

THE AMMANATI AFFAIR: SEVEN CENTURIES OLD, AND NOT FEELING THE AGE

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Collectivity has been a central and seemingly indispensable feature of that distinct body of law dealing with insolvency situations. It follows that any attempt to analyse insolvency law which does not explain the deep structure of [the] collectivity rule must be considered a failure.¹

I. INTRODUCTION

The enactments of the UNCITRAL Model Law on Cross-Border Insolvency (“UNCITRAL Model Law”) and the European Regulations on insolvency proceedings have promoted an incremental approach towards substantive harmonization. This strategy has not remained unquestioned. One of the major criticisms is that such a course of action overlooks the nature of the issues currently raised in multi-national and cross-disciplinary bankruptcy procedures.

This Article focuses on the Anglo-American bankruptcy tradition. It adopts a doctrinal methodology to question the conclusion that “collectivity” is and should be a procedural, objective and secondary notion in light of two case studies. It suggests that in the context of cross-border, cross-disciplinary² cases, equitable concepts could be employed to introduce a more nuanced understanding of the notion of “collectivity.” This should facilitate the recognition of foreign bankruptcy proceedings³ alongside with their inclusiveness, finality and certainty.

This Article acknowledges that some of the discussed issues can be ascribed to the lack of mandatory guidance on group bankruptcies. This

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1. RIZWAAN JAMEEL MOKAL, CORPORATE INSOLVENCY LAW: THEORY AND APPLICATION 33 (2005).

2. “Cross-disciplinary” is herein used for cases where bankruptcy tenets clash with principles of other laws (i.e., contract, maritime, etc.) governing a transaction (and its effects), which is relevant for the bankruptcy case.

3. In this Article, the term “bankruptcy” refers to both corporate and personal cases.

aspect has not been ignored. Recently, the EU Regulation 2015/848 on Insolvency Proceedings⁴ (“EU Recast Regulation”) has included a section on the treatment of group bankruptcies,⁵ albeit the implementation of its provisions is voluntary. A comprehensive recitation of the current debate, the existing challenges, and the solutions proposed and implemented to date are beyond the limits of this Article. A cursory analysis of them would not do the issues justice, hence it is omitted from this text.

II. THE NOTION OF “COLLECTIVITY”

“Collectivity” represents a central feature of any bankruptcy system.⁶ It is the essential condition for claimants to accept a limitation to their autonomy and freedom of action and—in certain cases—unilateral amendments to their mutual obligations with the debtor. If only one of them was free to pursue their individual interest to the damage of the (collective) procedure, the theoretical mutual agreement⁷ that justifies the existence of bankruptcy law collapses.

Despite its relevance, collectivity is an elusive concept, and it is frequently misinterpreted as being a synonym of “automatic stay,” i.e., the prohibition of any creditor’s attempt to (continue to) collect from the debtor or the debtor’s property.⁸ This section investigates the current understand-

4. Regulation (EU) 2015/848, of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (recast), 2015 O.J. (L 141) 19.

5. *Id.* arts. 56–77.

6. Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225–26 (1918) (“There are two necessary antecedents before [a bankruptcy] procedure of collective execution need be invoked: (a) insolvency, actual or apparent, of the debtor, and (b) plurality, actual or potential, of the creditors.”).

7. According to Thomas H. Jackson, bankruptcy law “reflects the kind of contract that creditors would agree to if they were able to negotiate with each other before extending credit. This is an application of the Rawlsian notion of bargaining . . . behind a ‘veil of ignorance.’” THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 17 n.22 (Beard Books 2001) (1986) (citing JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971)).

8. For the U.S. notion of “automatic stay,” see ELIZABETH WARREN ET AL., *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 67 (7th ed. 2014) and 11 U.S.C. § 362(a) (2006). To illustrate the scope of the automatic stay, see, among others, *In re Green*, No. 09-06673-8-RDD, 2011 WL 5902502 (Bankr. E.D.N.C. Oct. 20, 2011).

For the U.K. notion of “moratorium,” see IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 515–22 (5th ed. 2017), VANESSA FINCH & DAVID MILMAN, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES* 302–12 (3d ed. 2017), and Insolvency Act 1986, c. 45, sch. B1, ¶¶ 40–45 (Eng.). Courts have been consistent in upholding the spirit and aim of the “rescue culture,” which this provision promotes. As a result, competitors have been barred from bringing an action against the debtor for infringement of intellectual property rights, unless with the prior authorisation of the administrator or the court. *See, e.g.*, *Biosource Techs. Inc. v. Axis Genetics plc* [2000] 1 BCLC 286 (Eng.). The conflicting interpretation of the Court of Session in *Air Ecosse Ltd. v. Civil Aviation Auth.* (1987) SC 285 (Scot.)—which held that the moratorium applied only in respect of the actions of the creditors of the

ing of this principle in some national and international statutes to identify the commonly accepted features of this notion.

A. *Collectivity in Statutes*

In line with the established tradition, the UNCITRAL Model Law prescribes that for a proceeding to qualify for relief under its rules, it must be collective:

For the purposes of this Law:

(a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation⁹

To seek further guidance on the notion of collectivity, it is only appropriate to look at the UNCITRAL Guide to Enactment and Interpretation¹⁰ (“UNCITRAL Guide”). The UNCITRAL Guide rightly clarifies that collectivity has nothing to do with the goal of the bankruptcy procedure. It is immaterial, in other words, if the procedure is designed to collect and liquidate assets and distribute proceedings, or to restructure the business.

Pursuant to the UNCITRAL Guide, a proceeding is collective when it is *designed* to offer a coordinated, global solution for all stakeholders in bankruptcy proceedings. The legal interests of all parties should be adequately represented. Key considerations to determine if a procedure is collective are whether:

- substantially all of the assets and liabilities of the debtor are dealt with (but the rights of a class of creditors may remain unaffected); and
- the *creditors* who are adversely affected by the proceedings have a right to submit claims, participate in the procedure, and receive an equitable distribution.¹¹

company, but not of its competitors—has never been considered a good authority on this point by English courts. *See generally Biosource Techs. Inc.*, [2000] BCLC. 286 (reviewing cases).

9. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, at 4, U.N. Sales No. E.14.V.2 (2014), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> [https://perma.cc/T9Y3-NR8B] [hereinafter UNCITRAL MODEL LAW].

10. *See id.* at 39–40. The U.S. Congress has specifically instructed the courts to look at the explanations in the Guide if they find a provision in the U.S. statutes (i.e., chapter 15) to be unclear or ambiguous. *See H.R. REP. NO. 109-31*, pt. 1, at 105–06 (2005).

11. *See UNCITRAL MODEL LAW, supra* note 9, at 40.

The notion of collective proceedings is flexible enough to include compulsory and voluntary, corporate and individual, debtor-in-possession or independent expert-led procedures.

The analysis of the wording of these documents suggests that, despite some suggestions to the contrary (such as the use of words like “stakeholders”), the UNCITRAL Model Law focuses on the contractual relationship between debtor and creditors to determine if proceedings are collective. In other words, bankruptcy proceedings are collective whenever their procedural net captures substantially all the assets and liabilities of the debtor and its contractual creditors are forced to sit at the bankruptcy table.

Even more explicit in its procedural approach is the EU Recast Regulation. The previous version, EU Regulation 1346/2000¹² (“EC Insolvency Regulation”), required “the partial or total divestment of a debtor and the appointment of a liquidator” for proceedings to be collective.¹³ The latest version shifts the emphasis from the goal of the procedure (divestment of assets) to its content (participation of the creditors). Accordingly, the EU Recast Regulation characterises as “collective” any bankruptcy proceedings that include “*all or a significant part of a debtor’s creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them.*”¹⁴

It follows that under both the UNCITRAL Model Law and the EU rules, collectivity is a procedural pre-condition to recognise foreign bankruptcy proceedings within the jurisdiction of another ratifying or EU member state. However, neither of these laws provides substantive guidance on how this notion should be interpreted. Additionally, despite the use of the term “stakeholder” in the UNCITRAL Guide, it appears that there is no obligation to extend the collective nature of the procedure beyond contractual creditors.

This approach is consistent with other examples of international frameworks for harmonising bankruptcy laws. For instance, principle 3 of the IBA Cross-Border Insolvency Concordat¹⁵ refers to collectivity as a practical aspect to achieve coordination in cross-border proceedings. The

12. Council Regulation (EC) No 1346/2000, of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1.

13. *Id.* art. 1, ¶ 1.

14. Regulation 2015/848, *supra* note 4, art. 2(1) (emphasis added).

15. Int’l Bar Ass’n, Committee J Cross-Border Insolvency Concordat (May 31, 1996), <https://www.iiiglobal.org/sites/default/files/media/International%20Bar%20Association%20Cross-Border%20Insolvency%20Concor.pdf> [https://perma.cc/8ZJH-9EW9]. The Concordat was adopted by the Council of the International Bar Association Section on Business Law in Paris on September 17, 1995, and by the Council of International Bar Association in Madrid on May 31, 1996. *Id.*

collective nature of the cross-border bankruptcy procedure does not result by itself in the autonomous recognition of new, substantive rights to any of the parties (i.e., creditors) involved.¹⁶

Similarly, in *Principles of European Insolvency Law*, the International Working Group in European Insolvency Law has identified some common characteristics shared by European domestic bankruptcy systems.¹⁷ Once again, collectivity is understood as a synonym for a collection and conversion mechanism¹⁸ designed to promote the creditors' collective interests.¹⁹

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As stated in the introduction of this section, the concept of collectivity represents a central feature in the Anglo-American bankruptcy system. It is therefore appropriate to look at the statutory definition of collective bankruptcy proceedings in each of these jurisdictions.

The adoption of the UNCITRAL Model Law in the English legal system (England, Wales, Northern Ireland, and Scotland) has been long in the making. Section 14 of the Insolvency Act 2000 ("IA 2000") authorised the Secretary of State to introduce by regulation "*any provision which he considers necessary or expedient for the purpose of giving effect, with or without modifications, to the model law on cross-border insolvency.*"²⁰ Despite that, it was only with the Cross-Border Insolvency Regulations 2006 ("CBIR 2006") that Great Britain implemented the UNCITRAL Model Law.

Surprisingly, there is no statutory definition of "collective insolvency proceeding" under the law, not even in section 426 of the Insolvency Act 1986 ("IA 1986").²¹ However, "foreign proceeding" is defined as

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to con-

16. Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 547 (1996). For an analysis of the implications that the Concordat may have on cross-border bankruptcy cases, see David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?* 14 CONN. J. INT'L L. 563 (1999).

17. See generally 4 LAW OF BUSINESS AND FINANCE: PRINCIPLES OF EUROPEAN INSOLVENCY LAW (William W. McBryde et al. eds., 2003).

18. *Id.*

19. *Id.*

20. Insolvency Act 2000, c. 39, § 14(1) (Eng.) (emphasis added).

21. This is the section of the Insolvency Act that dictates guidelines on cooperation between courts from selected, mainly Commonwealth, countries that exercise jurisdiction in bankruptcy cases. See Insolvency Act 1986, c. 45, § 426 (Eng.).

trol or supervision by a foreign court, for the purpose of reorganisation or liquidation.²²

It seems therefore that the U.K. definition places less emphasis on the participation of the creditors, and more on the nature and purpose of the proceeding. This view seemed to be supported in *Cambridge Gas*,²³ where the Privy Council held that an order of the District Court for the Southern District of New York was enforceable in the United Kingdom even if some of the shareholders of an insolvent Isle of Man company had not submitted to its jurisdiction.

