



# The implementation of banking liquidation by the German law (SAG)

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# Outline

- “ The framework BRRD
- “ Changing approach
- “ Alternatives
- “ Liquidation under SAG

# BRRD

- “ Commercial insolvency law fails to deal with systemic externalities
  - no special banking regime
  - insolvency proofness of close out-netting
  - privileging the large exposure regime
  - threat of contagion, including the real economy  
(but see sec. 57: resolvability through InsO or SAG?)
- “ From ex post-cleaning up to ex ante-avoidance
- “ G20 summits in Pittsburgh, London and Toronto → fin. market stability
- “ FSB Key Attributes for Effective Resolution Regimes, 15 Oct. 2014
- “ Three pillars of the Banking Union: SSM, SRM, DGS; see, additionally single rule book: CRR, CRD IV and BRRD
- “ BRRD from 15 May, 2014 → to be transformed until 2015 → SAG from 1 Jan, 2015

# Changing approach

- “ From private law towards public law:
- “ Regulation and supervision instead of insolvency law
  - . Marginalizing (but not displacing) insolvency law
  - . Insolvency law as measure rod for compensation, cf. s. 147
  - . Replacing pari passu by fin. market stability and ex ante-participation by ex post-protection
- “ Insolvency law for winding-up of the residual (or a small, 57) bank
- “ Regulation streams ever since the Washington Summit 2008:
  - . Supervision
  - . Risk Management, Capital requirement, liquidity
  - . Derivatives
  - . Wage
  - . Deposit Guarantee
  - . Market structures
  - . Rating agencies
  - . Shadow banking
  - . Restructuring
  - . Consumer protection

# Alternatives

- “ Prevention
- “ Early intervention, sec. 36 ff.
- “ Measures in critical cases

# Prevention + early measures

- “ Planning of recovery: Living will, sec. 12 ff.
- “ Planning of resolution, sec. 40 ff.
- “ Minimum requirements for own funds and eligible liabilities (MREL)
- “ Early intervention measures (revocation of directors, replacement by preliminary administrator, sec. 38)

# Resolution measures

- “ Creditors’ participation (bail in)
- “ Selling of the institute
- “ Bridge institute
- “ Transfer of assets

# Resolution I (common features)

- “ Sec. 62 ff.
- “ Likelihood of failure, sec. 63 (Bestandsgefährdung)
- “ Principles to be applied, sec. 68 (comparison with an insolvency proceeding)
- “ Goals to be achieved, sec. 67 (narrower than art. 31 BRRD. e.g. guarantee of continuity of critical functions and protection of customers' assets)
- “ Possible special administrator replacing management, se. 86 ff.



# Resolution II

- “ Bail in, sec. 89 ff. → debt-equity swap or write-off (sec. 99: fiction of fulfillment)
- “ Sec. 97: „Haftungskaskade“ (ranking order for swap): ... (4) eligible liabilities → s. 46f KWG (to be replaced by AbwMechG): in principle: owners (cf. art. 25 CRR) before creditors
- “ Possibility of transformation into stock company, sec. 77 par. 3

# Resolution III

“ Sale of business, s. 126 f. → initiating a sales process in due course with the possibility of re-transferring the business to old owners (sec. 127)

# Resolution IV

- “ Bridge institution, sec. 128 ff.
- “ Must be owned or controlled by public authority
- “ Same applies in case of transfer on asset management company, sec. 132 ff.

# Resolution V

“ Asset separation, sec. 107 ff.

# Legal protection

## “ Ex post mechanism:

- . No objection procedure (Widerspruchsverfahren), sec. 150
- . Only action for rescission (Anfechtungsklage) in first and last instance before court of appeal (VGH)
- . Reduced liability of decision makers, sec. 152



Thank you very much for your attention

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