Ontological approach to privilege or priority

Abel B. Veiga Copo *

I. The essence of the privilege or cause of preference. II. Seeking the efficiency of the security.

I. THE ESSENCE OF THE PRIVILEGE OR CAUSE OF PREFERENCE

It is and has been a constant in important doctrinal sectors to see in privileges an exception, if not, a perversion of the *par condicio creditorum*, as well as the causes of the impoverishment or devaluation of the bankruptcy patrimony [1]. We do not ignore the relevance of these criticisms that ultimately advocate a new redimension of the value of parity. And when speaking of parity, it is essential to refer

* Professor of commercial law. Comillas Pontifical University of Madrid.

1 Schlesinger, "L'eguale diritto dei creditori di essere soddisfatti sui beni del debitore", Scritti in onore di Luigi Mengoni, Milano, 1995, volume I, pp. 919 and following, has made a forceful statement on the marginal or residual nature of this idea of value, which is, after all, the par conditio creditorum. A standard-bearer in our doctrine of this correct postulate, BISBAL, "La insoportable levedad del derecho concursal", RDM, 1994, pp. 843-872, p. 855. Critical, extremely critical of the principle of equality of creditors, Nemedeu, "Le principe d'égalité des creánciers: vers une double mutation conceptuelle", RTDComm, 2008, no. 2, pp. 241 et seq., who starts from a clear axiom, desacralising the principle of equality in favour of the inequality of creditors. A principle whose juridical nature he accuses of mystery, going so far as to state on p. 242 how some have come to recognise that the principle of equality of creditors, despite the controversies it arouses, is a dogma, "l`âme du violon, une balise dans la tempête". For Ruggiero, "Art. 111", Il nuovo diritto fallimentare, [Jorio (Dir.)], II, Bologna, 2007, pp. 1832 et seq., p. 1838 the par condicio is not an absolute principle, but only a tendential principle of a procedural nature that can undergo derogations insofar as interests arise that are considered prevalent and, consequently, better and better protected.

to the *distributive* value or paradigm. But ***what is the value and role that the distributive plays in the competition***? And perhaps one of the most intricate questions in bankruptcy law and, significantly in the seat of passive mass and privilege or preference, what role does the autonomy of the will play, if any, in the face of the proportional distribution rule, the par condicio creditorum and the imperative limitation of privileges?

It has been the last bankruptcy reforms, which clearly advocate the excess of privileges, claiming in a somewhat sui generis way a sort of purge of them, but if the legislator blasts such or such a disruption of them why is not more categorical and takes the knife of Ockam that with so much disdain omitted in the recent past [2]. **Today as yesterday reign the same anchors and principles in privileges, *legality, typicity and reality*** in each and every one of the causes of preference, although this last character will be reflected with greater individualization in the special privileges and in a more dissolute way in the general ones [3].

To situate and determine the place and position that each creditor, recognized by the entity and consistency of its credit, corresponds to in the procedure and does so in accordance with the legal and principal parameters that have been designed and regulated by the

[2] A similar questioning is taking place in Italian doctrine and practice. Thus, Rordorf, "El proyecto de reforma del derecho concursal italiano", RCP, 2016, n.º 25, pp. 291 and following, p. 305 questions precisely the fragmentariness and obsolescence of the privileges. In particular, many special privileges related to retention are the result of past conceptions, which have lost their meaning today, while other situations that have arisen with the evolution of society seem equally (or even more) deserving of privilege. He also criticises past reforms in this area of privileges as asystematic.

[3] Classical in Italian doctrine, the anchoring of legality, typicality and "realità" as characterising privilege, vid. Cicarello, voce "Privilegio" (dir. priv.), Enciclopedia del diritto, XXXV, Milano, 1986, pp. 723 et seq.; on the nature of the "realità" in the causes of priority, understood as the determination and individualisation of certain assets of the debtor, vid. Tucci, I privilegi, Trattato di diritto privato, [RESCIGNO(Dir.)], XIX, Torino, 1987, pp. 602 ff; more recently, insisting on these characteristics and also on that of reality, Innocenti, "Sulla questione del privilegio speciale "incapiente" nel concordato preventivo. Appunti a margine di una recente pronuncia della Cassazione", Dir. Fall., 2014, no. 6, pp. 573 ff, pp. 579 ff.

bankruptcy law [4]. Under that typicity, under that essence, there is also a need, the effectiveness of the prelatory cause, the shield and the scope of the same, especially when the object on which the privilege is made and manifested does not reach in its entirety for the total satisfaction of the privileged creditor [5].