This position was distinguished in the joint appeal of *Rubin*,²⁴ where the U.K. Supreme Court held that *Cambridge Gas* was wrongly decided and that recognition of one of the two foreign proceedings submitted to its analysis could not be allowed.

At common law and under the 1933 Act, a foreign court has jurisdiction to give a judgment *in personam* capable of being enforced in the U.K. if the person against whom it is given was present in that country when the proceedings were instituted, claimed or counterclaimed in the proceedings, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings, or had agreed to submit to the jurisdiction of the court (the “Dicey rule”).

While the Supreme Court treated the foreign decisions in the appealed cases of *Rubin*²⁵ and *New Cap*²⁶ as “judgments against third parties,” it is implied that the U.K.’s most senior court is unwilling to recognise and enforce foreign proceedings where procedural rights of contractual claimants are not upheld. As a result, the current position of the English judiciary is substantially aligned with the procedural notion of collectivity recognised in the international documents mentioned above.

Finally, with reference to the U.S. Bankruptcy Code, the law defines “foreign proceeding[s]” as any

collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor

22. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art. 2(i) (Gr. Brit.).

23. *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC* [2006] UKPC 26, [2007] 1 AC 508 (appeal taken from Isle of Man).

24. *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (appeal taken from Eng.).

25. *Rubin v. Eurofinance SA* [2010] EWCA (Civ) 895, [61], [2011] Ch 133 (Eng.).

26. *New Cap Reins. Corp. Ltd. v. Grant (In re New Cap Reins. Corp. Ltd.)* [2011] EWCA (Civ) 971, [66] (Eng.).

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are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.²⁷

This general definition seems to apply also to cross-border bankruptcy procedures, as § 1502(4) and (5) of chapter 15²⁸ do not introduce special criteria for them.

It is also significant that Congress decided to include the words “or adjustment for debt” in the definition. As explained in House Report 109-31, Congress wanted to extend the scope of the recognition procedure to all cases in which the debtor is in financial distress, yet not necessarily insolvent. Therefore, the U.S. recognition procedure applies to cases in which the traditional bankruptcy rules on distribution and on the characterization of claims do not apply.

* * *

To conclude, it appears that all the national and international laws analysed in this section adopt a similar, procedural definition of collective procedure. To provide recognition and assistance to a foreign representative, the foreign procedure shall feature the following three key elements:

1. be regulated by a bankruptcy law, while the content and goal of the procedure are immanent;
2. offer a coordinated, global solution to the debtor’s distress; and
3. represent the interest of all the creditors.

The next section investigates whether academics and judges have different views on the matter.

B. Collectivity: Cases and Opinions in the United Kingdom

This section investigates how the notion of collectivity has been interpreted by English judges, by the academic literature and in governmental documents, to determine if there are significant discrepancies between the “practical” and statutory understanding of this notion.

27. 11 U.S.C. § 101(23) (2012).

28. Chapter 15, which replaces section 304 of the 1978 U.S. Bankruptcy Code, is the portion of the current U.S. Bankruptcy Code that incorporates the UNCITRAL Model Law in the United States. See generally Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (codified as amended in scattered sections of 11, 18, and 26 U.S.C.).

In the recognition procedure, the matter of whether a foreign proceeding is collective is only cursorily addressed by U.K. courts. The collective nature of the foreign proceeding is frequently assumed. Courts address specific complaints only if it is *manifest* that there is a significant doubt over the procedural, collective nature of the foreign proceeding.

For instance, in *In re 19 Entertainment*, the court held that:

Article 2 of the [CBIR 2006] defines the term ‘foreign proceeding’ to mean a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. The evidence . . . to which I have referred already, and it is not necessary for me to refer more fully on this point to the body of his report, persuades me completely that the proceedings are ‘foreign proceedings’ within the meaning of the 1986 Regulations.²⁹

In re 19 Entertainment is one of the last decisions in a long line of cases that treated collectivity as a *procedural requirement*. Other examples include *In re Lines Bros*³⁰ and *In re Stanford International Bank*.³¹

In the latter, the Court of Appeal had to determine, in a competing application from an Antiguan liquidator and an U.S. receiver, which of the two procedures should be considered the “foreign main procedure.” The Court of Appeal affirmed on the point the decision of Judge Lewinson and held that the U.S. receivership was not “collective” in the relevant sense because it was for the protection of the debtor’s assets and its investors, and not the wider class of creditors generally, notwithstanding the occasional reference to claimants in the orders.

Stanford International Bank is a significant case because the ruling does not clarify if the Learned Judges considered—as requested by the counsel for the U.S. receiver—that paragraph 6 of the U.S. district judge’s amended order enabled the receiver to seek relief on behalf of the bank under the U.S. Bankruptcy Code.³² We also do not know if they paid sufficient regard to the extent of the powers conferred on the receiver under

29. *In re 19 Entertainment Ltd.* [2016] EWHC (Ch)1545, [14] (Eng.).

30. *In re Lines Bros Ltd.* [1983] Ch 1 at 20 (Eng.); *see also* Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC [2006] UKPC 26, [15], [2007] 1 AC 508 (appeal taken from Isle of Man) (“The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.”).

31. *In re Stanford Int’l Bank Ltd.* [2010] EWCA (Civ) 137, [2011] 1 Ch 33 (Eng.).

32. *See id.* [18], [21]; *see also* SEC v. Stanford Int’l Bank, Ltd., No. 3-09CV0298-L, 2009 WL 9123278 (N.D. Tex. Feb. 17, 2009).

U.S. common law (paragraph 2 of the original order). Such powers enabled the receiver to propose an appropriate plan which included all creditors for the distribution of the assets vested in him or under his control to the court.

Following *Rubin*, courts have further strengthened their procedural approach, as evidenced by *Isis Investments*.³³ In *OGX*,³⁴ albeit in an *obiter dictum*, the High Court clarified that the right to be heard cannot be invoked by any claimant. In particular, the court observed that only *directly-affected* parties should be included in a bankruptcy proceeding for that procedure to be considered collective.³⁵

The case that most recently touched on the notion of collectivity is the U.K. recognition of the “extraordinary administration” filed by Agrokor DD, a company incorporated in Croatia. In *Agrokor*,³⁶ the plaintiff (Sberbank, a Russian bank) opposed the recognition of the Croatian bankruptcy procedure in Great Britain, under schedule 1, article 2(i) of the CBIR 2006,³⁷ on several grounds, including that the Croatian procedure was not collective.

Sberbank argued that “collective” refers to any bankruptcy procedure that deals with all of the debtor’s assets and liabilities and their creditors. As Croatian law extended this concept to a group level, solvent companies were also drawn into the procedure, and the estate pool would have been distributed not only for the benefit of the debtor’s creditors, but also for the creditors of its (sometimes solvent) subsidiaries.

In other words, the High Court was asked to reject the recognition on the argument that the Croatian extraordinary administration was too procedurally collective. Following the precedents mentioned above (and, in particular, *Stanford International Bank*), the court rejected this reasoning, without looking at whether the interests of the claimant would have been

33. *Isis Invs. Ltd. v. Oscatello Invs. Ltd.* [2013] EWHC (Ch) 7 (Eng.). The High Court followed *Rubin* and refused to grant a stay of the English proceedings to favour the related proceedings in the Isle of Man because—among other reasons—some of the parties in the U.K. litigation were not part of the Manx proceedings.

34. *Nordic Trustee A.S.A. v. OGX Petróleo e Gás S.A. (In re OGX Petróleo e Gás S.A.)* [2016] EWHC (Ch) 25 (Eng.).

35. *Id.* [50] (“So, for example, if the party is a secured creditor, he will be regarded as standing outside the collective process, and the automatic stay under section 130(2) will invariably be lifted to enable him to enforce his security.”).

36. *In re Agrokor DD* [2017] EWHC (Ch) 2791 (Eng.).

37. While both Croatia and the United Kingdom are EU member states, the EU Recast Regulation could not apply to this procedure as, pursuant to article 1, paragraph 1, the automatic recognition is granted only for those bankruptcy proceedings which are listed in annex A of the regulation. The Croatian extraordinary administration proceeding was enacted by the government shortly before the company filed for its protection, and at the time of writing it is not yet included in that list. See Regulation 2015/848, *supra* note 4, art 1, ¶ 1, annex A; Cross-Border Insolvency Regulations 2006, SI 2006/1030, art. 2(i).

affected—positively or negatively—by this broad understanding of collectivity. The court seemed to hold the view that, so long as all creditors are represented, and all assets and liabilities fall into the same pot, the collectivity of the procedure cannot be questioned.

Undeniably, this case also touches on the issue of procedural and substantive consolidation in the case of bankruptcy of a group of enterprises. Generally speaking, procedural consolidation occurs when the distinct proceedings of the entities that formed part of a group of companies are heard simultaneously by the same judge, while the consolidation becomes “substantive” when the estates are merged. In other words, substantive consolidation includes “the pooling of assets and liabilities of separate but related legal entities to effect an equitable distribution of value to stakeholders.”³⁸

Substantive consolidation is extremely controversial, as it is recognised only in certain jurisdictions. This may explain Sberbank’s surprised reaction to the Croatian statutory mechanism. However, in the English case, Judge Matthews held that it was not necessary for him to address this aspect as the recognition was sought only with reference to a particular individual debtor, and not the network of companies.

Time will tell if the characterization proposed by Judge Matthews will hold up on appeal (if any). However, as a matter of fact, in this case collectivity, and not consolidation, was the issue touched on and addressed in the court’s opinion, and the court did not depart from the established case law.

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This procedural understanding of the law is rarely questioned by commentators. One such example is Look Chan Ho,³⁹ who finds the approach adopted by U.K. courts (especially in *Stanford International Bank*) too mechanic and superficial.

Other commentators, however, are far less critical. Professor Goode, for instance, states that collectivity entails the abandonment of individual, executory actions against the debtor, which are replaced by “*collective actions by the creditors as a whole*,”⁴⁰ while individual rights are converted

38. Craig Martin, *United States*, in 1 CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 597, 637 (Look Chan Ho ed., 4th ed. 2017).

39. Look Chan Ho, *England*, in 1 CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, *supra* note 38, at 163, 178 (criticising the method, but not the basic understanding that “[f]or a proceeding to be collective, it must concern all creditors generally”).

40. ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 64–65 (4th ed. 2011) (emphasis added).

into rights of proof in competition with other creditors.⁴¹ In line with *OGX*, he also observes that in liquidation cases (and, possibly, in rescue cases where the concerned assets are not essential for the turnaround effort), enforcement of security interests or other real rights should not be affected. As a result, the persons who benefit from these interests or rights are not touched by the collective nature of the procedure, and they should not be heard for a procedure to be collective.

Goode's view is shared by his fellow colleague Ian Fletcher,⁴² who starts from the assumption that the majority of bankruptcy procedures (with the exception of receivership) are collective in nature. Once again, collectivity represents the right of any claimant to be included in the bankruptcy proceeding, which shall be carried out to promote the collective interest of the procedure, and not the specific, peculiar interests of some of its participants or a class of creditors.

