

## CROSS-BORDER COOPERATION IN BANK RESOLUTION: A FRAMEWORK FOR ASIA

VIVIEN CHEN,\* ANDREW GODWIN\*\* and IAN RAMSAY\*\*\*

This paper identifies challenges to cross-border cooperation in Asia in the area of bank resolution and potential measures to enhance cooperation. In line with the consensus-based approach that is common in Asia, these measures include strengthening regulatory harmonisation and promoting convergence in supervisory practices through the use of non-binding guidelines. Drawing on the experience in the EU and the Trans-Tasman cooperation between Australia and New Zealand, the paper proposes that convergence-promoting functions be incorporated within existing institutions and considers the use of resolution colleges. In addition, acknowledging the preference in Asia for bilateral arrangements over multilateral arrangements, the paper suggests ways in which information-sharing and recognition of foreign resolution action can be enhanced and draws on the experience of Singapore for this purpose.

### I. INTRODUCTION

Increasing interconnectedness in Asian financial systems<sup>1</sup> suggests the need for regulatory frameworks to support regional financial stability. The need is likely to increase with the advent of the ASEAN<sup>2</sup> Economic Community (“AEC”), which was established at the end of 2015 and is anticipated to be the seventh largest economy in the

---

\* Research Associate, Melbourne Law School, The University of Melbourne.

\*\* Senior Lecturer, Melbourne Law School, The University of Melbourne.

\*\*\* Harold Ford Professor of Commercial Law, Melbourne Law School, The University of Melbourne. The authors would like to thank Professor Andrew Walter for his helpful and insightful comments on this paper. All errors and omissions are the authors' alone. This paper is part of a project on Financial Regulation in Asia, which is funded by a cluster grant from the Melbourne School of Government, The University of Melbourne, and by contributions from external partners, including ANZ Bank, the University of Hong Kong, Osaka University of Economics, the Australian APEC Study Centre, and the Fung Global Institute. We gratefully acknowledge the support of these organisations.

<sup>1</sup> Asian financial systems are posited to become a dominant force in global markets by 2030: see ANZ Research, “Caged Tiger: The Transformation of the Asian Financial System”, online: (2014) ANZ Insight 5 <<http://www.media.anz.com/phoenix.zhtml?c=248677&p=irol-insight>>. They are forecast to be four times their present size and twice the projected size of the US financial system by 2030: see Andrew Cornell, “Financial Integration Lags the ASEAN Boom, is that a Problem?”, online: (2015) ANZ BlueNotes <<https://bluenotes.anz.com/posts/2015/04/%E2%80%8Bfinancial-integration-lags-the-asean-boom-is-that-a-problem/>>.

<sup>2</sup> ASEAN is the acronym for the Association of Southeast Asian Nations, a political and economic organisation which comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

world.<sup>3</sup> Financial integration and the growth of regional banks give rise to the potential for contagion of financial instability across borders.<sup>4</sup> Regulatory frameworks have been developed internationally with a view to minimising the effect of financial contagion. Among these are frameworks facilitating the resolution—namely the restructuring or orderly winding up—of distressed financial institutions.

International experience reveals the inherent difficulty of cross-border cooperation, particularly in times of crisis. Cross-border cooperation refers to cooperation between resolution authorities in home and host countries, the former being the jurisdiction in which a financial institution is incorporated and the latter being the other jurisdictions in which it operates. Such cooperation is central to the effective implementation of internationally prescribed resolution frameworks for cross-border banking groups. Such frameworks aim to achieve the smooth resolution of financially distressed financial institutions without jeopardising systemic stability or burdening the public purse. They are achieved through a variety of tools, including powers on the part of resolution authorities to take control of distressed financial institutions and to strengthen their capital adequacy by converting debt into equity.

This paper identifies challenges to cross-border cooperation in the Asian region and seeks to ascertain features of a resolution framework that are likely to facilitate cross-border cooperation in bank resolution in the Asian region. The analysis draws from international models of cross-border cooperation in bank resolution, acknowledging ASEAN's distinct form of consensus-based cooperation and emphasis on national sovereignty. ASEAN's consensus-based cooperation arguably underpins cross-border cooperation in the broader East Asian region, as demonstrated by financial cooperation within ASEAN + 3.<sup>5</sup> A resolution framework consistent with established modes of cooperation within the region is arguably more likely to be implemented and remain resilient in a crisis when cooperation is crucial.

Part II considers existing forms of economic cooperation in Asia and the challenges to deepening regional cooperation. This provides the general context within which the specific challenges that relate to financial regulation can be examined. Part III examines the significance of cross-border cooperation in bank resolution and details internationally recommended tools for effective cross-border cooperation. Part IV focuses on Asia and the need for cross-border cooperation in bank resolution. The development of Asian regulatory frameworks for bank resolution and progress in cross-border cooperation are also discussed. Part V canvasses the challenges to the implementation of international frameworks for cross-border cooperation in bank resolution. The discussion draws from international experience and highlights

---

<sup>3</sup> Rajeshni Naidu-Ghelani, "Asean economic growth 'to outdo EU'" *BBC News* (20 April 2015), online: [BBC News <http://www.bbc.com/news/business-32387376>](http://www.bbc.com/news/business-32387376); Asian Development Bank, "ASEAN Economic Community: 12 Things to Know" (18 August 2014), online: [The Asian Development Bank <http://www.adb.org/features/asean-economic-community-12-things-know>](http://www.adb.org/features/asean-economic-community-12-things-know).

<sup>4</sup> International Monetary Fund, *Regional Economic Outlook: Asia and Pacific* (Washington: International Monetary Fund, 2015) at 104-106; E Wong, A Tsang & S Kong, Implications of Liquidity Management of Global Banks for Host Countries – Evidence from Foreign Bank Branches in Hong Kong (HKIMR Working Paper No 21/2014).

<sup>5</sup> ASEAN + 3 refers to the ASEAN countries, together with China, Japan, and Korea: see Jee-young Jung, *Regional Financial Cooperation in Asia: Challenges and Path to Development* (Bank for International Settlements Paper No. 42, 2008) at 122.

specific challenges in the Asian context. International models of cross-border cooperation in bank resolution are discussed in Part VI, focusing on the European Union (“EU”) and Trans-Tasman cooperation. Part VII analyses features of a framework that may facilitate regional cooperation in bank resolution across ASEAN. Part VIII concludes.

## II. REGIONAL ECONOMIC COOPERATION IN ASIA

In seeking to identify features of a regulatory framework for regional cooperation in Asia, it is essential to understand the established modes of cooperation within the region. Initiatives towards regional cooperation in bank resolution are more likely to be implemented successfully when consistent with established methods of regional cooperation in Asia. This part considers the characteristics of Asia’s most advanced forms of regional economic cooperation and identifies challenges to deepening regional cooperation.

To date, economic cooperation among Asian countries has focussed primarily on trade liberalisation. Economic cooperation has centred largely on Southeast Asian countries through ASEAN initiatives. Significant regional cooperation is also seen in ASEAN + 3. Hence, existing economic cooperation in Asia is sub-regional, rather than region-wide. West Asia has had minimal involvement in the regional economic cooperation among East and Southeast Asian countries. Forums such as APEC have a broader membership base, including countries from outside the Asian region, but it excludes some of Asia’s emerging economies.

The most advanced form of economic cooperation in Asia is seen in the AEC, which was established at the end of 2015. The AEC aims to achieve the free movement of goods, services, investment, capital, and skilled labour. Economic integration among ASEAN’s ten Member States is facilitated by the harmonisation of regulatory frameworks.<sup>6</sup> The ASEAN Banking Integration Framework (“ABIF”) is central to financial integration within the AEC. The ABIF was entered into by ASEAN’s ten Member States in March 2015. Under the ABIF, Member States may enter into bilateral arrangements that allow Qualified ASEAN Banks (“QABs”) to operate in partner countries on the same terms as domestic banks.<sup>7</sup> The criteria for QABs and the reciprocal terms on which they will be allowed to operate are determined bilaterally.<sup>8</sup> In principle, the ABIF provides ASEAN banks greater market access to the ASEAN sub-region than the access granted to non-ASEAN counterparts.

The ABIF reflects the ASEAN model of cooperation with its multi-track approach, in accordance with Member States’ level of financial development and capacity

---

<sup>6</sup> These include regulatory harmonisation in areas of competition policy, consumer protection and intellectual property; Association of Southeast Asian Nations, *ASEAN Economic Community Blueprint* (Jakarta: ASEAN, 2008) [Association of Southeast Asian Nations, *Blueprint*].

<sup>7</sup> Deutsche Welle, “ASEAN Banking Accord ‘A Step Toward Economic Integration’” (23 March 2015), online: Deutsche Welle <<http://www.dw.de/asean-banking-accord-a-key-step-towards-economic-integration/a-18333763>>.

<sup>8</sup> Association of Southeast Asian Nations, Press Release, “Joint Statement of the 1<sup>st</sup> ASEAN Finance Ministers’ and Central Bank Governors’ Meeting (AFMFM) Kuala Lumpur, Malaysia, 21 March 2015 Theme: Our People, Our Community, Our Vision” (21 March 2015), online: ASEAN Press Releases on Finance and Banking <<http://www.asean.org/asean-economic-community/asean-finance-ministers-meeting-afmm/press-releases-statements/>> [*Joint Statement*].

for regulatory reform.<sup>9</sup> Countries with more developed financial systems are able to progress at a faster pace,<sup>10</sup> providing impetus to less developed countries to participate in financial integration as their capacity increases. While the ABIF acknowledges the need for international regulatory standards, the emphasis on national sovereignty—characteristic of ASEAN cooperation—is clearly evident in statements noting that “respect for national policy objectives” and “the right to uphold the regulatory discretion of national authorities of Member States” underpin financial liberalisation.<sup>11</sup>

Milestones in ASEAN + 3 economic cooperation include the Chiang Mai Initiative, in which ASEAN + 3 Member States set up an emergency currency pool of US\$120 billion to boost liquidity and help the region overcome the global crisis.<sup>12</sup> Efforts have also been made to develop Asia’s financial markets through the Asian Bond Markets Initiative and the Asian Bond Fund. The ASEAN Surveillance Process monitors members’ and regional economic developments, although its resources are limited and it lacks any compliance mechanism.

Cooperation among Southeast Asian states is characterised by non-binding decision making, consensus-building and soft institutions.<sup>13</sup> Regionalism in Asia has been driven primarily by market forces, with intergovernmental economic cooperation subsequently developing. Informal agreements and non-binding commitments underpin Asian regional cooperation,<sup>14</sup> facilitated by “the moral power of informal procedures” in determining relations between actors.<sup>15</sup> Regional cooperation in Asia differs considerably from the EU’s legally binding frameworks among Member States and central coordinating institutions.<sup>16</sup> In contrast to the EU, ASEAN + 3 maintain minimal regional institutions and have expended limited resources in strengthening regional institutions. The ASEAN Secretariat and the ASEAN + 3 Macroeconomic Research Office (“AMRO”), the surveillance unit of the Chiang Mai Initiative, arguably lack efficacy due to limited funding.<sup>17</sup> As national sovereignty is central to ASEAN’s consensus-based cooperation, regional institutions assume a supporting role without the binding decision-making functions of the EU’s institutions.

---

<sup>9</sup> Masahiro Kawai & Peter J Morgan, “Regional Financial Regulation in Asia” in Masahiro Kawai, Peter J Morgan & Pradumna B Rana, eds, *New Global Economic Architecture: The Asian Perspective* (Cheltenham: Edward Elgar, 2015) 112 at 136.

<sup>10</sup> Geert Almekinders *et al*, *ASEAN Financial Integration* (IMF Working Paper WP/15/34, February 2015).

<sup>11</sup> Asian Development Bank, *The Road to ASEAN Financial Integration* (Philippines: Asian Development Bank, 2013) at 6.

<sup>12</sup> Kawai & Morgan, *supra* note 9 at 133.