Beyond the why and the typicity and legality of the prelatorial cause is, inextricably linked to it, the value of the good, value that is or has been sieved in two moments, the constitutive-static of the object-guarantee-contract by which that credit is strengthened with a priority, and the dynamic moment of an execution and where the loss of value can be certain and therefore lead to a potential but also real dissatisfaction. Parameters that leave little room for the availability of the parts, for flexibility, for gradual alteration, even with a negative connotation, as happens with regard to the admissibility of voluntary credit subordination: to what extent can the autonomy of the will interfere in such a strict area as credit graduation and classification, is it possible to renounce a cause of preference, where is the myth of equality and where is the myth of priority? [6]

To simply say that privilege is the enemy of right — **Das Vorrecht ist der Feind des Rechts —** can constitute an aberration [7]. To give

---

[4] As Sánchez Graells, "Los acreedores involuntarios en el concurso", in Créditos, garantías y concurso, [Veiga (Dir.)], Cizur Menor, 2011, p. 392, points out, this is not a matter in which the autonomy of the will of the affected parties can prevail, in which a negotiated solution between the agents involved in the insolvency situation of the common debtor can be allowed, given that the very nature of the existing patrimonial conflict determines the impossibility of reaching optimal results in the absence of imperative rules.

[5] On the privilege, the genesis, the strength of privileged credit, through the comparative perspective of 29 countries from Australia to the United States, see the recent contribution of Faber/Vermunt/ Kilborn/Richter/Tirado, Ranking and priority of creditors, Oxford, 2016.

[6] Indispensable is the work of Mokal, «Priority as Pathology: The Pari Passu Myth», *Cambr. L. J.,* 2001, n.º 60, pp. 581 y ss., conclusive and perhaps excessive, Finch, *Corporate Insolvency Law Perspectives and Principle*, Cambridge, 2002, pp. 28 is indispensable when he categorically states: «… the protection of non-creditor interest of other victims of corporate decline, such as employees, managers and members of the community, is not the role of insolvency law».

[7] Jaeger, *Lehrbuch des Deutschen Konkursrechts*, 8 ed., Berlin-Leipzig, 1932, p. 64. En un sentido análogo HENCKEL, «Reform des Insolvenzrechts», *ZZP* (97),

priority to one or other interests is a choice, a selection between alternatives that do not always coincide, but rather are antithetical, misunderstood and in many cases worse explained and justified [8]. One thing is the natural and today complex aspiration to achieve a complete satisfaction of the privileged creditor and another very different reality of property and bankruptcy that has become evident in recent years.

Insolvency is a complex phenomenon, a complex institution, even multifaceted, where there are several and different conflicting interests [9]. In the tension of the same, but above all, in the resolution of all those interests not infrequently opposed, as well as the pre-ordering of the same by *voluntas legis*, one finds the very core of a bankruptcy system. Pre-ordering credits, reassigning positions (positive and preferential or negative and relegated) in a bankruptcy and avoiding distributive equality among all creditors, entails risks, generates asymmetries, implies choices as well as selections and opting to protect even legally legal positions that would otherwise be relegated, perhaps, excluded and always hidden [10].

1984-4, pp. 369 ss., p. 373, «*Die Vorrechte sollen entfallen*». También Berges, «Zur Einschränkung der Konkursvorrechte», *KTS,* 1959, n.º 4, pp. 53 y ss., p. 54; Hasnisch, «Zur Reformbedürftigkeit des Konkurs — und Vergleichsrecht», *ZZP,* 1977, 90, pp. 1 y ss., p. 14. In Austria it goes even further, since the insolvency reform of 1982 and in favour of the principle of parity abolished the privileges in pursuit of classless insolvency — ***Klassenlosser Konkurs***, *vid.* Holzhammer, *Österreichischen Insolvenzrecht. Konkurs und Ausgleich*, 2.ª ed., Wien-N. York, 1983, p. 37. About *Klassenlosser Konkurs* también Habscheid, «Öffentlich-rechtliche Forderungen, insbesondere Steuerforderungen im Konkurs», *KTS,* 1996-2, pp. 201 ss., p. 202. Also Mccormack, «The Priority of Secured Credit: an Anglo-American Perspective», *JBL,* 2003, July, pp. 389, p. 392.

8 Thus, on the privileged position of movable collateral in the process, see, from the German perspective, the recent contribution of Mitlehner, *Mobiliarsicherheiten im Insolvenzverfahren*, 4.ª ed., Köln, 3016.