Finally, this uniformity of approach towards the procedural understanding of the notion of collectivity is neither questioned by the government nor by practitioners.⁴³ Particularly, in the government's view, collective procedures are "proceedings in which all creditors participate, under which a duty is owed to all creditors and in which all creditors may look to an office holder for an account of his dealings with the company's assets."⁴⁴

To conclude, it is possible to observe that in the United Kingdom, the procedural notion that has emerged in the case law is fully supported by the other main bankruptcy players, i.e., academics, practitioners, and the legislature. The next section explores the notion and content of collectivity in the other jurisdiction considered in this study, namely, the United States.

41. In the same vein, see generally Gabriel Moss, *Principles of EU Insolvency Law*, INSOLVENCY INTELLIGENCE, Mar. 2015, at 40 (U.K.) (arguing that the notion of collectivity is a synonym of "unity," and it is used to describe the situation in which we have one proceeding in one country for all of the debtors' assets and affairs), Hamish Anderson, *What is the Purpose of Insolvency Proceedings?*, 8 J. BUS. L. 670 (2016) (arguing that collectivity means to operate for the benefit of all creditors), and ROY GOODE, *GOODE ON COMMERCIAL LAW* (Ewan McKendrick ed., 5th ed. 2016).

42. FLETCHER, *supra* note 8, at 3 ("[A] central tenet of the collectivity principle [is] that the debtor's assets are administered, and creditors' claims processed, without any regard for the chronological order in which assets were acquired or debts created.")

43. See, e.g., Morgan Bowen, *An Introduction to the Fundamental Principles Governing Cross-Border Insolvency in an English Law Context*, INSOLVENCY & RESTRUCTURING INT'L, Sept. 2012, at 19.

44. DEP'T OF TRADE & INDUSTRY, THE INSOLVENCY SERVICE, *INSOLVENCY—A SECOND CHANCE*, 2001, Cm. 5234, ¶ 2.5 (U.K.).

C. Collectivity: Cases and Opinion in the United States

As both the United Kingdom and the United States are common law countries, this Article looks at case law first to determine the established notion of collectivity in bankruptcy procedures.

There is no shortage of such cases in the United States.⁴⁵ At first glance, it appears that American judges have adopted the same, procedural approach as their English colleagues. In *Board of Directors of Hopewell*,⁴⁶ the court held that a Bermuda “scheme of arrangement” for creditors was collective in nature because all creditors had a right to object to the proposed schemes and the court was involved in approving all plans. Probably the most widely-known example of this approach is the decision in *Betcorp*,⁴⁷ where the Bankruptcy Court for the District of Nevada held that “[a] collective proceeding is one that considers the rights and obligations of all creditors.”⁴⁸

In this case for U.S. recognition of a voluntary liquidation initiated in Australia, the court concluded that the Australian proceeding was “collective in nature,” despite the absence of any judicial procedure or supervision and of any assertion or allegation that the debtor was insolvent. This was because Australian law on voluntary liquidation outlawed any attempt by a creditor to undermine the orderly, cooperative system that accounted for the rights of all creditors. The court considered that this element was sufficient to classify the procedure as collective.

Betcorp was followed in other districts, including in New York⁴⁹ and Delaware.⁵⁰ In *British American Insurance*,⁵¹ however, the Bankruptcy Court for the Southern District of Florida suggested that

[i]n determining whether a particular foreign action is collective as contemplated under [the Bankruptcy Code’s definition of “foreign proceeding”], it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.⁵²

45. Martin, *supra* note 38, at 614.

46. *In re Bd. of Dirs. of Hopewell Int’l Ins. Ltd.*, 275 B.R. 699, 707 (S.D.N.Y. 2002).

47. *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009).

48. *Id.* at 281 (emphasis added).

49. See *In re Gold & Honey, Ltd.*, 410 B.R. 357, 369–70 (Bankr. E.D.N.Y. 2009) (denying the recognition in the United States of an Israeli receivership procedure, as it was not designed to protect the interests of all the creditors as a whole).

50. See *In re ABC Learning Ctrs. Ltd.*, 445 B.R. 318, 328–30 (Bankr. D. Del. 2010), *aff’d*, 728 F.3d 301 (3d Cir. 2013).

51. *In re British Am. Ins. Co.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010).

52. *Id.* at 902 (citing 11 U.S.C. § 101(23) (2012)); see 11 U.S.C. § 1502(4)–(5).

This court therefore recommended the use of a *holistic approach* to assess the nature of the foreign bankruptcy procedure. It is suggested that it is only appropriate to carry out a factual analysis of the laws of the jurisdictions where proceedings had been initiated to determine if their provisions satisfy this prong of the definition of foreign proceeding.

Two years later, this holistic approach was followed by New York bankruptcy judges in the *Ashapura*⁵³ case. This was an application for the recognition, under chapter 15, of the proceeding before India's Board for Industrial and Financial Reconstruction ("BIFR") to rehabilitate the debtor's finances under the Indian Sick Industrial Companies Act ("SICA"). Although SICA did not provide a formal mechanism for the participation of unsecured creditors, the debtor was *allowed* to prove to the satisfaction of the court that, in practice, the proceeding considered the interests of all creditors, as it involved parties other than just one class of creditors or one party-in-interest. The applicant also proved that the combination of actual and published notice in the procedure was adequate, there were formal mechanisms for the court to review adverse determinations, and distribution generally occurred according to statutory priorities.

In this case, the court conceded that "[i]n determining whether a particular foreign action is collective . . . it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action."⁵⁴

Ashapura did not innovate the test to determine if a foreign procedure is collective. Nevertheless, applicants are given more opportunities to *factually* prove that a procedure meets the criteria established by the U.S. Code, as interpreted by the judiciary.

This approach was followed in other more recent cases, such as the decision in *Irish Bank Resolution Corp.*,⁵⁵ where the District Court for the District of Delaware authorised the recognition of a proceeding to wind-up an Irish bank notwithstanding the assertion that the Irish Finance Minister who supervised proceeding might give priority to any assets to the Irish state.⁵⁶ The Southern District of New York recently reinstated this ap-

53. *Armada (Singapore) Pte Ltd. v. Shah (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 140–42 (S.D.N.Y. 2012).

54. *Id.* at 136 (quoting *In re British Am. Ins. Co.*, 425 B.R. at 902).

55. *Flynn v. Wallace (In re Irish Bank Resolution Corp. Ltd.)*, 538 B.R. 692 (D. Del. 2015).

56. The Irish liquidator was able to prove that the assets would have been distributed in accordance with distribution scheme set forth in Ireland's Companies Act, and not in a discretionary manner. *Id.* at 698.

proach in *Poymanov*,⁵⁷ where the court admitted the use of expert witnesses to determine if a foreign bankruptcy procedure was collective.

To conclude, the collectivity requirement is proven whenever a foreign proceeding considers the rights and obligations of all creditors (e.g., *ABC Learning, Betcorp*). For a legislative choice, the interests of third parties are ignored (in accordance with the approach suggested in the UNCITRAL Guide). If the proceeding is in the interest of a single creditor (such as in *Gold & Honey*) or if notice is not given to all creditors (such as in *British American Insurance* and *ABC Learning*), recognition may be refused.

After *Ashapura*, it seems that all courts are moving from a rubber-stamp approach to a more holistic, factual analysis of the circumstances of the case. As a result, the notion of collectivity “can encompass a proceeding in which not every class of claim is subject to compromise where significant amount of financial debt, like issuance of bond debt or syndicated or bilateral bank debt alone, are subject to compromise in a foreign insolvency proceeding.”⁵⁸

* * *

In turning our analysis to the literature review, bankruptcy scholarship has long been dominated by the “creditors’ bargain model” (“CBM”). This theory—first introduced by scholars like Jackson, Baird, and Shanker⁵⁹—has been pervasive in influencing the understanding of some key pillars of this area of law, including the notion of collectivity.

This procedural understanding, however, is not without critics. For instance, Elizabeth Warren observed that in enacting the Bankruptcy Act, Congress wanted to promote policies capable of protecting the values and expectations of the community and a wide range of participants. Restricting collectivity to a debtor–creditors debate can hardly ensure that the procedure achieves the “‘public interest’ beyond the interests of the disputing parties.”⁶⁰

57. *In re Poymanov*, 571 B.R. 24 (Bankr. S.D.N.Y. 2017).

58. Martin, *supra* note 38, at 613.

59. See, e.g., Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857 (1982) (arguing that bankruptcy law should deal only with inter-creditor questions on the basis of the creditors’ bargain model); Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573 (1998); Morris G. Shanker, *The Abuse and Use of Federal Bankruptcy Power*, 26 CASE W. RES. L. REV. 3 (1975) (asserting that rules valid only in front of bankruptcy courts are a tension-creating situation).

60. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987) (emphasis added) (quoting 124 CONG. REC. 33,990 (1978) (statement of Sen. Dennis DeConcini)).

It seems therefore that a value-oriented notion of bankruptcy law may overcome the shortcomings of a rational, procedural approach to the notion of collectivity. Bankruptcy law should be seen as the arena where parties compete over their legitimate expectations, rather than over their legitimate, contractual claims.

The risk implicit in this approach is that it proves too much, and that it overextends the limits of this area of law. In many cases, especially those involving micro, small, and medium enterprises (“MSMEs”), the public interest is the interest of the contracting parties. Anchoring the notion of collectivity with societal values may cause—rather than promote the solution of—distributive issues, without effectively enhancing the protection offered to unsecured or non-contractual participants. It may simply result in a reduction of the pareto efficiency of the system.

In the same line of thinking with Elizabeth Warren, but with the purpose of overcoming some of the limits of her theory, Lawrence Ponoroff⁶¹ suggested (albeit with reference to personal bankruptcies) that collective goals and substantive fairness could be ensured only by the active involvement and discretion of bankruptcy judges, even at the price of losing some degree of uniformity. Following the remarks of Jack Williams,⁶² he suggested that only a decentralised approach could recognise the intrinsic value and dignity of all participants in the process.

This is one of the few cases in the Anglo-American tradition in which the word “collectivity” is used to promote substantive values for society as a whole, rather than procedural equality among participants as part of the procedure. The majority view, however, is much less radical.⁶³

61. Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 216–17, 216 n.209 (2000).

62. Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 130–31 (1999).

63. Among others: John A.E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests,”* 104 MICH. L. REV. 1899 (2006). The author seems to suggest the use of a broader notion of collectivity. He claims that “bankruptcy proceedings are in rem and bind all potential stakeholders in the debtor’s property. This broad-sweeping and compulsory law corrals those constituents who would prefer to defer collective resolution and deal with their debts on an individual in personam basis.” *Id.* at 1902 (footnote omitted). However, reference to broad concepts such as “stakeholders” and “constituents” is misleading, as the author appears to adhere to the CBM scholarship. In other words, Pottow does not question the procedural nature of the collective action problem. *See id.* at 1916.

