

# The Fractured Nature of European Bank Insolvency and Liquidation Proceedings: The Experience So Far

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Innovations**

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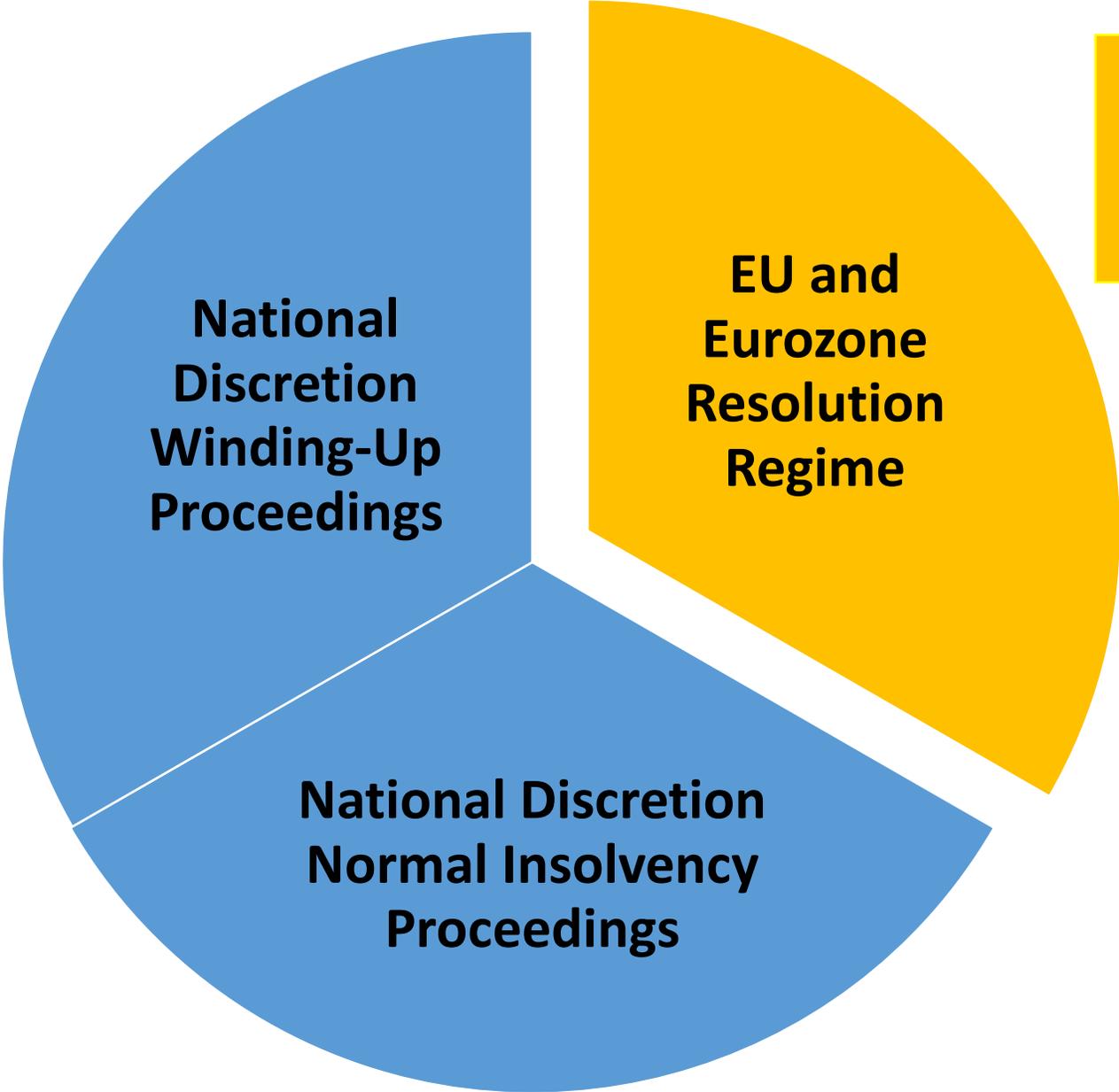
**Venue: Astoria Hotel (St. Isaac's Square 24, St. Petersburg, Russia)**

# Introduction

- The Talk will focus on:
- The Current EU Instruments governing bank resolution, and bank insolvency and liquidation law.
- The challenges of using a court or administrative based approach to deal with bank insolvency-liquidation. The interlinkages with DGS payouts.
- It will illustrate the challenges by using case studies.

RWCD 2001

BRRD 2014 and SRMR 2014



# When is a bank likely to be a threat to financial stability?

- The BRRD supports the rationale of a resolution regime to safeguard the continuity of banks critical functions and avoid a threat to financial stability.
- Banks placed into normal insolvency-liquidations do not offer critical functions such that discontinuation of a bank's regulated activities is assumed not to threaten financial stability.
- The consistency in practice of deciding whether or not it is in the public interest to resolve or liquidate a bank is lacking and so gives rise to concerns of predictability and certainty.
- The trigger for the decision about a banks insolvency may reside outside of the administrative authorities mandate after deciding the bank is FOLTF.

Table 3. Single Resolution Board: Resolution Decisions

Name of bank	ECB significant bank	Other systemically important institution	Resolution—within public interest threshold	Liquidation—outside public interest threshold
Banco Popular Español	✓	✓	✓	
Banca Popolare di Vicenza SpA	✓	×	×	✓
Veneto Banca SpA	✓	×	×	✓
ABLV BankLatvia (parent)	✓	✓	×	✓
ABLV BankLuxembourg (subsidiary)	×	×	×	✓

## SRB: Italy, Banca Popolare di Vicenza and Veneto Banca SCPA vs. National Authority, Croatia, Jadranska Banka d.d. in Šibenik: – Sub-Regional Interests

- Liquidation-Insolvency Option: Veneto Banca 2nd biggest in the Veneta region (total assets of approx. EUR 30billion and 6000 employees)\*
- Resolution Option: Jadranska Banka d.d. in Šibenik (€ 300m) it held below 1% of total market share in Croatia. However, from a regional perspective it accounted for 34% of total deposits and 50% of finance to the regions business sector and operated over half the ATM machines.

