



**UNIDROIT**

International Institute for the Unification of Private Law  
*Institut international pour l'unification du droit privé*

# **Bank Liquidation Tools**

## **A consensus view**

**Prof. Ignacio Tirado  
Secretary General**

**International Conference «Proportionality in bank crisis: The case of retail banks»**

**Università di Siena**

**Pontignano**

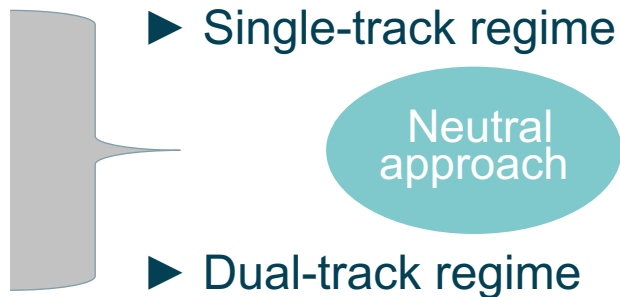
**17 October 2024**

The orderly liquidation of:

1. “Non-systemic” banks that are not resolved pursuant to special resolution regimes
2. Parts of a bank following, or in the context of, a resolution action

→ Certain aspects of liquidation frameworks also relevant for the resolution of systemic banks

**Design of legal frameworks for managing bank failures**



- ▶ EU model/FDIC (max flexibility)
- ▶ ***EU's the right model or the inevitable consequence of the limited design of the Banking Union?***



**Drawbacks of ‘piecemeal liquidation’:** destruction of value; disruption of access to deposits; possible broader adverse effects

**Tool selection** objectively discretionary: flexibility is key and there are **safeguards**

**The legal framework should allow and facilitate a ‘sale as a going concern’:** transfer of a bank’s assets and liabilities – especially (insured) deposits – to another bank to allow continued operation

**Piecemeal available** when no going concern surplus or not all assets covered by transfer

In any case **piecemeal value** key to determine baseline against which to assess transfer (and NCWO)

- ➔ Power for the liquidation authority / liquidator to transfer a non-viable bank’s assets and liabilities to a sound acquirer
- ➔ Without the need to individually notify, or obtain consent from, shareholders and creditors
- ➔ Enabling the liquidation authority / liquidator to prepare and execute the transfer
  - Definition of perimeter (flexibility)/the issue of licensing/non bank acquirers/special process for bidders (pre-marketing/link with planning)/valuation/related parties
  - External funding may be needed for prompt reimbursement of insured depositors or to enable deposit transfer to a sound acquirer (‘filling the gap’)
  - Facilitating the provision of post-liquidation financing by private lenders

## III. Effective Liquidation Tools (Chapter 6)

- ❖ **Alternative mechanisms: bridge bank/AMC**
- ❖ **Piecemeal liquidation: when a sale as a going concern is not feasible or desirable & to liquidate the residual estate following a transfer**

### « **Need for bank-specific provisions** »

- ➔ **Recognition of claims:** Allowing the liquidator to rely on a bank's records; no need for insured depositors to submit claims for amounts covered by deposit insurance
- ➔ **Contracts:** Allowing the continued provision of services to transferred business
- ➔ **Depositors:** Allowing advance payments to depositors
- ➔ **Avoidance:** Exceptions (resolution transactions); possibly stricter rules (related party transactions)

#### Financial contracts:

- Contractual early termination rights, including close-out netting, should remain enforceable
- Power for the liquidator to impose a temporary stay to facilitate a transfer, provided that substantive obligations continue to be met

## IV. Funding, Creditor Hierarchy, Safeguards

### Creditor ranking to facilitate implementation of liquidation tools

- ➔ Depositor ranking (benefits of some form of depositor preference)
- ➔ Depositors should not be treated differently based on their nationality, the location of their claim or the jurisdiction in which it is payable
- ➔ The legal framework should provide the possibility to subordinate the claims of related parties
- ➔ Shareholders should not be paid until the bank's creditors are fully repaid. In case of a transfer, equity interests could be left in the residual entity
- ➔ Specific provisions may be needed to protect bank-specific secured creditors

### Substantive and procedural safeguards

- ➔ Independence of the liquidation authority
- ➔ Judicial and non-judicial accountability mechanisms; but limitation of remedies to monetary compensation (no reversal of measures)
- ➔ Respect for the *pari passu* treatment of creditors; deviations for reasons of value maximisation and provided that no creditor is worse off
- ➔ Other, e.g., provisions to avoid unwarranted benefits for related parties



# UNIDROIT

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
*INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE*

**Thank you for your attention!**