D. Collectivity: Conclusive Remarks

To conclude, Sections II.B and II.C of this paper have demonstrated that in the United Kingdom and the United States there is a widespread acknowledgment, both in the doctrine and in the judiciary, that the collective nature of bankruptcy law is primarily procedural. Collectivity results in the freeze of individual, executory actions against the insolvent debtor, and in the creation of an inclusive procedure where all contractual claimants affected by the debtor's insolvency should take part.

This notion is not challenged outside the Anglo-American tradition either. As observed by Bob Wessels, the principle of collectivity determines the freeze of individual action by creditors and substitutes this right with the “*idea of the rule of joint execution against the assets of the insolvent debtor.*”⁶⁴

The procedural notion of collectivity can be summarised in the creditor's right to take part in the bankruptcy proceeding against their debtor. It is frequently recognised only to contractual creditors, and it is rarely ever understood as an entitlement to claim new rights or to amend existing rights in bankruptcy. Only rarely the circumstances of a case may lead the court to conclude that the procedure is not collective in nature.

This shared view of the procedural nature of the notion of collectivity is a remarkable achievement in a sector made distinctive by the frequent lack of agreement and commonalities between national laws. It is seldom questioned or even commented on. For instance, in his latest book *Principles of Cross-Border Insolvency Law*, Reinhard Bork did not even consider collectivity as having an autonomous standing among the principles of the cross-border insolvency practice.⁶⁵

The next section introduces the first of these case studies, the collapse of O.W. Bunker, to investigate if this procedural understanding of the notion of collectivity may have influenced the parties of that case to pursue their individual claims outside the bankruptcy context.

64. Bob Wessels, *Europe Deserves a New Approach to Insolvency Proceedings*, 4 EUR. COMPANY L. 253, 254 (2007) (Neth.) (emphasis added).

65. See generally REINHARD BORK, *PRINCIPLES OF CROSS BORDER INSOLVENCY LAW* (2017).

III. THE COLLAPSE OF O.W. BUNKER

It is an understatement that O.W. Bunker's collapse caused a significant disruption in the world of maritime bunkers and bankruptcy practice.⁶⁶ As observed:

The collapse of O.W. Bunker has led to a frenzy of actual and threatened vessel arrests and delays, and vessel owners have faced demands for double payment. The split decisions from courts around the world illustrate the difficulties arising from a bankruptcy in which contractual claims and maritime lien claims interact.⁶⁷

Before filing for bankruptcy, O.W. Bunker was the leading global independent marine fuel (bunker) company. Founded in Denmark in 1980, it had operations in twenty-nine countries. It acted as a physical distributor and reseller of marine fuel. It also provided risk-management solutions to control costs, minimise risk, and protect against market fluctuations. At the end of 2013, O.W. Bunker was the second-largest listed company in Denmark after Maersk.

O.W. Bunker fulfilled its request for fuel bunkers from maritime operators by a chain of contracts with subsidiaries and independent suppliers. Each contract contained a retention of title ("ROT") clause in favour of the supplier, and a provision that payment was due a fixed number of days after delivery. Some of these suppliers, depending on the law governing their contracts, also were believed to have a maritime lien on the vessel for the provision of necessities.

Each supplier gave permission for the ship owner to consume the bunkers while payment was pending as the vessel went about its business, thus impliedly accepting that all or substantially all fuel bunkers may be consumed before payment became due.

On December 19, 2013, O.W. Bunker signed an English omnibus security agreement with ING Bank.⁶⁸ ING acted as a syndicate of lenders to the O.W. Bunker group, which assigned and charged to ING all rights,

66. For a more detailed analysis of the factual and judicial implications of the O.W. Bunker collapse, see Eugenio Vaccari, *O.W. Bunker: A Common Law Perspective on Multi-Lateral Co-Operation in Insolvency-Related Cases*, 28 INT'L COMPANY & COM. L. REV. 245 (2017) (U.K.). For a description of the company's collapse see generally ALESSANDRO MAURO, GLOB. ASS'N OF RISK PROF'LS, *THE RISE AND FALL OF OW BUNKER, THE WORLD'S LARGEST MARINE FUEL TANKER* (2015).

67. Jingchen Xu, *A Protective Method for Vessel Owners Following the Collapse of O.W. Bunker: The Second Circuit Approval of Interpleader Actions in Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading*, 47 J. MAR. L. & COM. 389, 403 (2016).

68. A copy of the agreement is available at *O.W. Bunker & Trading A/S*, PWC UK, https://www.pwc.co.uk/assets/pdf/ow_bunkers_charge_19_12_13_registration.pdf [<https://perma.cc/WVL8-DB4T>].

titles, and interests in third-party and inter-company receivables, both current and future. In exchange, ING provided \$700 million to O.W. Bunker in different currencies.

On November 7, 2014, the holding company of the O.W. Bunker group filed for bankruptcy in a Danish court, following an alleged fraud in its Singapore subsidiary and substantial losses relating to unsupervised over-the-counter trading. Shortly afterwards, on November 12, PwC was appointed as receiver for the security agreement. On November 13, the U.S. entities of the group (O.W. Bunker U.S.A., O.W. Bunker North America Inc., O.W. Bunker Holding U.S.A and North America) filed a chapter 11 petition in the Bankruptcy Court for the District of Connecticut.⁶⁹

On November 25, 2014, the receivers signed a cooperation agreement with the Danish trustees. According to this document, the receivers would pursue all global receivables assigned and charged to ING. All recoveries would be deposited to ING accounts, and the parties would later determine—either among themselves or pursuant to a decision of the domestic court—which receivables were not covered by the security agreement.⁷⁰ This agreement was followed by similar documents with many other insolvency practitioners appointed in national bankruptcy procedures, including the United Kingdom, Singapore, and China.⁷¹

Preliminarily, it is interesting to observe that the collapse of the Danish holding company has resulted in few cross-border bankruptcy procedures. In the United States, only O.W. Bunker Germany filed a chapter 15 petition, on November 11, 2015.⁷² To date, O.W. Bunker Holding has not yet filed a petition for a recognition of a foreign proceeding under § 1515.

This may be due to a variety of reasons. It may have been perceived as unnecessary as, under U.S. bankruptcy law, a chapter 15 order is not a precondition for the recognition of relief measures if the representative is only acting in U.S. courts to collect or recover a claim that is the property of the foreign debtor or estate.⁷³ Additionally, the circumstance that in Denmark

69. *In re* O.W. Bunker Holding N. Am., Inc., No. 14-51720, 2014 WL 7669372, at *1 (Bankr. D. Conn. Dec. 8, 2014).

70. Press Release, PwC UK et al., OW Bunker Group—Co-Operation Agreement Between Trustees (Nov. 26, 2014), https://www.pwc.co.uk/assets/pdf/owbunker_26nov14.pdf [<https://perma.cc/7GA5-Z4SD>].

71. There is no evidence of a similar agreement for the U.S. procedure.

72. Voluntary Petition at 1, *In re* OW Ger. GmbH, No. 15-13018 (Bankr. S.D.N.Y. Nov 11, 2015), ECF No. 1. This led to the decision in *Hapag-Lloyd Aktiengesellschaft v U.S. Oil Trading LLC*, 814 F.3d 146, 153–54 (2d Cir. 2016), where the circuit court affirmed the district court's decision to deny O.W. Bunker Germany's motion to have non-maritime lien issues decided by the bankruptcy court and retain the case in its entirety.

73. Martin, *supra* note 38, at 607.

neither the UNCITRAL Model Law nor the EU Recast Regulation may have played a significant role.

However, the absence of a foreign main bankruptcy procedure resulted in the potential risk for ship owners and charterers to be subject to double, and in some cases, triple liability, as all unpaid entities in the chain of contracts described below commenced actions against them to recover their entitlements. While this risk had been partially reduced by the use of interpleader actions,⁷⁴ the lack of a global bankruptcy procedure has impacted on co-ordination practiced between national courts.

Before analysing the legal issues of this case, it is to be determined if O.W. Bunker is so unique in the context of cross-border bankruptcy cases that it does not represent an appropriate case study. In the opinion of the author, this question should be answered in the negative.

It is true that the shipping industry is international in its nature, and that some adaptations are needed when bankruptcy courts deal with shipping cases. For instance, in *Yakushiji v Daiichi Chuo Kisen Kaisha*,⁷⁵ the Federal Court of Australia held that applications relating to debtors involved in shipping were required to satisfy more extensive advertising requirements.⁷⁶

At the same time, it does not appear that the uniqueness of the shipping industry is so significant to justify the exclusion of maritime traders from the scope of the UNCITRAL Model Law. In fact, when it comes to restrictions on the application of the UNCITRAL Model Law, national statutes tend to exclude credit and insurance institutions to various degrees. Some of them also exclude individuals (e.g., Greece), specific sectors of the industry, such as corporations that provide essential services (e.g., Australia), and railroads (e.g., United States and Canada), but—to the knowledge of the authors—none of the ratifying states exclude shipping companies from its scope.

As a result, we can trustingly conclude that the O.W. Bunker saga is not exceptional enough to become unique.

74. See, e.g., *Hapag-Lloyd*, 814 F.3d at 149–53. Interpleader actions are judicial procedures where a debtor facing competing claims from several, alleged creditors brings proceedings to join the claimants, and pays the money into court. It will be to the court to determine who is entitled to the money.

75. [2015] FCA 1170 (2 November 2015) (Austl.).

76. See *id.* [24]–[25].

A. O.W. Bunker: The Legal Issues?

From the narrative here, it seems that the two main obstacles to a coordinated solution of the O.W. Bunker collapse were the lack of available cross-border remedies in Denmark and the possibility that some creditors could rely on a maritime law device known as a “maritime lien.”

The statutory deficiency is arguably not problematic, as mechanisms to coordinate cross-border bankruptcy procedures existed well before the enactment of the UNCITRAL Model Law.⁷⁷ The second conundrum is more controversial. The treatment of maritime liens brings to the fore issues that are truly international, as ships travel across the world.

Maritime liens are quite unique in the law,⁷⁸ to the point that one commentator observed that “*a lien is a lien is a lien, but a maritime lien is not.*”⁷⁹ The existence of maritime liens rests on the principle that a vessel is a legal entity itself, apart from its ownership. The lien is not a security interest arising from the personal obligation of the vessel’s owner or operator under a contract, but instead the vessel itself owes obligations that may be breached.

Maritime liens are subject to uniform rules in the Anglo-American tradition. They arise by operation of law out of services rendered to, or injuries caused by, a maritime property.⁸⁰ They are not required to be filed or recorded for perfection: they attach to the rem simultaneously with the cause of action. Also, they do not necessarily require notice or possession (unlike land-law-type liens).

77. See, e.g., Jay Lawrence Westbrook, *International Judicial Negotiations*, 38 TEX. INT’L L.J. 567 (2003); Paul H. Zumbro, *Cross-Border Insolvencies and International Protocols—An Imperfect but Effective Tool*, 11 BUS. L. INT’L 157 (2010); Rosalind Mason, *Cross-Border Insolvency and Legal Transnationalisation*, 21 INT’L INSOLVENCY REV. 105 (2012); IRIT MEVORACH, *THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS* 37 (2018).