## Liquidation Cases with DGS Payouts and Other DGS Interventions – EBA Notifications

\*See Table, Liquidation Cases with DGS Payouts – EBA Notifications, from D Singh, *European Cross-Border Banking and Supervision*, Oxford University Press, 2019 forthcoming.

See separate document.

# Court based approach vs Administrative based approach

- The RWCD 2001 allows both administrative and court based approach for bank insolvency and liquidation. The BRRD moves towards an administrative based approach for bank resolution conferring powers on the resolution authority.
- A court based approach is broadly speaking a 'reactive' approach to safeguarding private stakeholder rights and holding individuals accountable within insolvency proceeding.
- An administrative based approach is broadly speaking a 'proactive' approach to safeguarding public and private stakeholder interests and rights.

# Court based approach vs Administrative based approach

- A question of capacity building is required to either improve the expertise of the judiciary and the administrative body to better understand the sensitives of private and public interest concerns in such time dependent decisions.
- A hybrid approach is possible where insolvency proceedings are initiated by an administrative body and the courts oversee the proceedings and ensure fairness. More importantly the court cannot reverse the administrative decision.
- Independence of both the court and administrative based approaches needs to assured to safeguard trust in the decision making process.

*ABLV Luxembourg SA*

*Luxembourg Bank Liquidation Approach:*

*Court led*

# Luxembourg Bank Liquidation Approach: Court led

## ABLV Luxembourg SA Experience

- The ECB concluded the subsidiary was likely to fail since it was reliant on the parent entity for financial support and clients. The SRB decided the bank could be placed in to liquidation proceedings.
- Latvia and Luxembourg take a single entity approach in insolvency has meant separate proceedings have taken place rather than it being coordinated through unified proceedings by the parent entity courts.

# ABLV Luxembourg SA, Administrative Authority vs Court Opinion

Luxembourg refers to two distinct proceedings:

- The judicial liquidation procedure – automatic withdrawal of the license; **or** The procedure of suspension of payments – restore the financial situation or liquidation
- The Court confirmed that it was not bound by the assessment by the authorities.

# ABLV Luxembourg SA, Administrative Authority vs Court Opinion

- The court decided to rely on the facts presented during the proceeding: ‘It is therefore necessary to analyse whether the financial situation of ABLV will no longer be able to meet the commitments to all holders of debt and equity rights.’
- The Court found the application for the ‘procedure of suspension of payment’ well founded and set 6 months +1 month extension, as a deadline to secure a potential acquirer.
- The covered depositors of ABLV Luxembourg were reimbursed separately, *see handout.*

Southsea Mortgage & Investment Company Ltd  
UK Bank Liquidation Approach: Administrative  
led

# UK Bank Liquidation Proceedings: Administrative led

## The application for a bank winding up order:

- The appointment of a Bank Liquidator can only be made by either the BoE, PRA or HM Treasury via a Court application.

- Three grounds for an application for an insolvency order in respect of a bank:

**A:** the bank is unable to pay or likely to become unable to pay its debts; it is also necessary to show that a bank is in default of an obligation to pay an amount that is due and payable under an agreement;

**B:** it is in the public interest to wind up the bank;

**C:** it is fair to wind up the bank (“just and equitable”).

# UK The process of the winding up

- **Southsea was established on the South Coast of England. It was a small bank with just over 250 depositors and around £7.4 million deposits.**
- **The process of the winding up:**
- The bank liquidator (as an officer of the court) has 2 objectives:
  - Objective 1: ensure that each eligible depositor has their account transferred to another financial institution or receives payment from the FSCS as soon as practicable.
  - Objective 2: wind up the affairs of the bank so as to achieve the best result for the bank's creditors as a whole. Objective 1 'takes precedence' over Objective 2.

# Southsea Mortgage & Investment Company Ltd

- Following an application from the BoE, the Court was satisfied that Southsea was unable, or likely to become unable to pay its debts, in accordance with Section 96 of the Banking Act 2009.
- The Bank Liquidator, accountancy firm BDO LLP, pursued a strategy to achieve objective 1 and notified the committee when it has been achieved in order to pass a 'full payment resolution'.
- The SCV was submitted to the FSCS by close of business on the first day of the Bank Liquidator's appointment. The FSCS was then able to pay compensation to 80% of depositors by close of business the next day. In this way, it managed to minimise disruption and provide access to funds by paying out as quickly as possible.

## Additional Issues

- The ‘public interest’ test as defined by Article 32(5) of the BRRD is by no means a clear-cut definition between the scope of BRRD-style resolution on the one hand and ‘winding up’.
- The lack of consensus is not just with regard to the substantive design of bank insolvency procedures:
- A consistent general depositor preference rule with a tiered approach would allow equal protection of insured depositors throughout the Euro area.

## Additional Issues

- The definition of objectives: to be pursued in restructuring and/or liquidation
- The powers of relevant actors: administrative authorities, courts, liquidators, creditors' meetings or committees
- The substantive rights allocated to stakeholders: the ranking of claims, recognition or non-recognition of collateral arrangements, set-off rights.
- The availability of legal redress.