<sup>13</sup> Jorn Dorsh, “Regional Answers to the Global Crisis? Asia-Pacific Multilateral Organisations and the Economic Downturn” in Jorn Dosch & Christopher M Dent, eds, *The Asia-Pacific, Regionalism and the Global System* (Cheltenham: Edward Elgar, 2012) 132 at 134. For general reference to regionalism in Southeast Asia, see Amitav Acharya, *The Making of Southeast Asia: International Relations of a Region* (Cornell: Cornell University Press, 2013).

<sup>14</sup> Fariborz Moshirian, “Implications of Global Financial and Regulatory Policies on Systemic Risk in Asia” in Iwan J Azis & Hyun Song Shin, eds, *Global Shocks, Risks, and Asian Financial Reform* (Cheltenham: Edward Elgar, 2014) 284 at 296.

<sup>15</sup> Jorn Dosch & Christopher M Dent, “The Asia-Pacific, Regionalism and the Global System: An Introduction” in Dosch & Dent, *supra* note 13 at 5.

<sup>16</sup> Joanne Wong, “On Legal Harmonisation Within ASEAN” (31 October 2013), online: Singapore Law Review <<http://www.singaporelawreview.org/2013/10/on-legal-harmonisation-within-asean/>>.

<sup>17</sup> Frank Frost, *ASEAN and Regional Cooperation: Recent Developments and Australia’s Interests* (Australia: Parliamentary Library, 2013) at 44, 45; Kawai & Morgan, *supra* note 9 at 131.

Bilateralism is described as one of the pillars of Asian regionalism.<sup>18</sup> Bilateral arrangements, particularly on trade and investment, are a common feature of Asian economic cooperation.<sup>19</sup> The Chiang Mai Initiative initially began as a network of bilateral swap agreements, subsequently developing into a multilateral agreement. The ABIF similarly seeks to facilitate financial integration within ASEAN through bilateral agreements.<sup>20</sup> Hence, financial integration in the AEC is anticipated to take place through a network of bilateral agreements. In contrast with the EU, ASEAN's financial integration does not involve centralised coordination through a central bank authority.

There are several forums for dialogue and cooperation within ASEAN + 3. The Executive Meeting of East Asia-Pacific Central Banks ("EMEAP"), a cooperative group of central banks and monetary authorities in East Asia and the Pacific region, and the ASEAN + 3 Finance Ministers and Central Bank Governors' Meeting have been instrumental in facilitating regional financial cooperation.<sup>21</sup> Nevertheless, there are several impediments to more institutionalised regional integration and cooperation in East Asia. Diversity in the level of economic development, territorial disputes and the lack of political leadership pose challenges to greater regional integration.

Relations among various ASEAN + 3 countries continue to be challenged by disputes over contested borders. In this respect, ASEAN members have tended to refer disputes to the International Court of Justice rather than attempt to resolve them through regional channels.<sup>22</sup> Territorial disputes have occasionally given rise to armed conflict. Clashes between Thai and Khmer soldiers over Preah Vihear, for instance, resulted in deaths and displacement.<sup>23</sup> The Spratly Islands in the South China Sea are a continuing source of contention among China, Vietnam, Taiwan, the Philippines, Malaysia and Brunei.<sup>24</sup> The lack of political trust flowing from unresolved territorial disputes, historical wartime atrocities and concern over China's growing economic dominance and potential military power arguably work against regional integration.<sup>25</sup> Nevertheless, economic cooperation has progressed in the region, spurred on by market integration and facilitated by multiple channels for dialogue, despite a deficit of political trust.<sup>26</sup>

Regional integration is also thought to be impeded by a lack of political leadership in the region.<sup>27</sup> As noted above, ASEAN cooperation is premised on consensus and

---

<sup>18</sup> *Ibid.*

<sup>19</sup> John Ravenhill, "The Numbers Game in Asia-Pacific Cooperation" in Dosch & Dent, *supra* note 13 at 75, 90.

<sup>20</sup> *Joint Statement*, *supra* note 8.

<sup>21</sup> Jung, *supra* note 5 at 125.

<sup>22</sup> These include disputes between Malaysia and Indonesia over islands off the coast of Sabah, and between Singapore and Malaysia over islands in the Singapore Straits: Frost, *supra* note 17 at 32.

<sup>23</sup> *Ibid* at 32, 33.

<sup>24</sup> David Wroe, "Chinese Ambassador Fires Warning over Spratly Islands Dispute", *Sydney Morning Herald* (26 May 2015), online: The Sydney Morning Herald <<http://www.smh.com.au/>>.

<sup>25</sup> Kevin G Cai, *The Politics of Economic Regionalism: Explaining Regional Economic Integration in East Asia* (London: Palgrave Macmillan, 2010) at 139; Peter Drysdale, "Regional Cooperation in East Asia and FTA Strategies" (2005) *Pacific Economic Papers* 344 at 13.

<sup>26</sup> *Ibid.* Cai posits that ASEAN + 3 leaders have sought to limit political disagreements from interfering with regional economic cooperation.

<sup>27</sup> Giovanni Capanelli & Carlo Filippini, "Economic Integration in East Asia and Europe: Lessons from a Comparative Analysis" (2010) 55 *Singapore Economic Review* 163 at 180; Jung, *supra* note 5 at 129.

mutual respect for national sovereignty. While adherence to these principles has been instrumental in the establishment of the AEC, ASEAN's characteristic voluntary participation is also thought to impede market integration.<sup>28</sup> Progress towards the development of the AEC has been slow, and is thought to be hampered in part by the limits of consensus-based cooperation and the lack of enforcement mechanisms.<sup>29</sup> ASEAN's minimal coordinating institutions are thought to pose further constraints on the deepening of cooperation within Asia. Further, different levels of economic development and political diversity add to the complexity of policy coordination and cooperation among countries in the region,<sup>30</sup> although ASEAN's multi-track approach mitigates this to an extent.

### III. CROSS-BORDER COOPERATION IN BANK RESOLUTION

The failure of globally systemically important financial institutions ("G-SIFIs") during the global financial crisis highlighted the need for coordinated resolution mechanisms. The lack of effective cross-border resolution mechanisms arguably contributed to disorderly collapses and contagion of financial instability across borders.<sup>31</sup> Since then, structures that minimise the impact of distressed financial institutions and facilitate the continuity of essential banking services have been proposed. Coordinated responses are thought to be more conducive to financial stability and the preservation of asset value than disorderly liquidation.<sup>32</sup> The Financial Stability Board's ("FSB")<sup>33</sup> *Key Attributes* set out features for effective resolution of financial institutions.<sup>34</sup> The *Key Attributes* are aimed at facilitating orderly resolution and maintaining continuity of failed banks' vital economic functions without exposing taxpayers to loss flowing from bank failure. A range of resolution tools is prescribed to facilitate these objectives.

Cross-border cooperation is vital to the implementation of group-wide resolution plans in a crisis. Effective resolution requires resolution authorities in host countries to give effect to resolution action in relation to assets and liabilities in their jurisdiction.<sup>35</sup> In the absence of cooperation, territorial approaches, under

<sup>28</sup> Cai, *supra* note 25 at 139.

<sup>29</sup> Siow Yue Chia, "The ASEAN Economic Community: Progress, Challenges, and Prospects" (2013) Asian Development Bank Institute Working Paper Series No 440; Cecelia Kok, "Indonesia Pouring Cold Water over ASEAN Economic Community", *The Star* (18 May 2015); Benny Hutabarat, "ASEAN Economic Community 2015: Will It Happen?", *The Jakarta Post* (24 November 2014), online: The Jakarta Post <<http://www.thejakartapost.com/news/2014/11/24/asean-economic-community-2015-will-it-happen.html>>.

<sup>30</sup> Frost, *supra* note 17 at 62.

<sup>31</sup> Basel Committee on Banking Supervision, *Report and Recommendations of the Cross-border Bank Resolution Group* (Bank for International Settlements, March 2010) at 24.

<sup>32</sup> Jianping Zhou *et al.*, *From Bail-out to Bail-in: Mandatory Debt Restructuring of Systemic Financial Institutions* (International Monetary Fund, IMF Staff Discussion Note SND/12/03, 24 April 2012).

<sup>33</sup> The Financial Stability Board is an association which monitors and assesses vulnerabilities that affect the global financial system, and proposes strategies to strengthen the resilience of financial systems: Financial Stability Board, *Report to the G20 Los Cabos Summit on Strengthening FSB Capacity, Resources and Governance* (18-19 June 2012).

<sup>34</sup> Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (15 October 2014) [Financial Stability Board, *Key Attributes*].

<sup>35</sup> Financial Stability Board, *Cross-Border Recognition of Resolution Action* (Consultative Document, 29 September 2014) at 3 [Financial Stability Board, *Cross-Border Recognition*].

which national authorities focus on the interests of domestic creditors and other domestic stakeholders to the exclusion of foreign or cross-border interests, are likely to result in less efficient outcomes for cross-border financial groups and exacerbate financial instability.<sup>36</sup> Cross-border cooperation is central to various stages of resolution. The development of resolution plans,<sup>37</sup> resolvability assessments, and information-sharing, particularly when there are material adverse developments, are premised on effective cross-border cooperation. The *Key Attributes* propose that institution-specific cross-border cooperation agreements should detail procedures for information-sharing and set out the roles and responsibilities of home and host authorities in resolution planning and crisis management.

A coordinated response requires the support of legal and statutory frameworks to facilitate the implementation of cross-border resolution plans<sup>38</sup> and give effect to foreign resolution action.<sup>39</sup> In the absence of compatible legal frameworks, efforts to implement resolution plans may fail. The International Monetary Fund (“IMF”) proposes that countries enter into non-binding multilateral arrangements on cooperation with foreign resolution authorities, subject to the resolution action being consistent with domestic financial stability and the interests of domestic creditors.<sup>40</sup> Under this approach, national resolution authorities should have the discretion to act independently in the interest of domestic financial stability and creditors.<sup>41</sup> However, at the same time, international prescriptions suggest that regulatory frameworks should ensure foreign creditors are not discriminated against.<sup>42</sup> Further, national laws should be amended to remove barriers to cross-border resolution such as constraints on information-sharing.<sup>43</sup> The IMF and FSB propose the adoption of harmonised resolution regimes across countries incorporating a range of resolution powers.<sup>44</sup>

Resolution authorities should have the power to take control of distressed banks and appoint administrators to restore to viability as much of the bank’s business as possible.<sup>45</sup> Resolution frameworks should enable resolution authorities to replace senior management and recover monies, including clawing back variable remuneration. Recommended risk mitigation measures include enabling customers to regain access to their assets quickly, minimising market disruptions. The continuation of

---

<sup>36</sup> Basel Committee on Banking Supervision, *supra* note 31 at 25.

<sup>37</sup> The *Key Attributes* indicate that home resolution authorities should assume responsibility for the development of group resolution plans. Host authorities may develop resolution plans consistent with the group’s resolution plans: Financial Stability Board, *Key Attributes*, *supra* note 34 at 14, 15.

<sup>38</sup> Basel Committee on Banking Supervision, *supra* note 31 at 27; Financial Stability Board, *Report of the Financial Stability Board to the G-20* (2 September 2013) at 14.

<sup>39</sup> International Monetary Fund, *Cross-border Bank Resolution: Recent Developments* (June 2014) [International Monetary Fund, *Cross-border Bank Resolution*].

<sup>40</sup> In determining the latter, national authorities should consider whether domestic creditors are likely to receive at least what they would have if a territorial approach had been adopted: International Monetary Fund, *Resolution of Cross-border Banks – A Proposed Framework for Enhanced Coordination* (11 June 2010) at 17 [International Monetary Fund, *Proposed Framework*].

<sup>41</sup> *Ibid* at 18.

<sup>42</sup> *Ibid* at 40.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*; Financial Stability Board, *Key Attributes*, *supra* note 34.

<sup>45</sup> Financial Stability Board, *Key Attributes*, *ibid* at 7.

critical banking functions is essential. The *Key Attributes* suggest several options for resolution authorities to ensure that a bank's essential functions are continued, including procuring third party services or establishing bridge institutions.