For a comprehensive list of cross-border cases where protocols were used, see cases cited *infra* note 148, and MEVORACH, *supra*, ch. 1. Well-known cases include: *In re Bank of Credit and Commerce International SA* (No. 2) [1992] BCC 715 (AC) (Eng.); *In re Maxwell Communications Corp.* [1993] 1 WLR 1402 (Ch) (Eng.); *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. filed Dec. 2, 2001); *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008); and *In re Nortel Networks Inc.*, No. 09-10138 (Bankr. D. Del. filed Jan. 14, 2009).

78. *Riffe Petroleum Co. v. Cibro Sales Corp.*, 601 F.2d 1385, 1389 (10th Cir. 1979) (“The maritime lien is a unique security device which serves the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away.”).

79. Michael A. Orlando, *A Lien Is a Lien Is a Lien, but a Maritime Lien is Not*, INT’L RISK MGMT. INST. (June 2003) (emphasis added), <https://www.irmi.com/articles/expert-commentary/a-lien-is-a-lien-is-a-lien-but-a-maritime-lien-is-not> [https://perma.cc/BBV2-ABSK].

80. See *Senior Courts Act 1981*, c. 54, § 21(2) (Eng.); 46 U.S.C. § 31342 (2012); see also *Piedmont & George’s Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 8–9 (1920).

Maritime liens are equitable in nature⁸¹: they can take priority over any other “traditional” security interest because they are designed to protect equitable interests.⁸² These special, privileged claims upon sea-connected properties remain valid despite changes in the ownership of the vessel. The law of the ship’s nationality governs the existence and priority of maritime liens, but certain characteristics—such as their priority over non-maritime liens and the preponderance of the right of the most recent lienholder—stem from the enforcement and recognition of the 1952 Convention on the Arrest of Seagoing Ships.⁸³

As a general rule, maritime liens can only be enforced under the maritime jurisdiction of a civil (federal in the United States) court. However, there is a valid English precedent according to which the proper procedure to enforce a maritime lien on a vessel belonging to a company which has been ordered to be wound up is by a proceeding in the winding-up, and not by a proceeding *in rem* in the Admiralty Court.⁸⁴

Maritime liens are potentially disruptive for bankruptcy cases, since they allow the holders of this “nuclear weapon of maritime law” to leapfrog the ordinary order of payment of creditors in bankruptcy. In fact, despite the majority of bankruptcy law systems recognizing some priority and preferential treatment to selected creditors, the general rule remains the *pari passu* distribution among creditors. Maritime rules, on the other hand, would grant to otherwise unsecured claimants the right to satisfy their claims in preference to other equally or higher-ranking creditors. Courts, especially in the United States, have consistently ruled out the possibility that bankruptcy rules could affect maritime claims.⁸⁵

81. See e.g., *In re Welsh Irish Ferries Ltd. (The Uglund Trailer)* [1986] Ch 471 (Eng.); *The Kalfarli*, 277 F. 391, 394 (2d Cir. 1921).

82. See *The Charles Amelia* (1868) 2 LRA & E. 330 (Eng.) (maritime liens prevail over non-maritime claims, including bankruptcy ones); *United States v ZP Chandon*, 889 F.2d 233, 234 (9th Cir. 1989).

83. International Convention Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 193.

84. *In re Austl. Direct Steam Navigation Co.* (1877) 5 Ch D 70 (Eng.).

85. See, e.g., *In re New Eng. Transp. Co.*, 220 F. 203, 207 (D. Conn. 1914) (finding there is a general rule “[w]here a maritime lien exists, either a court of bankruptcy or of equity will enforce such a lien with the same effect as would a court of admiralty”); *Walsh v. Placedo Shipping Corp. of Liber.* (*In re Pac. Caribbean Shipping (U.S.A.), Inc.*), 789 F.2d 1406, 1408 (9th Cir. 1986); *ZP Chandon*, 889 F.2d at 238 (automatic stay provision does not apply to maritime liens, and lien has priority over preferred ship mortgage); *McAllister Towing v. Ambassador Factors (In re Topgallant Lines, Inc.)*, 154 B.R. 368, 376 (S.D. Ga. 1993), *aff’d sub nom. McAllister Towing v. Ambassador*, 20 F.3d 1175 (11th Cir. 1994) (maritime liens prevail over non-maritime claims, including bankruptcy ones).

However, is there really no other option than an open contrast between bankruptcy and maritime rules? The author argues that there are grounds to build a harmonious relationship between them.

Firstly, the “need” for a special forum. If it was possible to agree on general principles for the treatment of maritime liens in bankruptcy (domestic and cross-border) cases, there would be no need to assert that either bankruptcy or maritime/civil courts have exclusive jurisdiction to hear these claims.

Systematic reasons may therefore suggest that only one court should have jurisdiction over all other disputes in bankruptcy cases. This is a position which has been expressed by the English courts in the past. Regardless, it is undeniable that as the admiralty proceeding is *in rem* (it is the vessel—and not a person—that is the party defendant⁸⁶), the resulting judgment is theoretically enforceable anywhere in the world.⁸⁷

This claim is, however, valid only in theory, as domestic courts may decline to enforce foreign admiralty judgments on the same grounds as bankruptcy ones.

Secondly, the asserted incompatibility between substantive bankruptcy and maritime rules. Courts have recognised that maritime liens may affect certainty in international commerce,⁸⁸ and criteria can be agreed on to establish a sufficient degree of coordination between bankruptcy and maritime tenets.

In several cross-border cases, courts have been willing to accept that local assets were distributed according to the order of priority established by the national domestic law, even if this contrasted with the principles or rules applicable under the law of the foreign main proceeding.⁸⁹ A similar approach was taken by the High Court of New Zealand in *Cornelius*

86. *Todd Shipyards Corp. v. City of Athens*, 83 F. Supp. 67, 75 (D. Md. 1949).

87. *Xu*, *supra* note 67, at 393.

88. *Itel Containers Int'l Corp. v. Atlantrafik Express Serv. Ltd.*, 982 F.2d 765, 768 (2d Cir. 1992) (holding that a strict interpretative approach of the notion of “maritime lien” is in keeping with the overriding purpose of maritime liens and necessary to prevent a proliferation of liens, which might hinder international commerce).

89. Under the UNCITRAL Model Law, *see supra* note 9, at 6–7 (enacted both in the United States and in the United Kingdom), while foreign creditors have the same right as local ones to commence or participate in an insolvency proceeding, they cannot require the application of their national distribution rules. Ranking of claims is not affected by the foreign nature of the creditors. Additionally, in the United Kingdom, in an Insolvency Act 1986, c. 45, § 426 case, all the Supreme Judges agreed that Parliament had given courts the authority to remit the assets to foreign insolvency practitioners even when distribution would not be in accordance with English distribution rules. *See generally* *McGrath v. Riddell* [2008] UKHL 21 (appeal taken from Eng.).

Verolme,⁹⁰ where the court held that maritime liens for unpaid wages and redundancy payments enjoy an absolute priority over any conflicting claim, even if secured and even during a bankruptcy proceeding. However, the request for arrest could be denied, and the recognition of a foreign proceeding could be granted if the trustee agreed that the beneficiaries of the maritime priority would continue to rank at the very top in the ranking of creditors.

Thirdly, the asserted need to prioritise maritime over bankruptcy principles. Of particular relevance is the position adopted by the Australian courts in cross-border maritime cases, where a petition for the recognition of a foreign proceeding had been filed pursuant to the Cross-Border Insolvency Act 2008.⁹¹

In several leading cases, the Australian federal courts were asked to provide automatic or discretionary relief to a shipping company that was undertaking a restructuring proceeding in a foreign jurisdiction. In particular, courts were asked to provide protection to the sea-connected properties of these companies by denying the right to arrest the vessels pursuant to a valid maritime lien.

Unlike in the United Kingdom and the United States, where bankruptcy courts have consistently found in favour of the lien-holders, Australian courts have adopted a more nuanced approach based on a comprehensive analysis of the circumstances of the case.

For example, the court in *Kim v Daebo International Shipping Co Ltd*⁹² relied on the preparatory materials of the UNCITRAL Model Law and the domestic ratifying process to conclude that it was not the intention of the legislator to affect the maritime creditors' rights to proceed *in rem*, but the earlier case *Yu v STX Pan Ocean Co Ltd*⁹³ and the subsequent decision in *Tai-Soo Suk v Hanjin Shipping Co Ltd*⁹⁴ demonstrated that there are circumstances in which maritime lien actions can be stayed.

This lack of consistency in the approach to the interaction between admiralty and bankruptcy law over the enforcement of maritime liens suggests that efforts should be made to explore alternative mechanisms to reach consistent decisions in cross-border bankruptcy cases. One of these alternative paths could be a revised notion of collectivity.

90. *Turners & Growers Exporters Ltd v. The Ship "Cornelius Verolme"* [1997] 2 NZLR 110 (HC) (N.Z.).

91. *Cross-Border Insolvency Act 2008* (Cth) pt 2 (Austl.) (enacting the UNCITRAL Model Law into Australian law).

92. (2015) 232 FCR 275 (Austl.).

93. *Yu v STX Pan Ocean Co Ltd (In re STX Pan Ocean Co Ltd)* (2013) 223 FCR 189 (Austl.).

94. [2016] FCA 1404 (23 November 2016) (Austl.).

Finally, if maritime liens were the issue in the O.W. Bunker case, it should be expected that in those jurisdictions that do not recognise maritime liens for necessities like fuel bunkers, the case would have run smoothly in front of the judge responsible for the bankruptcy case.

In the United Kingdom, parties cannot claim the existence of a maritime lien for necessities.⁹⁵ Nevertheless, the O.W. Bunker collapse resulted in a litigation that was ultimately decided by the Supreme Court. This suggests that other factors may have hindered a coordinated solution of the O.W. Bunker collapse. The next section reports on the maritime litigation in the O.W. Bunker case in the United Kingdom and the United States to suggest an alternative explanation for the coordination problems evidenced in the case.

B. O.W. Bunker: The Maritime Litigation

A comprehensive recitation of the litigation in the O.W. Bunker case to date is beyond the limits of this paper, and it would be of limited contribution to this Article. The following section covers the decisions that—in the author’s view—are most significant to understand the legal complexities of the O.W. Bunker case.

* * *

In the United Kingdom,⁹⁶ the end users filed some arbitral and judicial claims to determine to whom they owed the money for the fuel bunkers they bought for their ships (i.e., the physical suppliers, the traders, or any of the companies in between).

If the contract was qualified as a “sale of goods” (as the title suggested), recovery of the price was possible by the seller only in circumstances where the property has passed to the buyer. However, all contracts were

95. Senior Courts Act 1981, c. 54, § 21(2) (Eng.). The Senior Courts Act 1981 states that an action *in rem* against the ship or the property in connection with which the claim or question arises can be brought only for the following reasons:

- claims to the possession or ownership of all or part of the ship;
- questions on “possession, employment, or earnings” of a ship between co-owners;
- claims “in respect of a mortgage of or charge on a ship”; and
- claims for the “forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.”

Id. § 20(2)(a)–(c), (s).

