This is one area that should be subject to further consultation following the finalisation of the framework. For the removal of cross-default clauses (and in general for any remediation of resolvability issues) the following need to be assessed: • What is the barrier to resolvability that is deemed necessary to address; • How would the proposed actions improve the situation; • What would be the impact of changing the existing structure; • What is the alternative framework that would be superior; and

No.	Question	Response
		• What are the risks from the alternative, and has it effectively achieved the original objective. In the absence of modelling the above steps and public consultation to identify unintended consequences it is difficult to comment further or support such options. Furthermore, the costs and inefficiencies imposed through mandatory resolvability actions (which will necessarily flow to some extent to the broader economy) must be weighed against the assumed scenario that drove the assessment, and other possible scenarios in which the prescribed actions may in fact increase rather than reduce resolvability and systemic impact. Finally, the combined impacts of increased and better quality capital, improved liquidity, and enhanced supervision provide a greatly reduced probability of failure and opportunity to respond to deteriorating conditions.
18	What are the alternatives to existing guarantee / internal risk-transfer structures?	Intra-group activities provide significant efficiency benefits to consumers both in pricing and provision of banking services. In the absence of intra-group activities those efficiencies will be significantly reduced leading to a more costly and less comprehensive banking service to the economy. In the time available for this consultation period it is not possible to give full and thoughtful analysis regarding whether alternatives exist and what form they might take.
19	How should the proposals set out in **Annex 6** in these areas best be incorporated within the overall policy framework? What would be required to put those in place?	See answers above – rigid requirements to 'improve' resolvability would be best replaced with firm specific assessments and actions.
20	Comment is invited on the proposed milestones for G-SIFIs.	The timelines appear aggressive when, as discussed above, much detailed work and clarification remains to be completed. It will be difficult to perform resolvability assessments when the details of the resolution framework under which that assessment is to be performed remains unclear. The primary focus should be on Basel III implementation – Capital by 1 January 2013 and Liquidity after. Given the increased regulatory burden being applied to banks, it seems advisable to properly implement capital and liquidity Basel III frameworks first, without adding undue additional pressure with an unnecessarily short implementation timeframe of RRPs.

No.	Question	Response
21	Does the existence of differences in statutory creditor rankings impede effective crossborder resolutions? If so, which differences, in particular, impede effective crossborder resolutions?	In Australia, the cross border insolvency administration regime under the Cross Border Insolvency Act is new, having commenced in 2008. There is very little case law which highlights any deficiencies. The statutory ranking of creditors in Australia, other than ADI depositors, for corporate insolvency is mainly in section 556 of the Corporations Act which gives preference to specified classes of creditors including employees for salaries and wages over holders of floating charges and unsecured creditors. If the insolvency has Australia as its centre of main interest the local administrator will be required to administer subject to this hierarchy. Any overseas' assets of the company will presumably be subject to local laws. It seems doubtful that this would significantly impede resolutions. Non statutory differences occur between common law countries which recognise set-off rights which are not recognised in certain civil law countries. This can lead to tensions between creditors who expect to settle net and the administrators from non common law countries that do not recognise this right. "War-gaming" group outcomes would identify the issues ex-ante, which could include disparities between resolution regimes.
22	Is a greater convergence of the statutory ranking of creditors across jurisdictions desirable and feasible? Should convergence be in the direction of depositor preference or should it be in the direction of an elimination of preferences? Is a harmonised definition of deposits and insured deposits desirable and feasible?	Statutory preference given to specified creditors reflects the political desire in the relevant jurisdiction. . In Australia depositor preference exists under S13 A (3) of the Banking Act 1959. While the short consultation period makes it difficult to provide a considered response to this question, it is the ABA's position that it would appear that convergence of depositor preference regimes is desirable in order to respect a cross-jurisdictional level playing field for depositors and other creditors.
23	Is there a risk of arbitrage in giving a preference to all depositors or should a possible preference be restricted to certain categories of depositors, for example, retail deposits? What should be the treatment	This is again an example of where a separate project needs to be undertaken. Only once the high-level framework is agreed is it possible to consider the details of how individual customers and accounts should be treated.

No.	Question	Response
	of (a) deposits from large corporates; (b) deposits from other financial firms, including banks, assets managers and hedge banks, insurers and pension funds; (c) the (subrogated) claims of the deposit guarantee schemes 10 See recommendation 12 of the SIFI recommendations. 21 (especially in jurisdictions where these schemes are financed by the banking industry)?	
25	What other measures could be contemplated to mitigate the impediments to effective cross-border resolution if such impediments arise from differences in ranking across jurisdictions? How could the transparency and predictability of the treatment of creditor claims in a cross-border context be improved?	Through the CMG authorities will work together to develop resolution plans which will necessarily ensure a consideration of the jurisdictional differences and their impacts on resolvability and fairness.
26	Please give your views on the suggested stay on early termination rights. What could be the potential adverse outcomes on the failing firm and its counterparties of such a short stay? What measures could be implemented to mitigate these adverse outcomes?	The ABA is supportive of a stay, noting that a short stay is preferable to an extended stay which would potentially create significant uncertainty, and over time increasing unease for market participants regarding the status of their contracts. It was demonstrated during the GFC that the immediate termination of derivative contracts was a key driver of the systemic impact of the failure of Lehman. Automatic termination requires replacement by the market of positions. Further, to the extent that a bridge bank or the institution itself is recapitalised the firm will not want to be in a situation where previously hedged risks are now unhedged. Therefore, if it is preferable, for both the survivor institution and the market in general, that a survivor institution be