The *Key Attributes* anticipate that bridge institutions may be established by resolution authorities to assist with the resolution of failed banks. In addition to continuing the failed bank's essential functions, bridge institutions provide a vehicle through which the failed bank's assets and liabilities may subsequently be transferred to purchasing institutions.<sup>46</sup> Resolution measures include separating good assets from bad assets. Non-performing loans and assets that are difficult to value may be transferred to separate asset management vehicles. At times, resolution action may trigger the operation of early termination clauses in some contracts. The *Key Attributes* assert that resolution authorities should have the authority to temporarily delay the operation of contractual early termination clauses to facilitate the transfer of contracts to another entity.<sup>47</sup>

The prescribed resolution tools include restructuring and recapitalisation of failed banks. Resolution authorities should have the power to procure mergers and acquisitions involving the sale of substantial business operations, or wind down the bank's business, without shareholder approval. The power to convert debt to equity, known as bail-in, allows resolution authorities to recapitalise failed banks, shifting the loss flowing from financial institution failure to its shareholders and creditors<sup>48</sup> and away from publicly-funded intervention.<sup>49</sup> Bail-in is seen as a way to strengthen market discipline and avoid moral hazard.

#### IV. ASIA

##### A. *Why Asia Needs to Concern Itself with Cross-Border Cooperation in Bank Resolution*

Asian countries differ in their incentives to implement resolution regimes. Financial centres have stronger incentives to implement resolution regimes. Regulatory frameworks that comply with international standards are vital to financial centres maintaining their competitive edge.<sup>50</sup> Hong Kong, Singapore, Tokyo, and Seoul are among the top ten global financial centres.<sup>51</sup> Singapore, Japan, and Korea currently have the most developed resolution regimes in Asia. Hong Kong's proposed resolution regime incorporates the full range of internationally recommended resolution tools, including statutory bail-in, which Singapore, Japan, and Korea have not adopted.<sup>52</sup>

Home countries to G-SIFIs and regional banks arguably have considerable incentives to adopt measures that mitigate the risk of financial contagion across their

---

<sup>46</sup> *Ibid* at 8.

<sup>47</sup> *Ibid* at 10.

<sup>48</sup> The *Key Attributes* propose that bail-in should apply to unsecured and uninsured creditors, as well as holders of contingent convertible instruments: *ibid* at 9.

<sup>49</sup> *Ibid* at 9; Zhou *et al*, *supra* note 32 at 6.

<sup>50</sup> Deutsche Bank Research, *Global Financial Centres After the Crisis* (EU Monitor 76, 2 August 2010).

<sup>51</sup> Z/Yen Group Ltd, *The Global Financial Centres Index 15* (March 2014).

<sup>52</sup> This is discussed in Part IV-B below.

banking groups and, more broadly, across borders. Japan and China are home countries to G-SIFIs. Asian regional banks have expanded in Asia as European and US banks have deleveraged.<sup>53</sup> Various Asian banks have branches and subsidiaries across a number of Asian countries.<sup>54</sup> ASEAN banks are anticipated to grow as a consequence of the ABIF. The rise in cross-border banking raises challenges of cross-border supervision and the need for measures to mitigate the risk of financial contagion.<sup>55</sup>

ASEAN financial integration and anticipated growth of regional banks have led to a growing recognition of the need for cross-border resolution frameworks.<sup>56</sup> The need for resolution frameworks that seek to avoid disorderly collapses and preserve financial stability are arguably of more significance to some countries than to others. Japanese banks, for example, have increased lending in Asia.<sup>57</sup> Likewise, Chinese banks are seeking to expand their regional operations.<sup>58</sup> Singapore is the home country to three of ASEAN's largest banks<sup>59</sup> while Malaysia and Thailand are home to several other leading ASEAN banks.<sup>60</sup> Malaysian banks have a considerable presence in ASEAN countries<sup>61</sup> while Thai banks have expanded into the Greater Mekong Subregion.<sup>62</sup> Singaporean-based OCBC and UOB have regional operations

<sup>53</sup> "Asia's Regional Banks Running Fast", *The Economist* (24 November 2012).

<sup>54</sup> Reza Siregar, *Macro-Prudential Approaches to Banking Regulation: Perspectives of Selected Asian Central Banks* (ADB Working Paper Series No. 325, November 2011) at 22.

<sup>55</sup> W Raphael Lam, *Cross-border Activity of Japanese Banks* (International Monetary Fund Working Paper No. WP/13/235, November 2013).

<sup>56</sup> ASEAN's need for resolution frameworks has been acknowledged by Muhammad bin Ibrahim, Deputy Governor of the Central Bank of Malaysia at his keynote address for the ASEAN Risk Conference in Kuala Lumpur and by the President of the Asian Development Bank, Takehiko Nakao: Muhammad bin Ibrahim, Keynote Address: "ASEAN Financial Integration – Outlook and Implications", Kuala Lumpur, 14 May 2015 (Address delivered at the ASEAN Risk Conference), [unpublished]; "ASEAN to Fail. Must Try Harder at Financial Integration" *The Establishment Post* (11 April 2015), online: The Establishment Post <<http://www.establishmentpost.com/effort-need-achieve-full-asean-financial-integration-ahead-acc/>>.

<sup>57</sup> Andrew Cornell, "Japan's Mega-Banks have Big Asian Ambitions" (2015), online: ANZ BlueNotes <<https://bluenotes.anz.com/posts/2014/06/japans-mega-banks-have-big-asian-ambitions/>>; Alison Tudor-Ackroyd, "Japan's Banks are Back", *Finance Asia* (9 June 2014), online: Finance Asia <<http://www.financeasia.com/News/387070,japans-banks-are-back.aspx>>.

<sup>58</sup> Clancy Yeates, "Asian Banks Boost Presence in Institutional Lending Market", *Sydney Morning Herald* (24 June 2014).

<sup>59</sup> These are the Development Bank of Singapore, Overseas Chinese Banking Corporation ("OCBC"), and United Overseas Bank ("UOB"). Rankings were based on Tier 1 capital and profitability: Jessica Furseth, "ASEAN Banks on Cross-border Opportunities", *Banking Insight* (December 2013); Siregar, *supra* note 54 at 22.

<sup>60</sup> Brian Caplen, "Top 100 Asean Banks Ranking, 2014: Small Countries, Big Growth", *The Banker* (1 April 2014).

<sup>61</sup> Siregar, *supra* note 54 at 22. CIMB and Maybank have operations across various ASEAN countries: CIMB, "Who We Are", online: CIMB <<https://www.cimb.com/en/who-we-are.html>>; Maybank, "Worldwide", online: Maybank <<http://www.maybank.com/en/worldwide/all-countries.page>>.

<sup>62</sup> The Greater Mekong Subregion includes Cambodia, some parts of China, Lao PDR, Myanmar, Thailand, and Vietnam: Asian Development Bank, "Overview of the Greater Mekong Subregion", online: Asian Development Bank <<http://www.adb.org/countries/gms/overview>>; Khettiya Jittapong & Manunphattr Dhananaphorn, "Thai Banks Chase Regional Dreams as Domestic Lending Boom Fades", *Reuters* (1 December 2014), online: Reuters <<http://www.reuters.com/article/2014/12/01/thailand-banks-southeast-asia-idUSL3N0T82K820141201>>; Sucheera Pinijparakam, "Thai Banks Set to Expand Across Region", *The Nation* (14 April 2014), online: The Nation News <<http://www.nationmultimedia.com/business/Thai-banks-set-to-expand-across-region-30231443.html>>.

that extend to East Asia including Taiwan.<sup>63</sup> The expansion of Australian banks in Asia<sup>64</sup> also increases the need for Australia to consider the cross-border resolution of its banks in the region.

Asian countries that are members of the FSB are committed to implementing the *Key Attributes* by the end of 2015.<sup>65</sup> Australia, China, Hong Kong, India, Indonesia, Japan, Korea, and Singapore are members of the FSB. Many other Asian countries are, however, not members of the FSB. Some have expressed dissatisfaction at the apparent lack of an Asian voice—or a single Asian voice—in the prescriptions.<sup>66</sup>

Some countries have sought to limit risks associated with cross-border banking through subsidiarisation.<sup>67</sup> Cross-border banks operate in host countries through branches or locally incorporated subsidiaries. From a host resolution authority's perspective, subsidiarisation reduces the likelihood of cross-border contagion of financial instability as domestic authorities are able to exercise greater control over locally incorporated banks and impose capital requirements on subsidiaries.<sup>68</sup> Current international prescriptions favour the flexibility of foreign branch establishment as the freer movement of capital is posited to contribute to the efficiency of the international financial system. However, cooperation in cross-border resolution is still relevant for the purpose of discouraging home authorities from cutting off subsidiaries and giving local creditors "recourse to assets other than those of the local subsidiary."<sup>69</sup> This is because in times of financial crises, capital within the group may be utilised to provide liquidity support. Studies suggest that parent banks repatriated funds from Hong Kong branches during the global financial crisis.<sup>70</sup>

There is considerable diversity among Asian countries on subsidiarisation requirements. Various Southeast Asian countries restrict foreign ownership of banks<sup>71</sup> or limit foreign banks' operations.<sup>72</sup> Singapore, for instance, requires foreign banks to

---

<sup>63</sup> OCBC has operations in Japan, Hong Kong, China, Taiwan, and South Korea in addition to several Southeast Asian countries: OCBC, "International Presence", online: OCBC <<https://www.ocbc.com/business-banking/large-corporates/international-presence.html>>; UOB, "About Us", online: UOB <<http://www.uobgroup.com/about/index.html>>.

<sup>64</sup> ANZ, *ANZ's Super Regional Strategy Five-Year Progress Report* (2012).

<sup>65</sup> Moody's Investor Service, *A Compendium of Bank Resolution and Bail-in Regimes in the Asia-Pacific* (24 July 2014); Freshfields Bruckhaus Deringer, *Living Wills Regulatory Reform in Asia Pacific* (June 2014).

<sup>66</sup> Ajith Nivard Cabraal, "Thoughts on a New Global Financial Architecture" (Address delivered at the SEACEN Conference, Kuala Lumpur, 20 October 2013), [unpublished]. The international prescriptions are discussed in Part III above.

<sup>67</sup> Subsidiarisation refers to the local incorporation of cross-border banks' operations.

<sup>68</sup> Basel Committee on Banking Supervision, *supra* note 31.

<sup>69</sup> Institute of International Finance, *Achieving Bank Resolution in Practice: Are We Nearly There Yet?* (September 2014) at 9, 15.

<sup>70</sup> Simon Kwan, Eric TC Wong & Cho-hoi Hui, *The International Transmission of Shocks: Foreign Bank Branches in Hong Kong during Crises* (Federal Reserve Bank of San Francisco Working Paper Series 2014-25, October 2014) at 10.

<sup>71</sup> The implications of restrictions on foreign ownership appear to be similar to subsidiarisation. IMF observes that "restrictions on foreign ownership of domestic banks discourage cross-border banking flows" and allow domestic authorities to maintain more control over banking activities: International Monetary Fund, *supra* note 4 at 100, 101.

<sup>72</sup> In Myanmar, for instance, foreign banks are not permitted to conduct retail banking business: Atsuko Fukase, "Two Japan Banks First Foreign Banks to Open Myanmar Branches", *The Wall Street Journal* (22 April 2015).

incorporate locally or limit the scope of their operations.<sup>73</sup> Malaysia and Indonesia require foreign banks to incorporate locally.<sup>74</sup> Indonesia restricts foreign ownership of banks<sup>75</sup> while the Philippines has lifted restrictions on foreign ownership and allows foreign banks to establish branches.<sup>76</sup>

Japan, on the other hand, takes a more liberal stance on foreign banks by permitting them to operate as branches, although reforms in 2013 strengthened minimum capital requirements for foreign branches in Japan.<sup>77</sup> Most foreign banks operate as branches in Japan.<sup>78</sup> Likewise, the large majority of foreign banks in Hong Kong have established branches.<sup>79</sup> Nevertheless, capital requirements such as Japan's, which require branches to maintain asset reserves within Japan of amounts equivalent to the minimum capital requirements for domestic banks,<sup>80</sup> arguably reduce the distinction between branches and subsidiaries.