96. Peter Walker, *Bunker Mentality*, CREDIT MGMT. (Oct. 1, 2016), <https://www.highbeam.com/doc/1P3-4214429511.html> [<https://perma.cc/U8UN-DTK6>] (describing English litigation).

subject to a ROT clause. Hence, the owners argued that they were bound to pay neither ING or O.W. Bunker nor, as a consequence, their physical suppliers as they had never been in contractual relations with them.⁹⁷

The matter was decided first by a panel of arbitrators, and then by the English courts.⁹⁸ It is known as *The Res Cogitans*⁹⁹ saga, from the name of the ship. The Supreme Court concluded (in line with the reasoning of the arbitrators and the lower courts) that there was a valid contractual obligation between the owners of the vessel and O.W. Bunker. This granted its assignee ING the right to recover the price agreed for the transaction.¹⁰⁰

In the English litigation, courts paid little if any consideration to the fact that the debtor was part of a bankruptcy procedure. Their rulings have been based entirely on commercial and admiralty law arguments, even if similar and less contentious conclusions could have been achieved by applying the English bankruptcy law rules on the qualification of claims and distribution of assets and proceeds in bankruptcy cases.

This lack of proper consideration for the bankruptcy procedure also characterised the U.S. cases. While U.S. law recognises the existence of maritime liens for necessities,¹⁰¹ substantially all courts concluded that the physical suppliers did not have a right to a maritime lien,¹⁰² with many

97. Liron Shmilovits, *Testing the Limits of Interpretation*, 2016 LLOYD'S MAR. & COM. L.Q. 20 (2016) (U.K.) (“[A] contest between two arguably incredible propositions.”).

98. PST Energy 7 Shipping LLC v. O.W. Bunker Malta Ltd. [2015] EWHC (Comm) 2022 (Eng.); PST Energy 7 Shipping LLC v. O.W. Bunker Malta Ltd. [2015] EWCA (Civ) 1058; PST Energy 7 Shipping LLC v. O.W. Bunker Malta Ltd. [2016] UKSC 23 (appeal taken from Eng.).

99. Latin expression for “a thinking thing.” It is part of the mental-substance theory of the philosopher Descartes in his *Principia Philosophiae*. Lord Mance commented in the Supreme Court’s ruling, “Despite the significance of her name in Cartesian philosophy, the vessel “Res Cogitans” depends on bunkers.” *PST Energy 7 Shipping LLC* [2016] UKSC 23, [1].

100. Not all commentators agreed with the Supreme Court. See David Osler, *Pappas to Seek Supreme Court Appeal in OW Bunker Test Case*, LLOYD'S LIST (Oct. 22, 2015), <https://lloydlist.com/11/news/article516527.ece> [<http://perma.cc/VWK3-RJCJ>] (describing this decision as “the most spectacular shipping legal imbroglio in this century”); Andrew Tettenborn, *Of Bunkers and Retention of Title: When Is a Sale not a Sale?*, 2016 LLOYD'S MAR. & COM. L.Q. 24, 26 (2016) (U.K.) (“[T]he potential problem of the non-applicability of the Sale of Goods Act [is] more serious than immediately apparent.”); Michael Bridge, *The UK Supreme Court Decision in The Res Cogitans and the Cardinal Role of Property in Sales Law*, 2017 SING. J. LEGAL STUD. 345, 363 (2017) (“At no point in *The Res Cogitans* does anyone appear to stand back from the matter in dispute to consider the systemic consequences of the decision . . .”); Felix W.H. Chan, *Rights to Consume Bunkers Before Payment: Neither as a Bailee nor as an Owner*, 28 INT'L COMPANY & COM. L. REV. 104 (2017) (U.K.). For a more positive valuation, see Eugene Cheng Jiankai, *Interpleading the OW Saga*, 28 SING. ACAD. L.J. 631, 648 (2016) (hailing with favour the outcome of the case as it brought “certainty to the bunkering industry”); Henry Moore, *Unconventional “Sales,”* 75 CAMBRIDGE L.J. 465, 468 (2016) (U.K.); Shmilovits, *supra* note 97, at 22 (“There is no doubt that the common-sense outcome was reached in this case. The question is whether, in reaching it, the court properly applied the law.”).

101. 46 U.S.C. § 31342 (2012).

102. See *ING Bank N.V. v. M/V Temara*, 203 F. Supp. 3d 355, 366 (S.D.N.Y. 2016); *O'Rourke Marine Servs. L.P. v. M/V COSCO Haifa*, 179 F. Supp. 3d 333, 338 (S.D.N.Y. 2016) (holding that a

recognising O.W. Bunker's right to a maritime lien¹⁰³ (on one occasion, based on considerations of equity and public policy¹⁰⁴) and some denying the existence of any lien.¹⁰⁵

Finally, *Martin Energy* marked another blow to bankruptcy law, as the court held that it was entitled to decide the order of distribution of the proceeds on its own, as if the collapse and the bankruptcy petition had never occurred.¹⁰⁶ As a result, ING (and the bankruptcy proceeding) were awarded only the profit margin they originally negotiated for the transaction (\$3900), while the suppliers were paid the full amount invoiced to O.W. Bunker (\$286,000), despite them being unsecured creditors in the bankruptcy proceeding.¹⁰⁷

C. O.W. Bunker: Conclusive Remarks

The described state of affairs prompted some criticism from the academic community,¹⁰⁸ which observed that the current framework lacks balance. In particular, bankruptcy scholars could not find any rationale to justify why bunker suppliers should be preferred to all other unsecured creditors simply by reason of the product delivered and the area of law governing the agreement (maritime law).¹⁰⁹ Reliance on the ROT clause can be of little help either, as it is challenging to justify the validity of this clause when the seller accepted that the goods provided would be consumed before payment became due.

These cases seriously affect the rights, legal interests, and enforceable expectations of all the claimants in the bankruptcy proceeding. However,

subcontractor that provided necessities to a vessel cannot assert maritime lien unless it can show that the vessel or its owner specifically directed that subcontractor to be selected as physical supplier).

103. *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switz.) SA*, 239 F. Supp. 3d 674, 692 (S.D.N.Y. 2017); *Barcliff, LLC v. M/V Deep Blue*, 2016 A.M.C. 2901, 2929 (S.D. Ala. 2016), *aff'd*, 876 F.3d 1063 (11th Cir. 2017).

104. *Clearlake Shipping Pte. Ltd. v. O.W. Bunker (Switz.) SA*, No. 14-CV-9287 (VEC), 2017 WL 78514 (S.D.N.Y. Jan. 9, 2017), *amended and superseded by Clearlake Shipping PTE Ltd.*, 239 F. Supp. 3d 674.

105. *ING Bank N.V. v. M/V Temara*, 2016 A.M.C. 2946, 2959 (S.D.N.Y. 2016).

106. *Martin Energy Servs. v. M/V Bravante IX*, 233 F. Supp. 3d 1269, 1273 (N.D. Fla. 2017).

107. *Id.*

108. Mike Burns, *Clarity on Shipowners' Bunker Payment Obligations?*, MAR. RISK INT'L (Sept. 9, 2015), <https://www.maritime-risk-intl.com/insurance-and-finance/finance/clarity-on-shipowners-bunker-payment-obligations-111396.htm> [<https://perma.cc/3RG3-8WV6>]; Ji Lian Yap, *Predictability, Certainty, and Party Autonomy in the Sale and Supply of Goods*, 46 COMMON L. WORLD REV. 269 (2017).

109. Adrian Moylan, *Bankruptcy and Unpaid Bunkers—a Global Dilemma for Shipping*, MAR. RISK INT'L (Feb. 5, 2015), <https://www.maritime-risk-intl.com/insurance-and-finance/finance/bankruptcy-and-unpaid-bunkers—a-global-dilemma-for-shipping-106302.htm> [<https://perma.cc/9FNP-Y4HR>].

they have been conducted in several jurisdictions, with little or no coordination, not only on a cross-border, but sometimes even on a domestic level (as the *Clearlake* and *Temara* rulings prove). Also, the mandatory nature of bankruptcy provisions has entirely been disregarded.

The procedural, objective notion of collectivity is respected. However, what is left is mainly an empty shell. The next session investigates if we should look at the past for a novel understanding of the notion of collectivity.

IV. THE COLLAPSE OF THE AMMANATI “BANK”

The Ammanati case is widely known in the bankruptcy community, primarily as the episode that first evidenced the benefits associated with a unitary and universal management of a cross-border bankruptcy procedure.¹¹⁰ This paper cursorily covers its facts¹¹¹ to understand if this case can still guide scholars in the troubled waters of cross-disciplinary (i.e., maritime and bankruptcy law, finance and bankruptcy law) and cross-border bankruptcy cases.

The Ammanati Bank of Pistoja was, rather than a bank, a merchant company, with a variety of branches and business interests.¹¹² Additionally, charging interests on deposits and loans (“usury”)¹¹³ was not simply a sin in the eyes of the Church, but a behaviour prohibited by secular statutes. It was only in the mid-seventeenth century in Protestant countries that usury passed from being an offence against public morality that a Christian government was expected to suppress, to a matter of private conscience.

Bankers’ practices were on the fringe of legitimate business, but bankers would strongly deny acting outside the teaching of the Church. In fact, canon scholars developed theories to identify which transactions were per-

110. MIKAEL BERGLUND, CROSS-BORDER ENFORCEMENT OF CLAIMS IN THE EU: HISTORY, PRESENT TIME AND FUTURE 59 (2009); Nicki Kayser, *A Study of the European Convention on Insolvency Proceedings*, 7 INT’L INSOLVENCY REV. 95 (1998).

111. See André Fliniaux, *La Faillite des Ammanati de Pistoie et le Saint-Siège (Début du XIVe Siècle)*, 3 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 436 (1924) (Fr.). For a shorter summary, see David C. Cook, *Prospects for a North American Bankruptcy Agreement; Les Prospects pour une Convention de la Faillite en Amérique du Nord; Los Prospectos para un Convenio de Quiebra de Norte America*, 2 SW. J.L. & TRADE AM. 81 (1995) (despite the mistake on the year of the bankruptcy collapse), and Anton Trichardt, *The UNCITRAL Model Law on Cross-Border Insolvency*, 6 FLINDERS J.L. REFORM 95 (2002).

112. RAYMOND DE ROOVER, *THE RISE AND DECLINE OF THE MEDICI BANK 1397–1494* (Beard Books 1999) (1963).

113. *Id.* at 10 (“According to canon law, usury consisted in any increment, whether small or large, demanded above the principal solely on the strength of a *mutuum* [This doctrine] did not apply to exorbitant rates only, but extended to *all* interest”).

mitted under the law. Bankers were known as money-changers, and they were members of local corporations (*gilde*) who protected their interests.

The Ammanati “holding,” or super-company,¹¹⁴ became insolvent in 1302, and its downfall was sudden and unexpected. While previous cases of the *Gran Tavola* (great table or bank) of the Buonsignori (Siena) and of the Ricciardi merchant bankers (Lucca) were due primarily to adverse conditions in the market, the causes of the Ammanati collapse were primarily political.¹¹⁵ It resulted in one of the first known successful liquidations in history where a universal approach to the collection and distribution of assets was taken.

In 1302, the bank closed its branch in Rome, and this caused particular concern at the Holy See, as both the pope and the clergy had deposited a significant amount of money in the bank. The merchant bank had assets all over Europe: in different states of the Italian peninsula, as well as in the Spanish states, Portugal, England, France, and the Holy Roman Empire. However, while the creditors of the bank mainly resided in Rome, the bank’s debtors were primarily located in other European states.