No.	Question	Response
	How is this affected by the length of the stay?	created to carryover derivative positions. This would help address one of the key systemic risks of the failure of a firm. The adverse outcome is that counterparties do not know their outcome for some period of time. This lack of clarity means that losses are uncertain as is the requirement to replace transactions. Communication regarding the likelihood of a survivor institution would be important to reduce the adverse impacts. Additional comments include: • It could be that prior to the publication of the "stay" that some early termination right may have been exercised and some creditors had recourse and that itself may result in a stay being sought. • Maturing contracts are not impacted which, if your rights are stayed, may create uncertainty. • These arrangements also impact collateral flows. It is the ABA's understanding that the stay should not impact any contractual cash flows. • Early termination rights can include ATE as a result of a payment default on other non ISDA contracts. • Implies that providing obligations are met, the stay is enforceable. However, there is a possibility that a circumstance may arise where in the underling arrangements, for some financial institutions, there is no default, whereas others could have defaults and seeking to close out – therefore it is possible for inequalities to emerge. • It is unclear what happens if a trade gets moved to another bank/institution that an institution has either credit concerns or concentration issues – implies that the existing ISDA and CSA annexure also get carried – effectively for the same credit institution two FM documents would then be required – again as a SIFI this will cause much disruption. • The longer the stay the more the imbalances arise. • Consistency of implementation of this concept across jurisdictions is necessary to prevent banks in one jurisdiction being advantaged against others, both when an event occurs and in ordinary operations in the lead up to an event.

No.	Question	Response
27	What specific event would be an appropriate starting point for the period of suspension? Should the stay apply automatically upon entry into resolution? Or should resolution authorities have the discretionary right to impose a stay?	Once the legislation above passes, there will be at least a 48 hour stay from the time at which a statutory manager takes control of an ADI. An earlier trigger would flag a resolution is likely before actually triggered. Any later would be ineffective. The ABA's proposal is that the stay will apply automatically and it is believed that if the stay is reliant on the discretionary right of the resolution authorities this would introduce a level of uncertainty likely to cause more instability. For example, what would be the time frame by which a stay must be imposed?
28	What specific provisions in financial contracts should the suspension apply to? Are there any early terminations rights that the suspension should not apply to?	If the suspension is to apply, it should apply to the early termination right and there should be no early termination rights that it does not apply to. A situation where some counterparties are able to close-out where others are not able to would not be acceptable.
29	What should be an appropriate period of time during which the authorities could delay the immediate operation of contractual early termination rights?	As above, 24 to 48 hours. The concept should be compatible with existing non-payment grace periods that are already allowed, for example this is common in long-term funding documentation.
30	What should be the scope of the temporary stay? Should it apply to all counterparties or should certain counterparties, for example, Central Counterparties (CCPs) and FMIs, be exempted?	Again a specific issue of detail that should be addressed once the high level framework is agreed, and before resolution frameworks are implemented. The stay should apply to all counterparties.
31	Do you agree with the proposed conditions for a stay on early termination rights? What additional safeguards or assurances would be necessary, if any?	Annex 8 III Conditions and Safeguards 5. (i): The ABA agrees that the suspension should apply to provisions in financial contracts that trigger early termination rights by virtue of the initiation of insolvency or resolution proceedings but it does not agree that the suspension should apply to provisions in financial contracts that trigger early termination rights by virtue of a change of control. A change of control event is ordinarily a termination event and not an event of default under the ISDA. The consequences of a termination event do not have the knock-on impact of an event of default which has the potential to affect all of a counterparty's close-out netting contract. Further, a change of control termination event is not a

No.	Question	Response
		common event in an ADI's documentation where the only termination right is usually as a result of a credit event upon merger. Again this is a termination event and not an event of default and we do not consider that it has the same potential to create market instability which an insolvency event would have.
32	With respect to the cross-border issues for the stay and transfer, what are the most appropriate mechanisms for ensuring cross-border effectiveness?	The bankruptcy regime of the jurisdiction of incorporation of the respective parties usually supersedes any contractual terms which the parties may agree. It does not appear possible to ensure cross-border effectiveness other than the current practice of obtaining legal opinions such as the ISDA close-out netting opinions. Under the ISDA, if a stay were to apply in a particular jurisdiction, the other party would not be able to trigger the insolvency event of default until such time as the stay had expired. Having a stay apply in the home country, but have termination triggered elsewhere would generally defeat the purpose.
33	In relation to the contractual approach to cross-border issues, are there additional or alternative considerations other than those described above that should be covered by the contractual provision in order to ensure its effectiveness?	None that are not already covered in the ISDA or by legal opinions.
34	Where there is no physical presence of a financial institution in question in a jurisdiction but there are contracts that are subject to the law of that jurisdiction as the governing law, what kind of mechanism could be considered to give effect to the stay?	Banks rely on the ISDA jurisdictional netting opinions when negotiating ISDA Master Agreements off-shore in order to establish that close-out netting is enforceable in foreign jurisdictions. All onshore ISDAs are governed by Australian law. The ISDA jurisdictional netting opinions are based on the assumption that the ISDA is governed by American or English law and for this reason all ISDAs which we negotiate are governed by either American or English law whether they are for a bank or subsidiaries. There are a few exceptions to this (Singaporean law and a couple of ISDAs governed by Canada law). In these instances it is practice to commission independent legal opinion to confirm that close-out netting will be enforceable. In all other cases where the client insists that they will not submit to one of these governing laws, the parties can submit to arbitration in one of the international courts.