In summary, the perceived need for resolution frameworks and cross-border cooperation has increased with growing interconnectedness, particularly within ASEAN following the ABIF. The Southeast Asian Central Banks Conference in 2013 acknowledged the urgent need for ASEAN to develop a framework for cross-border regional crisis management, bank resolution and regional supervisory coordination.<sup>81</sup> However, progress on the establishment of resolution frameworks in Asian countries has been uneven, largely reflecting the diversity in financial development across Asia.

### B. Development of Resolution Frameworks in Asia

Financial centres and developed economies are leading the reforms to resolution frameworks. China, however, has a relatively undeveloped regulatory framework for bank resolution despite being the home jurisdiction to one G-SIFI. A common trait of Asian resolution regimes is the lack of statutory bail-in powers,<sup>82</sup> although Hong Kong and Singapore appear to be in favour of enacting statutory bail-in powers.

Japan, Korea, and Singapore have a wide range of resolution powers. Resolution authorities may assume control of distressed banks and transfer assets, liabilities, or

---

<sup>73</sup> Foreign bank branches with a significant retail presence in Singapore are required to incorporate locally; Monetary Authority of Singapore, *MAS' Framework for Impact and Risk Assessment of Financial Institutions*, (Singapore: MAS, April 2015) at 25.

<sup>74</sup> Central Bank of Malaysia, *Financial Stability and Payment Systems Report 2012* (20 March 2013) at 64; Dewi Kurniawati, "Nationalism vs Reciprocity in Indonesian Banking Regulations", *The Establishment Post* (23 October 2014), online: The Establishment Post <<http://www.establishmentpost.com/nationalism-vs-reciprocity-indonesian-banking-regulations/>>.

<sup>75</sup> Kurniawati, *supra* note 74.

<sup>76</sup> Paolo G Montecillo, "7 More Foreign Banks to Enter Philippines", *Philippine Daily Inquirer* (5 March 2015).

<sup>77</sup> Atsushi Sakai & Shunsuke Ogata, "What Japan's Banking Act Means for Foreign Lenders", online: (2014) International Financial Law Review <<http://www.iflr.com/Article/3334450/What-Japans-banking-act-means-for-foreign-lenders.html>>.

<sup>78</sup> KPMG, *Foreign Banks in Japan Survey 2014* (2014) at 3.

<sup>79</sup> Kwan, Wong & Hui, *supra* note 70 at 2.

<sup>80</sup> Sakai & Ogata, *supra* note 77.

<sup>81</sup> SEACEN, "Summary of Proceedings" (at the SEACEN 30<sup>th</sup> Anniversary Conference, Kuala Lumpur, 20 October 2013) at viii.

<sup>82</sup> A Michael Andrews, "Effective Resolution Regimes for Financial Institutions in ASEAN + 3" in Aziz & Shin, *supra* note 14 at 464.

businesses to bridge banks, or other banks, without the consent of shareholders.<sup>83</sup> Singapore's resolution powers include the claw back of directors' and executive officers' remuneration and other benefits.<sup>84</sup> Statutory bail-in powers have been proposed in relation to banks and bank holding companies incorporated in Singapore.<sup>85</sup> The proposed reforms seek to ensure that the exercise of bail-in powers by Singaporean resolution authorities will be enforceable in relation to liabilities governed by foreign law, through contractual recognition of such bail-in powers.<sup>86</sup> The reforms are likely to affect regional banks headquartered in Singapore whose overseas branches may be subject to the home jurisdiction's resolution action. While there are no statutory bail-in powers in Japan and Korea, contractual bail-in provisions exist.<sup>87</sup> By comparison with other jurisdictions where the focus has been placed on crisis management, both Japan and Korea have a preference for early intervention through liquidity and capital support to prevent triggering the need for resolution.<sup>88</sup> There is also an established preference in Japan for publicly supported restructuring—namely, bail-out arrangements.<sup>89</sup>

Hong Kong's second consultation paper released on 21 January 2015 reflects broad support for the full range of resolution options, including bail-in provisions.<sup>90</sup> There was unanimous support among respondents for the recognition of resolution action taken by foreign authorities in view of Hong Kong's status as a major financial centre. The Reserve Bank of India, likewise, has proposals for a comprehensive resolution framework that includes bail-in mechanisms.<sup>91</sup> However, questions have been raised as to whether legislation will be enacted as proposed and, if so, whether resolution regimes will be implemented.<sup>92</sup> Significant state ownership of bank assets is expected to engender political opposition to the proposed reforms.<sup>93</sup> Australia

---

<sup>83</sup> Stephen Schwartz & Sonny Hsu, "A Compendium of Bank Resolution and Bail-in Regimes in the Asia-Pacific", *Moody's Investor Service* (24 July 2014) at 24-27.

<sup>84</sup> Allen and Gledhill, Bulletin, "Financial Services Bulletin May 2013" (29 May 2013) online: Allen & Gledhill LLP <[http://www.allenandgledhill.com/pages/publications.aspx?list=FSBulletinAreas&pub\\_id=404&topic=Financial+Services+Bulletin+May+2013](http://www.allenandgledhill.com/pages/publications.aspx?list=FSBulletinAreas&pub_id=404&topic=Financial+Services+Bulletin+May+2013)>.

<sup>85</sup> Current proposals limit statutory bail-in to unsecured subordinated debt and unsecured subordinated loans issued after the statutory bail-in is implemented: Monetary Authority of Singapore, *Proposed Enhancements to Resolution Regime for Financial Institutions in Singapore*, (Singapore: MAS, June 2015) [Monetary Authority of Singapore, *Proposed Enhancements*].

<sup>86</sup> *Ibid* at 17, 18.

<sup>87</sup> Schwartz & Hsu, *supra* note 83; Kei Kodachi, "Japan's Orderly Resolution Regime for Financial Firms – A New Scheme Provided for Under the Revised DIA" (2013) 5 *Nomura Journal of Capital Markets* 1 at 20. The Basel Committee requires internationally active banks to ensure that all classes of capital instruments issued absorb losses before taxpayers are exposed to loss. Instruments should include a provision that a relevant authority may write off or convert such instruments into equity if it determines that the firm would become non-viable without the write off or conversion: Bank for International Settlements, Press Release, "Basel Committee Issues Final Elements of the Reforms to Raise the Quality of Regulatory Capital" (13 January 2011).

<sup>88</sup> Schwartz & Hsu, *supra* note 83 at 3.

<sup>89</sup> Kodachi, *supra* note 87; Andrews, *supra* note 82 at 477.

<sup>90</sup> Financial Services and the Treasury Bureau *et al*, *An Effective Resolution Regime for Financial Institutions in Hong Kong: Second Consultation Paper* (Hong Kong: January 2015).

<sup>91</sup> Reserve Bank of India, *Report of the Working Group on Resolution Regime for Financial Institutions* (January 2014).

<sup>92</sup> Fitch Ratings, "India Bank Resolution Framework May Face Major Hurdles" (19 May 2014), online: Fitch Ratings <[https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/India-Bank-Resolution?pr\\_id=830594](https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/India-Bank-Resolution?pr_id=830594)>.

<sup>93</sup> *Ibid*.

released a consultation paper in February 2015 seeking feedback from stakeholders on legislative proposals for a resolution regime largely consistent with the *Key Attributes*. While the proposed legislation provides for a wide range of resolution powers, it does not include bail-in.<sup>94</sup> Major Australian banks have resisted the bail-in provisions on the ground that they would trigger credit downgradings, increase funding costs and exacerbate the risk of financial instability.<sup>95</sup>

China's regulatory framework has limited resolution powers. These include the power to replace management and appoint an administrator. However, the regulatory framework does not allow for bail-in or the transfer of assets and liabilities to a bridge bank,<sup>96</sup> although asset management companies have been used for this purpose in the past. Schwartz and Hsu note that "the authorities have a policy of supporting cross-border cooperation, but there are no mechanisms for giving effect to foreign resolution action. Information-sharing is limited by law."<sup>97</sup>

Malaysian resolution authorities have considerable powers, which include assuming control of distressed financial institutions and carrying on their business.<sup>98</sup> They may also transfer assets and business to bridge institutions. Indonesia is considering draft legislation that will enable the transfer of assets of distressed banks to bridge or other banks.<sup>99</sup> Authorities have existing powers to assume the management of ailing banks. Apart from these countries and Singapore, the development of resolution regimes in many of the ASEAN countries has been modest and has tended to ignore the international dimensions.

Brunei, Cambodia, Lao PDR, Myanmar, Thailand and Vietnam all have legal provisions to permit the authorities to assume control of a bank but do not have special resolution regimes incorporating the *Key Attributes*.<sup>100</sup> Few of the resolution powers in the *Key Attributes* are available. The assumption is that banks will either be rehabilitated while under official control or liquidated pursuant to general insolvency law.<sup>101</sup> The inability to intervene in early stages of bank distress limits the capacity to maximise the value of assets and minimise disruption to essential banking services.

### C. Supervisory Cooperation in Asia

There are few provisions in the resolution regimes of ASEAN + 3 countries that refer specifically to cross-border cooperation. Among the most advanced is Singapore's statutory framework for recognition of foreign resolution action. The Monetary Authority of Singapore ("MAS") has a range of resolution powers in support of

---

<sup>94</sup> Australian Government, *Resolution Regimes for Financial Market Infrastructures: Consultation Paper* (February 2015).

<sup>95</sup> James Eyers, "Banks Demand Bail-out Protection", *Sydney Morning Herald* (30 August 2014).

<sup>96</sup> Schwartz & Hsu, *supra* note 83 at 12.

<sup>97</sup> *Ibid* at 10.

<sup>98</sup> Section 99 of the *Malaysia Deposit Insurance Corporation Act 2011* (No 720 of 2011, M'sia); Uma Rajoo, "Problem Bank Identification, Intervention and Resolution in Malaysia" in Sukarela Batunangar, ed, *Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries* (Kuala Lumpur: SEACEN, 2008) 109 at 118.

<sup>99</sup> Tassia Sipahutar, "LPS to Propose New Options to Save Troubled Banks", *The Jakarta Post* (15 December 2014).

<sup>100</sup> Andrews, *supra* note 82 at 480.

<sup>101</sup> *Ibid*.

foreign resolution action subject to Ministerial approval.<sup>102</sup> In exercising resolution powers, MAS is required to weigh public interest considerations including the effect of the financial institution's failure on Singapore's financial system, whether the interest of depositors is adequately protected, and the appropriateness of the relevant action.<sup>103</sup> This model allows for prompt implementation of foreign resolution action, alleviating the need for court approval.<sup>104</sup> At the same time, national interests may be taken into account in implementing foreign resolution plans, which may impact on the prompt implementation of foreign resolution action. Singapore's resolution framework empowers MAS to provide information to foreign resolution authorities despite legal or other restrictions in areas such as bank secrecy that would usually constrain disclosure.<sup>105</sup> Information or material requested by foreign resolution authorities is disclosed subject to several conditions. These include confidentiality, limiting the use of the information to agreed purposes, and public interest considerations.

At present, cross-border cooperation in Asia generally is addressed primarily through home-host supervisory relationships and memoranda of understanding. Participation in supervisory colleges and information sharing is widespread, with the majority of ASEAN + 3 supervisors having signed memoranda of understanding.<sup>106</sup> Information-sharing between home and host authorities is widely practised. Host authorities commonly provide home authorities with inspection reports and site access.