A. *The Ammanati Case: The Legal Issues*

Some time before the bankruptcy, the owners removed the assets from Rome to Pistoja. The owners fled to an unknown location and there were reasons to believe that they would attempt to dispose of the assets by demanding payment from the debtors of the bank.

Back in the fourteenth century, there was no legal cooperation between states on bankruptcy matters. Each domestic law prescribed autonomous measures, aimed at seizing and arresting the debtor and distributing its assets among its creditors.¹¹⁶ The consolidation of bankruptcy procedures in statutory rules occurred throughout the fourteenth century, thanks to the “experience” matured from the failure of merchant companies in the previous century. Guidance emerged also from the conciliatory mecha-

114. During the Middle Ages the concept of separate and limited liability for companies had yet to be recognised by the law. Large companies were an aggregation of smaller partnerships, where shareholders usually retained unlimited liabilities for debt. The notion of a “super-company” is used to describe the agglomerate of companies that engaged in general commerce, banking and manufacturing in substantial volume, alongside with commodity trading. See EDWIN S. HUNT, *THE MEDIEVAL SUPER-COMPANIES: A STUDY OF THE PERUZZI COMPANY OF FLORENCE* 3 (1994). The Peruzzi company was dissolved by reason of bankruptcy in 1347, and its business nature and structure were not dissimilar from those of the Ammanati bank. See RICHARD A. GOLDTHWAITE, *THE ECONOMY OF RENAISSANCE FLORENCE* 64–104 (2009).

115. BERGLUND, *supra* note 110.

116. David Graham, *The Insolvent Italian Banks of Medieval London*, 9 *INT’L INSOLVENCY REV.* 213 (2000).

nisms conceived and devised in the main commercial centres in Northern Italy and in the Champagne fairs.¹¹⁷

Existing bankruptcy procedures were procedurally collective, as they aimed at freezing all individual litigations against the debtor, collecting his assets, and distributing them in a rateable manner.¹¹⁸ Statutes did not innovate, but they codified what had already emerged as standard practice in commercial cases.¹¹⁹

Procedures were punitive and harsh for modern standards, as the creditors could recover the debt from the debtors¹²⁰—and not (only) his property—or to enslave, kill or *partes secare*¹²¹ them. The procedures were also designed to punish, as debtors were considered both dishonest people¹²² and *infames et infamissimi*.¹²³ Centuries later, Pope Pius V still prescribed the duty of insolvent debtors to carry on their head a *birettum viride* as a mark for their failures.¹²⁴

Other states adopted similar punitive measures,¹²⁵ the early English law being no exception as the ultimate penalty for defaulters was imprisonment, often at their own expense, until the debt was paid.¹²⁶ Imprison-

117. Jeremy Edwards & Sheilagh Ogilvie, *What Lessons for Economic Development Can We Draw from the Champagne Fairs?*, 49 EXPLORATIONS ECON. HIST. 131, 131 (2012).

118. FRANCESCO MIGLIORINO, MYSTERIA CONCURSUS: ITINERARI PREMODERNI DEL DIRITTO COMMERCIALE 72 (1999) (It.).

119. *Id.* at 74.

120. *Leges XII*, BIBLIOTHECA AUGUSTANA, http://www.hs-augsburg.de/~harsch/Chronologia/Lsante05/LegesXII/leg_ta03.html [<https://perma.cc/A4RF-MMG8>] (describing Table III under the Roman law: *Leges Duodecim Tabularum*).

121. The creditors' right to chop the insolvent debtor's body into as many pieces as there were creditors. *Id.*

122. For a description of the *status quo* of the law in the period, see BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 5–6 (2009).

123. 3 BALDO DEGLI UBALDI, CONSILIA (1490).

124. Pope Pius V, *Postquam Eousque Humana Processit Intemperantia* (Nov. 1, 1570), in 4 BULLARUM: AMPLISSIMA COLLECTIO 131 (1746).

125. MIGLIORINO, *supra* note 118, at 122.

126. See Matthew J. Baker et al., *Debtors' Prisons in America: An Economic Analysis*, 84 J. ECON. BEHAV. & ORG. 216, 216 (2012). In writing on bankrupts, Daniel Defoe, the author of *Robinson Crusoe*, commented that the English law on the subject "has something in it of barbarity . . ." DANIEL DEFOE, AN ESSAY UPON PROJECTS 192 (1697).

For the U.K. perspective, see Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351 (2014). For a U.S. perspective, see Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926), CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935), PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 (1974), and BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002). For an Anglo-American perspective, see Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229 (2010). For a European perspective, see Dave De Ruysscher, *Business Rescue, Turnaround Management, and the Legal Regime of Default and Insolvency in Western Europe (Late Middle Ages to Present Day)*, in TURNAROUND MANAGEMENT AND BANKRUPTCY 22, 29 (Jan Adrianse & Jean-Pierre van der Rest eds., 2017).

ment for debt persisted until the mid-nineteenth century, despite the existence of non-punitive bankruptcy procedures since the mid-eighteenth century.¹²⁷

The Roman clergy stood to lose the most from this uncoordinated approach. Despite the Bible's suggestion that if a debt is unpaid, the debtor could be killed or sold into slavery,¹²⁸ this prospect looked rather unappealing to the Church. Therefore, Pope Boniface VIII, "*a sovereign not bound by worldly frontiers*,"¹²⁹ took an active role in finding a better solution for the interest of the bank's creditors.¹³⁰ The Holy See issued orders to:

- prevent the owners from disposing of their properties;
- prevent the bank's debtors from paying their debts to the bankrupt debtor under threat of *censuram ecclesiasticam*; and
- force the bank's debtors to pay their debts to the Church.

The vigorous intervention of the pope emphasised that a novel approach was needed to achieve a more efficient and fair distribution of the assets. An unstructured liquidation proceeding was not in the best interest of all stakeholders.¹³¹ As a result, he tried to ensure the cooperation of the debtor's owners because they retained an interest in the orderly management of the procedure, if not on the bankrupt company.

The pope offered the owners a safe conduct (*salvus conductus*) for the safe return to Rome if they were willing to reach a settlement with their creditors. He also used the worldwide financial system of the medieval papacy to collect assets throughout Europe and transfer the incoming money to Rome. This brought some commentators to define this case as "*one of the earliest examples of international insolvency by 'decree.'*"¹³²

The collected assets were distributed according to a distribution ranking, which ensured the payment of the administrative expenses of the pro-

127. Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982).

128. *Matthew* 18:24–35 describes an episode in which a debtor is sold into slavery to repay a debt.

129. JONA ISRAËL, EUROPEAN CROSS-BORDER REGULATION: A STUDY OF REGULATION 1346/2000 ON INSOLVENCY PROCEEDINGS IN THE LIGHT OF A PARADIGM OF CO-OPERATION AND A COMITAS EUROPÆA I (2005) (emphasis added).

130. As Nadelmann observes, "[t]he papal registers show that Pope Boniface found it necessary, in the interest of the Curia, to take an active part in the solution of the difficult problems raised." Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 58 (1944).

131. Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?*, 27 INT'L L. 881 (1993). Gaa suggests that papal intervention was compelled by the need to ensure the benefit of all *creditors*, *id.* at 900, while this paper suggests that the interests of non-contractual creditors (such as the owners) were equally relevant in the determination of the pope.

132. WESSELS ET AL., *supra* note 122, at 2 (emphasis added).

cedure, a *de minimis* return to the owners for their co-operation, and a preferential treatment to certain *categories* of creditors (i.e., clergy).

*B. The Ammanati Case: Towards an Equitable Definition of
“Interested Parties”?*

The Ammanati affair had a significant influence on future cases. While before this multi-national cross-border procedure the usual alternatives were liquidation, or *cessio bonorum*, after this procedure settlements with creditors became more common. Not surprisingly, the failure of the Peruzzi company of Florence in 1343 resulted in a settlement with its creditors under the supervision of a bankruptcy court in 1347.¹³³ Furthermore, the involvement of bankruptcy courts marked a significant departure from the early years of uncoordinated and punitive liquidation procedures.¹³⁴ His non-secular intervention resulted in an equitable outcome¹³⁵ for this case.

Compared to the O.W. Bunker saga, the Ammanati affair suggests the opportunity to adopt an equitable, or at least more inclusive notion of collectivity in cross-disciplinary and cross-border bankruptcy procedures. This section explores if this case is still contemporary,¹³⁶ and if it is appropriate to re-consider the established and substantially uniform notion of collectivity in light of the findings of this case study.

* * *

Commentators are divided in two opposing schools of thought. Some argue that equity, or rather flexibility in the law is needed “to accommodate new practices and developments.”¹³⁷ Others, on the contrary, believe that “paternalism [*in the law*] should be resisted.”¹³⁸

Should judges adopt a more flexible interpretative attitude of the notion of collectivity to mitigate the rigidity of common law rules?

It is granted that “good” flexibility should not come at the expense of fairness, predictability and certainty. The author also agrees that, in princi-

133. HUNT, *supra* note 114, at 35–36.

134. Their involvement is well documented. Almost 5000 volumes covering the activity of the court of Mercanzia in Florence for the years 1314–1600 is still conserved in the state archives. GOLDTHWAITE, *supra* note 114, at xiv.

135. NEIL HANNAN, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW 6 (2017).

136. An opinion shared, even if for different reasons, by Gaa, *supra* note 131, at 900.

137. Roy Goode, *The Codification of Commercial Law*, 14 MONASH U. L. REV. 135, 150 (1988).

138. Sarah Worthington, *Common Law Values: The Role of Party Autonomy in Private Law*, in THE COMMON LAW OF OBLIGATIONS: DIVERGENCE AND UNITY 301, 301 (Andrew Robertson & Michael Tilbury eds., 2016) (emphasis added).

ple, sophisticated democracies usually promote rather than limit freedom of the parties, and to uphold the results of their negotiations.¹³⁹

Nevertheless, the cases described in this study suggest that there may be limited occasions when it is not simply appropriate, but also recommendable for judges to use their “equitable discretion.” This may be needed, for instance, if we want to achieve one of the goals laid out in the Cork Report, namely aim (h):

to revise and safeguard the interests not merely of insolvents and their creditors but of society and other groups in society who are affected by the insolvency, for instance not only the interests of directors, shareholders and employees but also those of suppliers, those whose livelihoods depend on the enterprise and the community.¹⁴⁰

However, judges cannot make law, and they have to be provided with appropriate legislative support to act in that way. To analyse when and to what extent we should depart from a procedural and *stricti juris* interpretation of the law, this section looks at the approach followed by the English and American courts to define their equitable powers. It then looks at whether courts have been willing to use these discretionary powers to extend the notion of the “interested party.”

U.S. and U.K. courts can rely on an established tradition in equity, even though they apply different standards when it comes to the use of their equitable powers. U.S. courts, relying on the letter of the law,¹⁴¹ use them when a literal interpretation of the law would produce results that contrast with the goal of the bankruptcy procedure.¹⁴² However, a basic tenet of U.S. equity jurisprudence is that the party seeking equitable relief must come to court with “clean hands.”¹⁴³

English courts, on the other hand, have adopted a more cautious approach. Clearly stated for the first time in a liquidation context in *Lundy*

139. *Id.*

140. CORK REVIEW COMMITTEE, REPORT ON INSOLVENCY LAW AND PRACTICE, 1982, Cm. 8558 (U.K.).

141. 11 U.S.C. § 105(a) (2012).

