

[Home](#) > [News & Analysis](#) > [Fund Managers](#) > [Germany's secured credit reset](#)

News & Analysis

Germany's secured credit reset

Independent enforcement is a superior alternative to M&A and workout processes, maintains Dagmar Gold of Deutsche Pfandverwertung.

Guest Writer - 22 hours ago



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Dagmar Gold

The 2021 ruling of the German Federal Court of Justice (BGH, IX ZR 145/21) has reshaped enforcement practice for secured creditors in a fundamental way. What initially appeared to be a technical legal clarification has, during the restructuring cycles of 2023–2025, become an operational turning point.

The BGH confirmed that secured creditors must enforce collateral independently and outside the

insolvency estate, and that administrators may not dispose of pledged or assigned assets. This shift places responsibility directly on the creditor, making enforcement readiness, legal accuracy and procedural discipline decisive for realisation outcomes. For private debt investors, the ruling represents a structural reset that requires updated strategies and a deeper understanding of statutory enforcement.

Legal foundation: Enforcement as an active and mandatory duty

Germany's separation principle ensures that security assets remain segregated from the debtor's estate from the moment they are created. As a result, the secured creditor alone assumes responsibility for realisation.

First, creditors bear an active enforcement duty, and delays increase exposure to allegations of value erosion. Second, statutory enforcement methods must be followed; informal sales or M&A-style transactions generally lack legal effect and may be voidable. Third, enhanced governance standards apply: lenders must maintain proper authorisations, possession verification and robust documentation.

Market developments: Recoveries determined by execution quality

Recent years demonstrate that recoveries improve when enforcement is initiated early and executed in strict compliance with statutory procedure. Losses arise where lenders rely on M&A processes or informal arrangements. Cross-border structures often suffer from unclear delegation or incomplete documentation.

In practice, recovery outcomes correlate with operational preparation rather than the conduct of insolvency administrators. This has prompted private debt managers to refine internal protocols and establish more rigorous enforcement playbooks.

Cross-border enforcement: Practical observations

Experience from statutory enforcement work for international credit investors reveals several recurring insights. Public auctions progress under fixed statutory timelines and often conclude within weeks. Because collateral remains outside the insolvency estate, recoveries are not diluted by administrator remuneration or estate-related costs.

Foreign lenders frequently underestimate German procedural requirements, including notarised powers and possession evidence. Early initiation strengthens negotiation leverage and provides lenders with a predictable, defensible path to realisation.

Liability exposure: Risks of private sales during insolvency

A widely underestimated risk concerns the informal private sale (*freihändige Verwertung*) of collateral during or near insolvency. Without a compliant enforcement framework, such sales are generally unlawful and expose creditors, advisors and directors to liability. Typical hazards include allegations of under-value disposal; personal liability for non-compliance with statutory procedure; avoidance actions by administrators; and unenforceable warranties, as an insolvency estate cannot provide representations.

Value erosion also results from slow M&A processes, during which assets deteriorate and buyers withdraw. Distressed M&A processes regularly incur six- to seven-figure advisory fees that reduce net recoveries. Public auctions avoid these pitfalls through transparent price formation, minimal leakage and a final, challenge-resistant result delivered by sovereign act (*Hoheitsakt*).

Why M&A and workout strategies underperform in distress

Distressed M&A processes suffer structural weaknesses: buyers demand warranties incompatible with insolvency law, and transactions often collapse once filings occur. Workouts offer little improvement: creditor interests diverge, negotiations extend while performance declines and asset values erode under uncertainty.

Many workouts postpone rather than resolve underlying issues. Independent statutory enforcement provides legal certainty, predictable timing, binding price formation and significantly lower costs, resulting in higher net recoveries for secured creditors.

Strategic recommendations for private debt funds

Funds should establish clear enforcement pathways at origination, maintain robust delegation structures, ensure proper authorisations and conduct periodic collateral valuations. Engaging publicly appointed auctioneers ensures statutory compliance and enhances defensibility. These measures strengthen governance, reduce liability exposure and support timely, cost-efficient realisation processes.

Outlook: A more creditor-favourable jurisdiction

Germany is evolving into a creditor-friendly jurisdiction offering clearer rights, faster procedures and more predictable outcomes. Investors relying on statutory enforcement – particularly public auctions – achieve materially better results than those dependent on M&A or workouts. The post-BGH environment rewards decisive, compliant action and confirms independent realisation as a superior strategy for secured creditors seeking consistent recoveries.

These developments also demonstrate that lenders must reassess how enforcement planning is integrated into credit underwriting. In an environment where timing and legal certainty are crucial, statutory enforcement provides a level of predictability that negotiated processes cannot match.

Moreover, the ability to achieve a final and uncontestable result is increasingly valued by institutional investors, who seek transparent and defensible recovery strategies. As more international lenders participate in the German market, understanding these enforcement mechanics becomes a competitive advantage rather than a niche consideration.

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Proper preparation, realistic timelines and reliance on statutory mechanisms enable creditors to act decisively at moments when value preservation is most critical. This reinforces the strategic relevance of statutory enforcement for creditors.

Dagmar Gold is founder of Deutsche Pfandverwertung, a German public auctioneer

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