The Hong Kong Monetary Authority is a member of crisis management groups for the ten G-SIFIs whose Hong Kong operations are considered to be material to the group.<sup>107</sup> China and Japan have established supervisory colleges for G-SIFIs domiciled within their jurisdictions.<sup>108</sup> MAS hosts supervisory colleges for the three Singaporean banks with a major regional presence. Malaysia's central bank has hosted supervisory college meetings for two of its banks that are active in the region, and participated in the supervisory colleges of five foreign banks.<sup>109</sup> It has further participated in regional discussions on crisis management<sup>110</sup> and inspected key overseas operations annually.<sup>111</sup>

---

<sup>102</sup> Financial Stability Board, *Cross-Border Recognition*, *supra* note 35.

<sup>103</sup> The Monetary Authority of Singapore recently proposed that enforcement of foreign resolution action should also be subject to non-discrimination of creditors resident in Singapore: Monetary Authority of Singapore, *Proposed Enhancements*, *supra* note 85 at 22.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Monetary Authority of Singapore Act* (Cap 186, 1999 Rev Ed Sing), Div 5.

<sup>106</sup> ASEAN + 3 Macroeconomic Research Office, *Understanding Banking Supervisory Priorities and Capacities in ASEAN + 3 Economies* (AMRO Thematic Study No. 01/2014, ASEAN + 3 Macroeconomic Research Office, February 2014) at 36.

<sup>107</sup> Financial Services and the Treasury Bureau *et al.*, *supra* note 90. FSB *Key Attribute* 8 requires home and key host authorities of all G-SIFIs to maintain crisis management groups "with the objective of enhancing preparedness for, and facilitating the management and resolution of, a cross-border financial crisis affecting the firm."

<sup>108</sup> Japan was assessed as largely compliant with Basel Core Principles 24 and 25 (consolidated supervision and home host relationships). China was assessed as compliant with Principle 24 and largely compliant with Principle 25: Andrews, *supra* note 82 at 484.

<sup>109</sup> Central Bank of Malaysia, *supra* note 74 at 103.

<sup>110</sup> *Ibid* at 103.

<sup>111</sup> International Monetary Fund, *Malaysia: Financial Sector Stability Assessment* (IMF Country Report No. 13/52, February 2013) at 18, online: International Monetary Fund <<http://www.imf.org/external/pubs/ft/scr/2013/cr1352.pdf>>.

Resolution planning, however, has been slow to develop, particularly in relation to regional banks. The lack of robust resolution and recovery planning further impedes efforts towards a coordinated response to distressed financial institutions. Ravi Menon of MAS has asserted that “until there are effective and credible mechanisms to tackle cross-border externalities of bank failure, countries will have little choice but to protect and ring-fence national systems.”<sup>112</sup>

#### V. CHALLENGES TO THE IMPLEMENTATION OF INTERNATIONAL FRAMEWORKS FOR CROSS-BORDER COOPERATION IN BANK RESOLUTION

Supervisory colleges and information-sharing are essential to cross-border cooperation. However, concerns remain that these may fail in times of crisis. The global financial crisis saw cooperation among bank supervisors fail despite a history of cooperation.<sup>113</sup> D’Hulster asserts that cross-border cooperation is impeded by numerous incentive conflicts between home and host authorities.<sup>114</sup> Regulators may seek to disguise poor performance or be less than diligent in supplying their counterparts with timely information. Concealing unfavourable information enables regulators to take remedial action without the risk that other regulators will intervene and limit their options.<sup>115</sup> Public reactions to such information potentially exacerbate financial instability. While home authorities may be inclined to minimise the gravity of adverse situations, host authorities are incentivised to ring-fence and protect domestic interests. Incentive conflicts are particularly acute in small economies where a foreign bank is a significant player but its operations may be insignificant to the group or home country.<sup>116</sup> In the event of branch failure, home countries may prioritise efforts to protect the group or home country residents from financial instability, sidelining efforts to minimise effects of failure on host countries.<sup>117</sup>

The Asian region faces several specific challenges to the implementation of internationally prescribed resolution frameworks. First, the prescriptions emanate largely from the West, and some commentators have expressed reservations concerning wholesale adoption of the prescriptions. While various Asian countries have resolution regimes incorporating a range of resolution tools, with the exception of statutory bail-in, several aspects of internationally prescribed resolution frameworks are at odds with perspectives common to the region, including the widespread acceptance of public intervention in bank failures among Asian countries. In addition to reservations concerning the relevance of Western financial prescriptions to the

---

<sup>112</sup> Ravi Menon, “Greater Financial Integration and Financial Stability” (Address delivered at the SEACEN 30<sup>th</sup> Anniversary Conference, Kuala Lumpur, 20 October 2013) at 103-105.

<sup>113</sup> Duncan Alford, *International Financial Reforms: Capital Standards, Resolution Regimes and Supervisory Colleges, and their Effect on Emerging Markets* (ADB Working Paper Series No 402, Asian Development Bank Institute, January 2013).

<sup>114</sup> Katia D’Hulster, “Cross-border Banking Supervision: Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors” (2012) 13 *Journal of Banking Regulation* 300.

<sup>115</sup> Richard Herring, “The Challenge of Resolving Cross-Border Financial Institutions” (2014) 31 *Yale J on Reg* 853 at 858.

<sup>116</sup> Siregar, *supra* note 54 at 24.

<sup>117</sup> Robert A Eisenbeis & George G Kaufman, “Cross-border Banking and Financial Stability in the EU” (2008) 4 *Journal of Financial Stability* 168 at 176; Steering Committee of the Vienna Initiative, *Observations on Bank Resolution Practices and the EU Proposal: Vienna Initiative 2* (9 January 2013).

Asian context, the lack of an Asian voice in the international prescriptions engenders caution in their implementation. Consequently, Asian countries have been selective, adopting international prescriptions deemed suitable to local conditions but triggering queries about their overall effectiveness. Economic development among Asian countries is uneven and the implementation of resolution regimes in less developed countries is impeded by their lack of capacity.

In particular, one of the central tenets of prescribed resolution frameworks is the shifting of loss flowing from bank failures from the public to shareholders and creditors. Bail-in is posited as an essential means of recapitalising distressed banks and shifting the burden of bank failure away from public funds.<sup>118</sup> However, the policy against state intervention and publicly funded bail-outs is not shared by certain stakeholders in some Asian countries, including Japan and Korea where the legislatures have implemented many of the international prescriptions but have not given their resolution authorities statutory bail-in powers.<sup>119</sup> Many Asian economies are characterised by strong links between the state or politics, banks, and corporate conglomerates.<sup>120</sup> The conversion of debt to equity entails the dilution of shareholding in the distressed bank, which is likely to encounter political resistance among Asian countries, including China where state-ownership of the large banks is entrenched. Australian banks have raised the need for caution with regard to bail-in due to its potentially detrimental consequences. As noted above, these include the downgrading of major banks by credit rating agencies and an increase in funding costs.<sup>121</sup> The Reserve Bank of Australia has further warned that bail-in could exacerbate financial distress as unsecured creditors withdraw funds to avoid being bailed-in.<sup>122</sup> Bail-in of debt held by other financial institutions could potentially result in contagion to the broader financial system. Despite reservations, there are arguments that Australia may have to adopt bail-in provisions in compliance with international standards in order to remain competitive,<sup>123</sup> and to comply with international norms. Recent proposals to implement statutory bail-in in Hong Kong and Singapore indicate that major Asian financial centres are willing to concede statutory bail-in, although Singapore proposes a “less encompassing bail-in regime”<sup>124</sup> due to the resilience of its well-capitalised banking sector which is subject to rigorous stress testing and supervisory oversight.<sup>125</sup>

---

<sup>118</sup> Zhou *et al*, *supra* note 32.

<sup>119</sup> Kodachi observes that in Japan, state intervention in ailing banks is more widely accepted. There are existing measures for resolution funds and the recapitalisation of banks. Hence, there is little perceived need for the introduction of statutory bail-in which has its own complications such as constitutional restrictions: Kodachi, *supra* note 87 at 20.

<sup>120</sup> Sukarela Batunanggar, *Comparison of Problem Bank Identification, Intervention and Resolution in the SEACEN Countries* (The South East Asian Central Banks Centre, 2008) at 1; John Gillespie, “Law and Development in ‘the Market Place’: An East Asian Perspective” in Kanishka Jayasuriya, ed, *Law, Capitalism and Power in East Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999) 118 at 100 & 104. In China, for instance, state ownership in banks is pervasive. State support for financial institutions renders the collapse of financial institutions in China unlikely: Wei Liu, “Basel III and Bank Regulation in China” (2014) 7 *Journal of Legal Technology Risk Management* 1.

<sup>121</sup> Eyers, *supra* note 95.

<sup>122</sup> Reserve Bank of Australia, *Submission to the Financial System Inquiry* (March 2014).

<sup>123</sup> Clancy Yeates, “‘Bail-in Rules’ may be Inevitable, says David Murray”, *Sydney Morning Herald* (21 August 2014), online: <http://www.smh.com.au/business/banking-and-finance/bail-in-rules-may-be-inevitable-says-david-murray-20140821-106j03.html>.

<sup>124</sup> Singaporean bail-in provisions are discussed in Part IV-B and note 85 above.

<sup>125</sup> Monetary Authority of Singapore, *Proposed Enhancements*, *supra* note 85 at 16.

A second challenge to the implementation of international prescriptions for bank resolution arises from the perception that they emerged in response to Western bank failure during the global financial crisis. Asian banks withstood the global financial crisis better than their counterparts in Europe and North America, having learned lessons from the Asian financial crisis.<sup>126</sup> Asian banks tend to be well-capitalised and resolution regimes are not accorded priority as banks in the region are thought to be well-positioned to withstand shocks.<sup>127</sup> Kawai asserts that regulations that address weaknesses in Western banks may not be suitable for Asia.<sup>128</sup> Many Asian banks have a lower risk exposure, as large retail funding bases are common, and there is less reliance on derivatives,<sup>129</sup> which are associated with contagion of financial instability.<sup>130</sup> Regional initiatives such as the Chiang Mai Initiative further provide liquidity support to ASEAN + 3 banks and, in principle at least, buttress financial stability in the sub-region. Asian regulators have emphasised crisis-prevention over crisis-management, focusing on supervision, macro-prudential measures, and capital and liquidity requirements. Early intervention is perceived as being less costly than resolution.<sup>131</sup> Some countries established resolution strategies during the Asian financial crisis,<sup>132</sup> reducing the perceived need for adoption of subsequent international recommendations.

The lack of an Asian voice in international frameworks on bank resolution contributes to caution in their implementation.<sup>133</sup> Many Asian countries are emerging economies. Policymakers in emerging economies have raised concerns over limited involvement in resolution planning of G-SIFIs, despite the systemic importance of G-SIFIs in their countries.<sup>134</sup> Existing supervisory arrangements arguably favour

---

<sup>126</sup> Susanna Tai, "Asia-Pac Banks Sail Through Basel III Transition", *Finance Asia* (31 August 2014), online: Finance Asia <<http://www.financeasia.com/News/389839,asia-pac-banks-sail-through-basel-iii-transition.aspx>>.

<sup>127</sup> Moshirian, *supra* note 14 at 316; Schwartz & Hsu, *supra* note 83 at 2.

<sup>128</sup> Masahiro Kawai, *An Asian Perspective on Global Financial Reform*" (ADB/OECD Roundtable: Capital Market Reform in Asia, Tokyo 7-8 February 2012).

<sup>129</sup> *Ibid.*

<sup>130</sup> Daniela Russo, *OTC Derivatives: Financial Stability Challenges and Responses from Authorities* (Banque de France, Financial Stability Review, July 2010) at 101.

<sup>131</sup> Schwartz & Hsu, *supra* note 83 at 2.

<sup>132</sup> Batunanggar, *supra* note 120. For instance, Malaysian state-led resolution initiatives during the Asian financial crisis were regarded as successful. State-owned asset management corporation, Danaharta, took over non-performing loans while banks' needs for recapitalisation were met by a subsidiary of the Central Bank: Takatoshi Ito & Yuko Hashimoto, *Bank Restructuring in Asia: Crisis Management in the Aftermath of the Asian Financial Crisis and Prospects for Crisis Prevention - Malaysia* (Research Institute of Economy, Trade and Industry, RIETI Discussion Paper Series 07-E-039, 2007); Rajoo, *supra* note 98.