142. See *Murgillo v. Cal. State Bd. of Equalization (In re Murgillo)*, 176 B.R. 524, 531–32 (B.A.P. 9th Cir. 1994); *Norpak Corp. v. Eagle-Picher Indus., Inc., (In re Eagle Picher Indus., Inc.)*, 131 F.3d 1185, 1189 (6th Cir. 1997) (“[B]ankruptcy courts ‘are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization.’” (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 389 (1993))); *In re Oglesby*, 519 B.R. 699, 703 (Bankr. N.D. Ohio 2014) (“[T]he bankruptcy court should exercise its equitable powers with respect to substance and not technical considerations that will prevent substantial justice.” (quoting *In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991))).

143. *Fulton Cty. Dep’t of Human Servs. v. Dodd (In re Dodd)*, 276 B.R. 817, 821 (Bankr. N.D. Ohio 2001); *Gugino v. Kerslake (In re Clark)*, 543 B.R. 16 (Bankr. D. Idaho 2015).

Granite,¹⁴⁴ courts nowadays admit the use of discretionary powers in business cases only when it would be unconscionable to allow the negotiated act or condition to take effect (“unconscionability test”).¹⁴⁵

Nevertheless, in both jurisdictions, in cases involving large enterprises (which feature in disproportionately high numbers in cross-border procedures),¹⁴⁶ the need to preserve finality seems to prevail over the necessity to ensure fairness.¹⁴⁷ This restrictive use of discretion is a welcome approach, because it prevents to invoke flexibility to affect the autonomy of the parties, and hinder predictability and certainty in commercial cases.

U.S. and U.K. courts on some occasions have proven their willingness to employ wider and more equitable notions of ‘interested parties’ in procedures where a procedural, objective interpretation of established notions would lead to unfair or unjust results.¹⁴⁸

This approach however is far from consistent and established, especially in the United Kingdom. For instance, in *Purewal*,¹⁴⁹ the court held that receivers appointed by a bank in respect of a mortgaged property did not owe a duty of care to a mortgagor who had gone bankrupt. In *Preston v. Green*,¹⁵⁰ the court held that a former director had no standing to apply for the rescission of an order for the winding up of a company because—among other reasons—the law failed to recognise such a right to claimants other than creditors. Finally, in *Frodstick*,¹⁵¹ the court held that a bankrupt had no interest in the property of the bankruptcy estate. While this case was of personal nature, nothing suggests that different conclusions would be reached had the request come from a shareholder.

144. *In re Lundy Granite Co.* (1871) 6 Ch App. 462 (Eng.). Followed by, among others: *In re MK Airlines Ltd.* [2012] EWHC (Ch) 2764; *Pillar Denton Ltd. v. Jervis* [2014] EWCA (Civ) 180.

145. *Amble Assets LLP v Longbenton Foods Ltd.* [2011] EWHC (Ch) 3774 (Eng.). However, in *In re Co-Operative Bank Plc.*, [2013] EWHC (Ch) 4074, the court held that judicial discretion had to be exercised on a principled basis. As a result, it held that the modification of a scheme of arrangement for a bank was admissible because the bank had an equitable duty to its creditors, but not a fiduciary duty to a category of them. This despite the detriment that could cause to some creditors who have already taken steps (such as borrowing money) to purchase the discounted shares.

146. *Martin*, *supra* note 38, at 597–98.

147. *McKinstry v. Richard Holmes Enters. (In re Black Diamond Mining Co.)*, No. 15-96-ART, 2016 WL 3448287, at *1 (E.D. Ky. June 16, 2016) (“Finality is important in litigation; people and companies must be able to move on with their lives.”).

148. For the U.S perspective, see *Clearlake Shipping Pte. Ltd. v. O.W. Bunker (Switz.) SA*, No. 14–CV–9287 (VEC), 2017 WL 78514 (S.D.N.Y. Jan. 9, 2017) (discussing the appeal on jurisdiction for interpleader actions in the 2nd Circuit), *amended and superseded by* *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switz.) SA*, 239 F. Supp. 3d 674, 692 (S.D.N.Y. 2017). For the U.K. perspective, see *Stena Bulk AB v. Copley* [2015] 1 Lloyd’s Rep 280 (QB) (Eng.).

149. *Purewal v. Countrywide Residential Lettings Ltd.* [2015] EWCA (Civ) 1122 (Eng.).

150. *Preston v. Green (In re Cre8atsea Ltd.)* [2016] EWHC (Ch) 2522 (Eng.).

151. *Frostdick v. Fox* [2017] EWHC (Ch) 1737 (Eng.).

Other judges have demonstrated their willingness to adopt a more flexible and equitable approach. Cases of this kind include *Ecology v. Hellard*,¹⁵² where, while the court applied an objective interpretation to the loan contract between the parties, it held that it might well have reached a different, opposite conclusion if the parties succeeded in proving that the transaction resulted in a breach of trust or was made under a state of mind that would make it unconscionable for the lender to retain the benefit of the loan receipt.¹⁵³

Equitable inclusion of interested parties in the bankruptcy process would not lead to a modification of the creditors' ranking. As observed by Judge Caproni in *Clearlake v. O.W. Bunker*:

[the physical suppliers'] real problem is the low priority given to an unsecured creditor in a bankruptcy. A low priority in bankruptcy almost always causes hardship, but that is not something that this Court, even sitting in equity, can alleviate.¹⁵⁴

Despite dissenting views, especially from academia,¹⁵⁵ equitable powers can be used by the judiciary to extend the notion of the interested party and transform collectivity into a substantive, rather than a simple procedural concept.

V. CONCLUDING REMARKS

This paper has suggested that in *O.W. Bunker*, the contentious issue has not been the application of maritime rules, but the interpretation of the notion of collectivity.

As a result, this paper is by no means advocating a return to the pre-UNCITRAL situation, where common law jurisdictions relied on the principle of comity, and commentators blamed courts for the uncertainty and

152. *Ecology Support Servs. Ltd v. Hellard* [2017] EWHC (Ch) 160 (Eng.).

153. In the same vein: *Sherlock Holmes Int'l. Soc'y Ltd. v. Aidiniantz* [2016] EWHC (Ch) 1076 (Eng.), and *Stewart v. HM Attorney Gen. for N. Ir. (In re Spirit of Enniskillen Trust)* [2013] NICH 10 (N. Ir.).

154. *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switz.) SA*, 239 F. Supp. 3d 674, 694 (S.D.N.Y. 2017) (footnote omitted).

155. Peter von Wilmsky, *Insolvency Law: Its Roles and Principles*, in *DEALING WITH ECONOMIC FAILURE: BETWEEN NORM AND PRACTICE (15TH TO 21ST CENTURY)* 243, 246–47 (Albrecht Cordes & Magrit Schulte Beerbühl eds., 2016). Peter von Wilmsky answered in the negative to the question of whether public interests should be considered when deciding how a debtor's firm is to be deployed. He observed that "insolvency (asset deployment) law is not the proper forum for considering matters of the public interest and exerting influence on entrepreneurial decisions." *Id.* at 246. He also stated that measures to combat the social costs triggered by the termination of firms "must apply equally both within and outside insolvency; they must be independent of insolvency." *Id.* at 247.

unpredictability of their decisions.¹⁵⁶ However, cases like *O.W. Bunker* show that a procedural understanding of some key notions of bankruptcy law may lead to uncertainty, extensive litigation and inefficient outcomes.

What this paper is advocating is a further specification of some powers that have already been entrusted to bankruptcy judges. Bankruptcy courts should have the right to issue judgments on all bankruptcy-related matters. They should employ their equitable powers to refuse recognition of foreign proceedings when they determine that the interests of all stakeholders—including the debtor—have not been adequately protected.

It may therefore be appropriate to introduce a more flexible notion of collectivity—maybe in the UNCITRAL Model Law, or in the recitals of the EU Recast Regulation—to achieve a higher degree of approximation in the practice.

This approach is expected to favour, rather than hinder, a higher degree of harmonization and cooperation in multinational and cross-disciplinary bankruptcy procedures. It may also avoid inconsistencies in the treatment of cross-border cases, especially in those countries where the civil/maritime litigation in the *O.W. Bunker* saga would have contrasted with the law on the recognition of foreign bankruptcy proceedings.¹⁵⁷

This more flexible approach would also be beneficial in non-bankruptcy cases. Since the UNCITRAL Model Law applies to judicial or administrative proceedings governed by a law relating to bankruptcy, it is possible that recognition is demanded in cases where the dissolution or restructuring of a company is not triggered by its insolvency.¹⁵⁸ In these circumstances, the inclusion of a larger number of stakeholders may follow from the nature of the proceeding itself.

156. This is a common criticism in particular in the United States, where many commentators criticised the subjective nature of the former statutory framework determined by 11 U.S.C. § 304 (2004) (repealed 2005) for affording too much discretion to courts. See, e.g., Martin, *supra* note 38, at 600.

157. This is, for instance, the case in Japan, where article 25(1)(2) of the Gaikokutosanshoritetsuzuki no Shonin Enjo nikansuru Horitsu [Law on Recognition of and Assistance for Foreign Insolvency Proceedings], Law No. 129 of 2000, extends the automatic stay to litigation as well as to execution upon recognition of the foreign proceeding. Shin-ichiro Abe, *Japan*, in 1 CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW, *supra* note 38, at 321, 327.

158. For the United States, see *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009), and *In re Millard*, 501 B.R. 644, 647 (Bankr. S.D.N.Y. 2013). For the United Kingdom, see Ho, *supra* note 39, at 186 (“[A] foreign proceeding under the British Model Law is not restricted to a proceeding in relation to a debtor that is technically insolvent.”). This conclusion contrasts with the decision taken in other common law countries that have adopted the UNCITRAL Model Law pursuant to the approach recommended by the Corporate Law Economic Reform Program (“CLERP”). The CLERP 8 report recommended not to extend the scope of the Model Law to receiverships and to other non-bankruptcy related procedures, including members’ voluntary windings up. THE TREASURY, CORP. LAW ECON. REFORM PROGRAM, PROPOSALS FOR REFORM: PAPER NO. 8, CROSS-BORDER INSOLVENCY: PROMOTING INTERNATIONAL COOPERATION AND COORDINATION 23 (2002) (Austl.).

Also, it is submitted that this more flexible and inclusive approach could be gradually extended to all countries that adopt the UNCITRAL Model Law. This is possible thanks to the consistent interpretation provision in the UNCITRAL document (article 8), as well as to the existence of the Case Law on UNCITRAL Texts (“CLOUT”) service.¹⁵⁹

The Ammanati affair proves that it is possible to defy established conventions, without revolutionising the system. The UNCITRAL Model Law and the EU Recast Regulation may nowadays play the role entrusted to the “sovereign not bound by worldly frontiers” in the Ammanati saga.

159. This service is made available by UNCITRAL Secretariat. The system collects and disseminates information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts. For more information, see *Case Law on UNCITRAL Texts (CLOUT)*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/case_law.html [<https://perma.cc/5UK8-FKU3>].