<sup>133</sup> Sohn asserts that meaningful participation in decision-making processes of global financial regulation facilitates implementation. Likewise, assurance that costs and benefits of cross-border cooperation will be shared equally is likely to engender compliance. Accordingly, Sohn argues that Asian developing countries are likely to remain cautious in implementing global prescriptions for financial regulation while the lack of an Asian voice in international prescriptions remains: Injoo Sohn, "Asian Financial Cooperation: The Problem of Legitimacy in Global Financial Governance" (2005) 11 *Global Governance* 487; Moshirian, *supra* note 14 at 293.

<sup>134</sup> Tarisa Watanagase, *Impact of Changes in the Global Financial Regulatory Landscape on Asian Emerging Markets* (ADB Working Paper Series No 391, Asian Development Bank Institute, 2012); Moshirian, *supra* note 14.

home supervisors, providing them a leading role,<sup>135</sup> while the interests of emerging markets are thought to be inadequately represented.<sup>136</sup> Discontent with the IMF's intervention during the Asian financial crisis<sup>137</sup> and the passive Asian involvement in global financial architecture have caused the region to remain circumspect towards the IMF and its prescriptions.<sup>138</sup> The Chiang Mai Initiative was a response to the need for a regional alternative to IMF funding.<sup>139</sup> An Asian Monetary Fund has been proposed on various occasions, which would facilitate an Asian voice in global financial architecture and set the agenda for financial regulation in the region.<sup>140</sup> Recent initiatives to transform AMRO into an international organisation have renewed suggestions of an Asian Monetary Fund.<sup>141</sup>

A further issue relates to national depositor preference in a resolution. In countries such as Australia, depositors in domestic banks have priority ahead of other unsecured creditors in the event of bank failure.<sup>142</sup> Similar depositor preference applies in Hong Kong, India, Indonesia, Malaysia, and Singapore.<sup>143</sup> In many cases, depositor preference is linked with deposit insurance schemes that guarantee recovery of money deposited in a domestic bank up to specified amounts.<sup>144</sup> Preferential treatment of domestic depositors is thought to be detrimental to fair resolution processes, and the *Key Attributes* favour non-discrimination of creditors regardless of nationality and the location of claims.<sup>145</sup> Nonetheless, preference in favour of domestic depositors is thought to be entrenched in non-ASEAN countries such as Australia.<sup>146</sup> As the protection of national interests is central to ASEAN cooperation, existing national depositor preference regimes are likely to persist. Deposit insurance schemes are regarded as an important means of maintaining public confidence in the financial system and an essential crisis management tool in many Asian countries.<sup>147</sup>

In addition to challenges to the adoption of internationally prescribed resolution frameworks, the Asian region faces several other challenges to cross-border

---

<sup>135</sup> D'Hulster also argues that current supervisory arrangements focus on safeguarding home country interests but fail to address host country exposure to home country failure: D'Hulster, *supra* note 114 at 302.

<sup>136</sup> Alford, *supra* note 113 at 25.

<sup>137</sup> Chalongphob Sussangkarn, *The Chiang Mai Initiative Multilateralization: Origin, Development and Outlook* (Asian Development Bank Institute, ADBI Working Paper Series No. 230, July 2010) at 3, 4.

<sup>138</sup> Masahiro Kawai, *From the Chiang Mai Initiative to an Asian Monetary Fund* (Asian Development Bank, ADBI Working Paper Series No. 527, May 2015).

<sup>139</sup> Hal Hill & Jayant Menon, *Financial Safety Nets in Asia: Genesis, Evolution, Adequacy, and the Way Forward* (ANU College of Asia and Pacific, Working Papers No. 2012/17, September 2012) at 2.

<sup>140</sup> Kawai, *supra* note 138; Sohn, *supra* note 133 at 496.

<sup>141</sup> Kawai, *supra* note 138.

<sup>142</sup> Grant Turner, *Depositor Protection in Australia* (Reserve Bank of Australia Bulletin, December 2011) at 45.

<sup>143</sup> Kevin Davis, *Depositor Preference, Bail-in, and Deposit Insurance Pricing and Design* (Department of Finance, University of Melbourne and Australian Centre of Financial Studies and Monash University, Draft 30 April 2015); Asia Securities Industry and Financial Markets Association, *Asia Bank Resolution Regimes* (2013).

<sup>144</sup> Davis, *supra* note 143.

<sup>145</sup> Financial Stability Board, *Key Attributes*, *supra* note 44.

<sup>146</sup> Shearman & Sterling, *UK FSA and US FDIC Concerned Over Effects of National Depositor Preference Regimes* (Financial Institutions Advisory and Financial Regulatory Client Publication, 28 February 2013).

<sup>147</sup> Batunanggar, *supra* note 120.

cooperation in bank resolution. Differences in national resolution regimes impede cross-border cooperation.<sup>148</sup> Limited resolution powers in the regulatory frameworks of many Asian countries place constraints on the resolution options available to banks operating in the region. The uniform absence of statutory bail-in, even among Asia's most developed resolution frameworks,<sup>149</sup> confines bail-in options to contractual bail-in.<sup>150</sup>

Cross-border cooperation in Asia is affected by some of the underlying reasons for the lack of integration within the region. As noted above, historical and ongoing hostilities surrounding territorial disputes have engendered a lack of trust<sup>151</sup> which may impede information-sharing and cooperation in times of crisis.<sup>152</sup> The sharing of sensitive information is especially controversial when national interests diverge.<sup>153</sup> At times, legal and constitutional constraints restrict information-sharing.<sup>154</sup> Differences in supervisory approaches and capacity pose further challenges to cross-border cooperation.<sup>155</sup>

International experience suggests that countries at times disagree on resolution proposals. While conflict resolution mechanisms could potentially facilitate agreement and cooperation,<sup>156</sup> Asia does not have such conflict resolution mechanisms. Likewise, there is a lack of enforcement mechanisms to ensure parties carry out their obligations. Uncertainties as to the sharing of costs of resolving failed banks with foreign counterparts further contribute to the difficulties of cooperation in times of crisis.<sup>157</sup> An interesting point of comparison is the EU's resolution framework, which has sought to address some of these challenges through coordinating mechanisms. These mechanisms are considered below.

## VI. INTERNATIONAL MODELS OF CROSS-BORDER COOPERATION

### A. *The EU's Framework for Bank Resolution*

Regional coordination of bank resolution has been strengthened in the EU through the Bank Recovery and Resolution Directive ("BRRD")<sup>158</sup> and the Single Resolution Mechanism ("SRM"). The EU's resolution framework has several central

<sup>148</sup> Central Bank of Malaysia, *supra* note 74 at 103.

<sup>149</sup> Hong Kong is the only country likely to introduce statutory bail-in at present: Financial Services and the Treasury Bureau *et al*, *supra* note 90.

<sup>150</sup> Zhou *et al* describe statutory bail in as "a statutory power that enables resolution authorities to eliminate or dilute existing shareholders, and to write down or convert, in the following order, any contractual contingent capital instruments that have not already been converted into equity, subordinated debt, and unsecured senior debt". Contractual bail-in, on the other hand, refers to provisions in capital or debt instruments that allow debt to be converted into equity when predetermined trigger events occur: Zhou *et al*, *supra* note 32 at 6.

<sup>151</sup> Frost, *supra* note 17.

<sup>152</sup> Cai, *supra* note 25.

<sup>153</sup> Siregar, *supra* note 54 at 24.

<sup>154</sup> *Ibid*.

<sup>155</sup> Siregar, *supra* note 54 at 24.

<sup>156</sup> Kelly Kirby, "Supervisory Colleges: Improving International Supervisory Coordination" (2012) 19 Connecticut Insurance Law Journal 149; D'Hulster, *supra* note 114 at 303.

<sup>157</sup> Herring, *supra* note 115 at 862.

<sup>158</sup> EC, *Directive 2014/59/EU of the European Parliament and of the Council* [2014] OJL 173 [EU Directive 2014/59].

authorities that facilitate cross-border supervisory cooperation and the convergence of supervisory practices. The European Supervisory Authorities (“ESA”) have a wide range of functions and powers including the authority to resolve disputes and impose binding decisions.<sup>159</sup> Their convergence-promoting functions include enhancing information-sharing, training, issuing guidance, developing common methodologies and best practices.<sup>160</sup>

The SRM is described as a “mixture of a centralized model where important powers are exercised at EU level” with decentralised implementation of decisions by national resolution authorities.<sup>161</sup> If national resolution authorities fail to comply with the Single Resolution Board (“SRB”)’s decisions, the SRB may intervene and execute the resolution action directly. The SRM, together with the Single Supervisory Mechanism, aligns resolution and supervision within the EU at a central level while involving national authorities.<sup>162</sup>

Regulatory harmonisation within the EU is facilitated through the BRRD. Under the BRRD, banks are required to draw up recovery plans while authorities responsible for resolving banks are required to prepare resolution plans. Recovery and resolution plans are prepared both at group level and individual institutions within the group. Harmonised resolution tools and powers in Member States ensure that they have common tools.<sup>163</sup> The BRRD provides powers for a distressed bank’s assets to be separated and sold in whole or in part to another bank or bridge institution. Likewise, the essential functions of the bank may be transferred to other banks or bridge institutions. The BRRD also allows for statutory bail-in.

Resolution colleges facilitate cooperation in all stages of resolution, from resolution planning to the implementation of cross-border resolution action. Resolution colleges build on existing supervisory colleges and are led by a group-level resolution authority. The colleges are responsible for the development of group resolution plans, including assessing the resolvability of groups and information-exchange.<sup>164</sup> Impediments to group resolvability are also addressed through resolution colleges.

Membership of resolution colleges includes resolution authorities, the European Banking Authority (“EBA”) and, where applicable, central banks and authorities for deposit guarantee schemes.<sup>165</sup> All national authorities involved in the resolution

---

<sup>159</sup> Eilis Ferran, “Financial Supervision” in Daniel Mugge, ed, *Europe and the Governance of Global Finance* (Oxford: Oxford University Press, 2014) 16.

<sup>160</sup> Other convergence-promoting functions of the ESAs include collecting and analysing data, reporting on trends and developing industry training standards: *ibid* at 30.

<sup>161</sup> George S Zavvos & Stella Kaltsouni, “The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing” in Matthias Haentjens & Bob Wessels, eds, *Research Handbook on Crisis Management in the Banking Sector* (Cheltenham: Edward Elgar, 2015) 117 at 117.

<sup>162</sup> The Single Resolution Board consists of representatives from the European Central Bank, the European Commission and national authorities: Delegation of the European Union to the United States, Press Release, “Commission Proposes Single Resolution Mechanism for the Banking Union”, online: Delegation of the European Union to the United States <<http://www.euintheus.org/press-media/commission-proposes-single-resolution-mechanism-for-the-banking-union/>>.

<sup>163</sup> European Commission, Press Release, “New Crisis Management Measures to Avoid Future Bank Bail-Outs” (6 June 2012).

<sup>164</sup> *EU Directive 2014/59*, *supra* note 158, art 88.

<sup>165</sup> *Ibid*.

of institutions are represented in resolution colleges. The framework facilitates cooperation among national authorities in all phases of resolution.<sup>166</sup> Regulatory technical standards on resolution plans and resolution colleges are issued by the EBA, setting out details that include measures to be taken in the event of disagreements.<sup>167</sup> The EBA, by majority vote of its board of managers, acts as a binding mediator in the event of disagreement in areas such as home-host conflict. Nevertheless, its power to settle disputes is limited to decisions that do not “impinge in any way on the fiscal responsibilities of Member States”.<sup>168</sup>

The EU’s framework provides for immediate recognition and enforcement of resolution action taken by Member States.<sup>169</sup> Decisions on the recognition of resolution action by non-EU countries are made by the relevant EU resolution college.<sup>170</sup> The BRRD allows resolution authorities to refuse recognition of non-EU resolution action on grounds that it would have adverse effects on financial stability of the Member State or that creditors would not receive the same treatment as creditors and depositors in that country.<sup>171</sup> Member States may also refuse to recognise resolution action by non-EU authorities if enforcement would have material fiscal implications for the Member State or would be contrary to national law.

The EU’s framework provides for the establishment of resolution funds. Every Member State is to set up financing arrangements funded with contributions from banks and investment firms in proportion to their liabilities and risk profile.<sup>172</sup> National financing arrangements are implemented *ex ante*. Contributions are raised from banks annually in order to reach a specific target funding level of covered deposits over a set period.

The EU requires Member States to guarantee deposits of individuals and enterprises up to €100,000.<sup>173</sup> Deposit protection and resolution are regarded as

---

<sup>166</sup> According to Alford, “ideally there would be a single pan-European authority that ‘would deliver a rapid, decisive and equitable resolution process for European financial groups, and better reflect the pan-EU nature of banking markets’. However, the commission recognizes that it would be difficult politically to create such an integrated system. The resolution colleges are a more moderate and realistic approach to bank resolution. The EBA would serve as an observer for the resolution colleges, much as it does for the colleges of supervisors”: Duncan Alford, “International Financial Reforms: Capital Standards, Resolution Regimes, and Supervisory Colleges and Their Effect on Emerging Markets” in Kawai Masahiro & Eswar S Prasad, eds, *New Paradigms for Financial Regulation: Emerging Markets Perspectives* (Washington, DC: Brookings Institution Press, 2013) 244 at 244, 257.

<sup>167</sup> European Banking Authority, Draft Regulatory Technical Standards on Resolution Colleges under Article 88(7) of Directive 2014/59/EU (Consultation Paper, 18 December 2014); European Banking Authority, EBA Final Draft Regulatory Standards on the Content of Resolution Plans and the Assessment of Resolvability (19 December 2014).

<sup>168</sup> EC, *Regulation (EU) No 1093/2010 of the European Parliament and of the Commission of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority)* [2010] OJ L331/12, art 38.

<sup>169</sup> *EU Directive 2014/59*, *supra* note 158, art 66.

<sup>170</sup> In the absence of a resolution college or a joint decision, each resolution authority concerned is to make its own decision on recognition of foreign resolution action: *Ibid*, art 94.

<sup>171</sup> *Ibid*, art 95.

<sup>172</sup> European Commission, *EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions* (Memo, Brussels, 15 April 2014), online: <[http://europa.eu/rapid/press-release\\_MEMO-14-297\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-297_en.htm)>.

<sup>173</sup> EC, *Directive 2014/49/EU of the European Parliament and of the Council* [2014] OJ L 173, art 6 [EU Directive 2014/49].

complementary as both mitigate risks of contagion.<sup>174</sup> Depositors are less likely to withdraw funds for fear of bank failure when their deposits are guaranteed. While resolution funds are kept separate from deposit guarantee funds, the EU envisages that some deposit guarantee funds may be used for early intervention, such as liquidity and recapitalisation, subject to various conditions, which include the resolution authority not having taken resolution action.<sup>175</sup>

### B. *Trans-Tasman Cooperation*

Trans-Tasman cooperation between Australia and New Zealand is held out as a model of cross-border cooperation.<sup>176</sup> The participants are the authorities in Australia and New Zealand involved in banking crisis management. The Memorandum of Cooperation on Trans-Tasman Bank Distress Management contains agreed principles for a coordinated approach to banking distress in a Trans-Tasman bank. These include exploring options that are “most likely to be conducive to maintaining stability and international confidence in the financial systems of both countries”.<sup>177</sup> Other principles include the preference for private sector solutions over public support. Where government support is involved, the parties agree that costs should be kept to the minimum, taxpayer interests’ protected, market discipline maintained, and moral hazard minimised. The arrangement also seeks to enhance information-sharing and coordinated responses to bank distress.

The Memorandum reflects cooperative arrangements in all stages of resolving a banking crisis. Participants are to keep each other informed of developments that may have a material impact on their financial systems. Likewise, problem identification, assessment of systemic impact, and response options are coordinated based on analytical frameworks used by the Reserve Bank of Australia (“RBA”), the Reserve Bank of New Zealand (“RBNZ”) and the Australian Prudential Regulation Authority.<sup>178</sup> Australian participants are responsible for assessing responses to parent bank distress while New Zealand participants have lead responsibility for assessing possible responses to distress among New Zealand subsidiaries and branches.

The Memorandum canvasses the potential need for capital and liquidity support. If liquidity support is required from central banks, RBA and RBNZ will provide support as may be necessary, ensuring that liquidity may be obtained in the other country’s currency should the need arise. Likewise, the participants will cooperate on recapitalising Trans-Tasman banks. Australian and New Zealand participants are responsible for designing and implementing capital support for banks in their respective countries. Australian parent banks are encouraged to provide financial support, including recapitalisation, for their New Zealand subsidiaries where such

---

<sup>174</sup> European Union, *Deposit Guarantee Schemes – Frequently Asked Questions* (15 April 2014), online: European Union <[http://europa.eu/rapid/press-release\\_MEMO-14-296\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-296_en.htm)>.

<sup>175</sup> *EU Directive 2014/49*, *supra* note 173, art 11.

<sup>176</sup> Ian Watt & Geoff Dangerfield, *Arrangements for Facilitating Trans-Tasman Government Institutional Co-operation* (Victoria: Australia and New Zealand School of Government, 2007).

<sup>177</sup> Financial Distress Planning Management, Council of Financial Regulators, *Memorandum of Cooperation on Trans-Tasman Bank Distress Management* (September 2011) at 4.

<sup>178</sup> *Ibid* at 5.

support would not compromise the financial soundness of parent banks, and it would be in their commercial interest to provide such financial support.

There are arguments, however, that fundamental differences between Australia and New Zealand's regulatory approaches render a coordinated approach far more complex than the Memorandum suggests. Divergence in supervisory approaches and disclosure requirements give rise to potential conflict between the two countries' strategies for dealing with distressed banks.<sup>179</sup> Further, New Zealand does not have depositor protection, whereas Australia accords preference to domestic depositors. This would arguably leave New Zealand depositors disadvantaged in a Trans-Tasman resolution that draws from a common pool of funds.<sup>180</sup>

## VII. FEATURES OF A REGIONAL FRAMEWORK FOR CROSS-BORDER COOPERATION IN BANK RESOLUTION

Cross-border cooperation on bank resolution in the EU and Trans-Tasman forms part of broader regional institutional integration.<sup>181</sup> The ESA's power to issue binding decisions, for example, reflects the EU's position on national sovereignty, which differs substantially from regional integration within Asia. A central authority with power to bind Member States would be inconsistent with ASEAN's consensus-based cooperation. Likewise, the mutual trust inherent in Trans-Tasman cooperation is arguably lacking in the Asian region.<sup>182</sup> However, while the Asian region lacks the level of regional integration of the EU and Trans-Tasman cooperation, there are some aspects of the EU's framework that may facilitate cross-border cooperation on bank resolution in Asia. Specific features of the BRRD that are pertinent to regional cooperation in Asia include the harmonisation of regulatory frameworks and, in particular, resolution tools across countries in the region. The convergence-promoting functions of the ESAs are a further feature of the EU's framework that could facilitate the harmonisation of supervisory approaches. Likewise, cooperation may potentially be enhanced through resolution colleges. In particular, Singapore's framework for recognition of foreign resolution action appears to be of particular relevance to ASEAN, as noted further below.

### A. Regulatory Harmonisation

Regulatory harmonisation is an integral aspect of ASEAN's regional integration. ASEAN's central banks have acknowledged the urgent need for regulatory frameworks for regional crisis management and bank resolution.<sup>183</sup> Harmonised regulation would ideally provide resolution tools in accordance with international prescriptions, including the power to take control of distressed banks, ensure the

<sup>179</sup> Edward J Kane, "Confronting Divergent Interests in Cross-Country Regulatory Arrangements" (2006) 69(2) Reserve Bank of New Zealand Bulletin 5; David G Mayes, "Financial Stability in a World of Cross-Border Banking: Nordic and Antipodean Solutions to the Problem of Responsibility Without Power" (2006) 8 Journal of Banking Regulation 20.

<sup>180</sup> Mayes, *supra* note 179.

<sup>181</sup> Capannelli & Filippini, *supra* note 27; Watt & Dangerfield, *supra* note 176.

<sup>182</sup> Frost, *supra* note 17.

<sup>183</sup> This is discussed in notes 56, 81 and 112 above.

continuity of essential banking functions and the transfer of assets and liabilities to another bank or a bridge institution.<sup>184</sup> Developments to date suggest that Asian countries, apart from Hong Kong and Singapore, have resisted statutory bail-in and the merits of bail-in and how essential it is to resolution processes have been debated.<sup>185</sup> Legal impediments to cross-border cooperation in bank resolution, such as shareholder approval requirements that may impede resolution action, need to be addressed through regulatory reform. The power on the part of national authorities to temporarily delay the exercise of contractual early termination clauses to facilitate the transfer of contracts to bridge or other institutions also assists the implementation of resolution action.

As previously noted, regulatory harmonisation among ASEAN Member States reflects a consensus-based approach. An example of this approach is the development of competition law across ASEAN, which has been facilitated through regional non-binding guidelines that serve as a reference for ASEAN Member States.<sup>186</sup> The guidelines set out various policy and institutional options, with a view to promoting best practices and enhancing regional cooperation. Guidelines also contain recommended practices on drafting competition law and establishing enforcement systems.<sup>187</sup> The recommendations eschew a one-size-fits-all approach. Member States are encouraged to tailor competition frameworks to their specific needs.<sup>188</sup> Consequently, regulatory harmonisation in ASEAN is less uniform than in the EU. Efforts have also been made to foster competition and compliance by informing the business community of basic principles of competition law and enforcement through a Handbook on Competition Policy and Law in ASEAN.<sup>189</sup>

Efforts at promoting the development of competition law across ASEAN have seen at least half of its Member States implementing competition laws while the remaining half is progressing towards establishing competition laws.<sup>190</sup> Several factors have arguably served as catalysts in the process of regulatory harmonisation. These include political consensus to establish competition law in the region as reflected in the AEC Blueprint,<sup>191</sup> the establishment of the ASEAN Experts Group on Competition (“AEGC”) as a regional forum for competition policy,<sup>192</sup> and financial as well as technical assistance from Germany. The need for cross-border resolution frameworks has been acknowledged by Southeast Asian central banks.<sup>193</sup> While this is promising, initiatives to develop regional harmonisation of cross-border bank

---

<sup>184</sup> Financial Stability Board, *Key Attributes*, *supra* note 34.

<sup>185</sup> Zhou *et al*, *supra* note 32. Part V above discusses reservations of major Australian banks towards bail-in.

<sup>186</sup> Association of Southeast Asian Nations, *ASEAN Regional Guidelines on Competition Policy* (ASEAN Secretariat, 2010).

<sup>187</sup> Association of Southeast Asian Nations, *Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN* (ASEAN Secretariat, 2012) [Association of Southeast Asian Nations, *Guidelines*].

<sup>188</sup> *Ibid* at 5.

<sup>189</sup> Association of Southeast Asian Nations, *Handbook on Competition Policy and Law in ASEAN for Business 2013* (ASEAN Secretariat, May 2013).

<sup>190</sup> Association of Southeast Asian Nations, *Guidelines*, *supra* note 187 at 5.

<sup>191</sup> Association of Southeast Asian Nations, *Blueprint*, *supra* note 6 at 18, 19.

<sup>192</sup> The AEGC comprises competition authorities from ASEAN Member States and was established to develop guidelines as agreed in the AEC Blueprint: Association of Southeast Asian Nations, *supra* note 189 at 4.

<sup>193</sup> See notes 56, 81 and 112 above.

resolution would benefit from political impetus and efforts to support and facilitate convergence similar to the efforts of AEGC in competition policy.

### B. Promoting Convergence

Since its inception, ASEAN has maintained minimal coordinating mechanisms such as its secretariat. In recent years, initiatives have been taken to strengthen regional institutions. ASEAN + 3 have signed an agreement to transform AMRO into an international organisation.<sup>194</sup> The ASEAN Integration Monitoring Office has also been established to strengthen regional surveillance and monitoring of economic integration in the sub-region.<sup>195</sup> Funding from the EU facilitated the EU-ASEAN Statistical Capacity Building Program aimed at harmonising statistics-monitoring in the region.<sup>196</sup> Recent developments in centralised regional institutions suggest that there may potentially be capacity to develop convergence-promoting functions along the lines of those conducted by the ESAs in the EU and AEGC in relation to competition law. In this respect, the focus of convergence is on supervisory capacity and supervisory best practice in addition to the adoption of common rules as in the case of regulatory harmonisation.

Potential steps towards the development of a regional resolution framework include formulating guidelines for national regulatory frameworks. Guidelines should include recommendations on resolution tools, addressing formal restrictions on information-sharing, implementing supervisory best practice and mutual recognition of Member States' resolution action. Convergence-promoting functions could take the form of a handbook of recommended practices to facilitate regional convergence in approaches to supervision and resolution.<sup>197</sup> Some assistance may be drawn from Hong Kong's development of a supervisory manual on recovery planning<sup>198</sup> which is anticipated to be extended to resolution planning.<sup>199</sup>

A central convergence-promoting body that provides training to facilitate supervisory capacity and supervisory best practice may be instrumental in addressing some of the concerns raised by central banks and monetary authorities in the region. These include differences in supervisory approaches and capacity that impede cross-border cooperation.<sup>200</sup> Alford asserts the need for additional training to address the lack of supervisory knowledge and experience in emerging markets.<sup>201</sup> He argues that in order for reforms to be effective, issues of supervisory capacity must be

---

<sup>194</sup> ASEAN + 3 Macroeconomic Research Office, Press Release, "AMRO Director's Statement Regarding the Completion of the Signing of the Agreement Establishing ASEAN + 3 Macroeconomic Research Office" (10 October 2014).

<sup>195</sup> ASEAN Secretariat and the World Bank, *ASEAN Integration Monitoring Report* (Working Paper 83914, 2013).

<sup>196</sup> Association of Southeast Asian Nations, News Release, "Supported by the EU, ASEAN Creates a Breakthrough in Harmonising the Region's Statistics Monitoring Progress towards MDGs" (27 November 2012).

<sup>197</sup> Other convergence promoting functions of the ESAs are discussed in note 160 above.

<sup>198</sup> Hong Kong Monetary Authority, *Supervisory Policy Manual: Recovery Planning* (20 June 2014).

<sup>199</sup> *Ibid* at 5.

<sup>200</sup> Siregar, *supra* note 54 at 24.

<sup>201</sup> Alford, *supra* note 113 at 24.

addressed. Likewise, observations in relation to Trans-Tasman cooperation suggest that cross-border cooperation is more effective when supervisory approaches converge.<sup>202</sup>

Among ASEAN's existing regional institutions, the Southeast Asian Central Banks ("SEACEN"), and to a lesser extent AMRO, potentially provide platforms for development of convergence-promoting functions in bank resolution. SEACEN's research and training centre conducts a range of training programs, which include banking supervision and risk management.<sup>203</sup> SEACEN's membership extends to 20 central banks across Asia, including ASEAN Member States. As SEACEN's conference has expressed an urgent need for a framework for regional crisis management, bank resolution and supervisory coordination, there appears to be demand within its members for such frameworks and convergence-promoting functions.<sup>204</sup>

AMRO's role primarily concerns regional surveillance in relation to the Chiang Mai Initiative Multilateralization ("CMIM"). AMRO's mandate is to "monitor and analyse regional economies and contribute to early detection of risks, swift implementation of remedial actions and effective decision-making of the CMIM".<sup>205</sup> AMRO has been involved in research on banking supervisory priorities and capacities in ASEAN + 3.<sup>206</sup> AMRO's mandate may extend to bank resolution as it is relevant to the CMIM's Stability Facility. Nevertheless, as a surveillance unit, convergence-promoting functions are arguably beyond its existing mandate. Questions remain as to whether AMRO's mandate will be extended in its transformation into an international organisation.

SEACEN's existing role and its expressed interest in resolution frameworks arguably place it as a more likely entity for the development of convergence in regional bank resolution. However, it appears to have a stronger emphasis on training than research. Initiatives towards the development of regional resolution frameworks are likely to benefit from catalysts in the form of political consensus, technical assistance and funding from external sources, as demonstrated by the experience of regional developments in competition law. EMEAP's instrumental role in facilitating discussions on the development of a regional resolution framework<sup>207</sup> may potentially assist in garnering political impetus for convergence.

Resolution colleges are another feature of the BRRD that could potentially strengthen cross-border cooperation in Asia. As supervisory colleges have been established in the region, resolution colleges may be built on existing networks and developed to include recovery and resolution planning, information-exchange and resolution action in a crisis. This may facilitate the development of resolution planning among regional banks, many of which have existing supervisory colleges.<sup>208</sup> Resolution colleges provide a forum for resolution planning and assessment of the

---

<sup>202</sup> Mayes, *supra* note 179; Kane, *supra* note 179; International Monetary Fund, *supra* note 40 at 19.

<sup>203</sup> Vicente B Valdepenas, Subarjo Joyosumarto & Adrianus Mooy, *The Road to Excellence in Central Banking in the Asia Pacific: The Role of the SEACEN Centre* (The South East Asian Central Banks Centre, 2007) at 179.

<sup>204</sup> See SEACEN, "Summary of Proceedings", *supra* note 81.

<sup>205</sup> Moshirian, *supra* note 14 at 297.

<sup>206</sup> ASEAN + 3 Macroeconomic Research Office, *supra* note 106.

<sup>207</sup> Central Bank of Malaysia, *supra* note 74 at 103.

<sup>208</sup> This is discussed in Part IV-C above.

resolvability of groups. Resolution colleges also enhance cooperation between the resolution authorities and banks involved in resolution.

An ASEAN framework for cross-border cooperation in bank resolution is unlikely to include binding mediation, which in the EU's framework is conducted by the EBA. Likewise, the SRM's centralised decisions, which are binding on national resolution authorities, conflict with ASEAN's emphasis on voluntary participation and the preservation of national sovereignty. The ABIF distinctly envisages that ASEAN financial integration should reflect the "ASEAN way". As the ABIF emphasises the role of bilateralism in facilitating financial integration, cooperation through resolution colleges may be established through soft institutions such as bilateral arrangements rather than the EU's formal regulatory frameworks.<sup>209</sup> The strengthening of cooperation on banking through bilateral arrangements may potentially develop into more formal multilateral arrangements, as seen in the Chiang Mai Initiative. The Memorandum of Cooperation on Trans-Tasman Bank Distress Management provides an example of non-binding bilateral cooperation in relation to distressed banks.

The informal channels by which regional cooperation has taken place in Asia lack the highly institutionalised coordination reflected in the EU's resolution framework. The lack of accountability and conflict resolution mechanisms are thought to impede cooperation at times. Nevertheless, inter-governmental forums such as the ASEAN + 3 Finance Ministers and Central Bank Governors' Meeting and EMEAP provide forums for dialogue and the deepening of cross-border cooperation in bank resolution.<sup>210</sup> It remains to be seen, however, how effective non-binding cooperative arrangements will be in a crisis without the support of enforcement or dispute-resolution mechanisms. Even in the EU, cooperation among national authorities is at times challenging.<sup>211</sup>

The EU's joint resolution-funding may be less appealing to Asian countries. It is questionable whether an Asian resolution regime will adopt the policy of resolution-funding contributions from financial institutions, as there seems to be less resistance towards publicly-funded intervention. *Ex-ante* contributions to a resolution fund arguably place additional financial burden on financial institutions. Further, the CMIM Stability Facility serves as a crisis-resolution facility for the region.<sup>212</sup>

Central banks and monetary authorities in Asia have commented on legal and non-legal constraints on information-sharing.<sup>213</sup> Singapore's legal framework facilitates the sharing of information with foreign resolution authorities that would otherwise be restricted. Information-sharing is subject to confidentiality, restrictions on usage and public interest considerations.<sup>214</sup> Resonance with the preservation of national sovereignty central to the ASEAN way suggests that the Singaporean provisions may

---

<sup>209</sup> The ABIF envisages that measures to strengthen supervisory cooperation will form a part of bilateral arrangements facilitating market access for ASEAN banks: *Joint Statement*, *supra* note 8.

<sup>210</sup> Central Bank of Malaysia, *supra* note 74.

<sup>211</sup> De Silva notes that diverse national interests among supervisory authorities potentially leads to the ESAs becoming "arenas for skirmishes between member-states"; Joao Soares de Silva, *Is the EU Better Prepared for a New Financial Crisis? A Brief Analysis of the New Financial Supervisory Architecture* (Contraditorio Policy Paper 11/10, February 2011) at 14.

<sup>212</sup> Hill & Menon, *supra* note 139 at 6.

<sup>213</sup> Siregar, *supra* note 54 at 22.

<sup>214</sup> This is discussed in Part IV-C above.

provide a suitable model for other countries in the region. Nevertheless, at times difficulties in information-sharing may be attributed to the sensitivity of the information involved and potentially conflicting national interests. In these situations, the removal of legal impediments does not on its own resolve the issue.

Singapore's recognition of foreign resolution action subject to public interest considerations<sup>215</sup> also appears to be consistent with ASEAN's model of cooperation. While the Singaporean provisions are statutory, similar provisions that facilitate prompt recognition and enforcement of foreign resolution action could be incorporated into bilateral arrangements between ASEAN Member States.

### VIII. CONCLUSION

The growth of regional banks and cross-border banking in Asia suggests the need for a regional resolution framework that reduces contagion of financial instability following banking distress. A resolution framework based on consensus and non-binding arrangements would be consistent with established forms of cooperation within the region. There are several challenges to the implementation of international recommendations in the region. Among the most significant is the acceptance of state intervention in banking crises on the part of certain stakeholders. A regional framework should be relevant to Asia and cognisant of its position on state-led intervention. Other impediments include the lack of resolution powers in a significant proportion of countries in the region, restrictions on information-sharing, differences in supervisory approaches and, at times, the lack of capacity.

Steps towards a regional resolution framework include regulatory harmonisation, which in ASEAN has been achieved through non-binding guidelines. International recommendations include regulatory frameworks that provide a range of resolution tools, and measures that facilitate the recognition and enforcement of foreign resolution action.<sup>216</sup> ASEAN Member States may find the Singaporean provisions, which provide for foreign resolution action to be implemented subject to national interests, of particular relevance. Likewise, Singaporean legislation facilitates information-sharing with foreign resolution authorities, addressing restrictions on information-sharing that would otherwise impede cross-border cooperation.

Cross-border cooperation may also be enhanced through bilateral arrangements and convergence-promoting initiatives. SEACEN's research and training centre potentially provides a platform for the development of guidelines or a handbook to promote convergence of supervisory and resolution approaches, and training to build capacity. Such initiatives would benefit from political consensus, funding, and technical assistance. Finally, resolution colleges may be built on existing supervisory colleges to facilitate cooperation across various stages of resolution. The establishment of a regional framework for cross-border cooperation in bank resolution will facilitate an efficacious response to distressed banks and strengthen financial stability in the region as it progresses towards increased financial integration.

---

<sup>215</sup> This is described in Part IV-C above.

<sup>216</sup> Financial Stability Board, *Key Attributes*, *supra* note 34; International Monetary Fund, *Proposed Framework*, *supra* note 40; Financial Stability Board, *Cross-Border Recognition*, *supra* note 35; International Monetary Fund, *Cross-border Bank Resolution*, *supra* note 39.