9 Kraakman, "Concluding Remarks on Creditor Protection", EBOR, 2006, no. 7, pp. 465 et seq., is right when he states that the treatment of preferential claims becomes one of the most specific but also one of the most intense issues of the conflicts of interest in a collective enforcement procedure.

10 Safeguarding the rights and claims of one creditor or another in insolvency proceedings is not a simple task, nor is it a comfortable one. To speak of efficiencies, to contrast one with the other, in short, is a decision or a fate that is left to each

It should not be forgotten that it is precisely the concursal treatment of credits, where the choices and decisions of the legislator face reality: that of prioritizing and relegated, that of relocating or denying concursal satisfaction, so that they take on a physiognomy within the concursal procedure and especially of credit with privilege, which shows a greater proclivity to those opposing interests, at a conflictual intensity. And there typicity, legality and reality are the axial nerve of credit graduation. The limit.

A ductile and flexible limit in which the legislator amputate, extend or let be. Delicate limit and today in absolute discordance with the past preferential canons that once sheltered the civil code. Nothing to say about the erosion when not open dysfunction of a presumed rule, ideal, but circumstantial, the par condicio creditorum [11]. Preserving, strengthening the principle *pari passu*, and therefore, an equitable distribution of creditors or among creditors is today, a mere entelechy. In many legal systems, the role of ordinary creditors has been marginalized [12].

However, this does not mean that they should also be questioned, doubted or even limited in order to erode the priority of certain claims in insolvency through numerous rules, regulations or practices. Chapter 11

---

legislator, to each legal system. See the interesting contribution made by Denozza, «Different Policies for Corporate Creditor Protection», *EBOR,* 2006, n .º 7, pp. 409 ff.

[11] The Italian author Innocenti, "Sulla questione del privilegio speciale "incapiente"", cit. p. 578, is not mistaken when she places the scenario of the debtor's patrimonial liability, the privileges of the Codice and the par condicio creditorum in this cocktail shaker, when she writes categorically: "La materia travalica quindi i confini della normativa speciale, fino ad abbracciare il piano dei principi generali del nostro ordinamento giuridico".

[12] This does not prevent, as Mccormack/Keay/Brown, European Insolvency Law. Reform and Harmonization, cit., p. 112, the emergence of certain "quasi-securities" that protect the credit, privileged in a certain sense, of (ordinary) commercial creditors. Thus, they argue that these "quasi-securities" can be described as "a form of legal machanism that is not strictly speaking security but serves many of the same economic functions". Quasi-security linked to the right of retention, but also to figures such as the lease. See the contribution of Omar, "Insolvency, Security Interests and Creditor Protection", *Security Interests in Mobile Equipment*, [Davis(ed.)], Aldershot, 2002, pp. 293 y ss.

of the US Bankruptcy Code, which paradoxically imposes restrictions on the execution or enforcement of security interests in the course of restructuring procedures for companies in difficulty, denotes a clear weakening of privilege, which can also lead to a loss of value during this time of the security interest [13].

To distribute *pari passu*, or in other words, *pars condicio creditorum*, the assets of the failed debtor, is an evanescence of a mere intrinsic element of justice as inapplicable today, no matter how much ideally and perhaps at some past moment it had its anchors and defenses for the sake of the counterpart of a waiver when not individual loss to execute the debtor's assets in exchange for reserving to creditors a position of equality and a similar and not privileged treatment [14].

And at the apex of competing interests, only one prevails, ambiguous and hardly ever concretized, the bankruptcy interest. And the protection of credit, and therefore of the set of creditors so different and disparate from each other, is one of the real vortexes of insolvency law. This does not begin so that the different creditors assume, or are in conditions of assuming different strategies in the bankruptcy procedure [15]. And it is the preeminence of some interests over others, of some conflicts and above all of some decisions that transcend them,

---

[13] Key at this point is the now classic contribution of Bebchuk/Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy", Yale L. J., 1996, vol. 105, pp. 857 ff.; Warren, "Making Policy with Imperfect Information: The Article 9 Full Priority Debates", Cornell L. R., 1997, vol. 82, pp. 1373 ff., p. 1377. And on reorganisation, see the study by Baird/Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy", University of Chicago Law Review, 1984, vol. 51, pp. 97 ff., pp. 112 ff.

[14] This was indeed the initial premise of English bankruptcy law and practice, especially since the Statute of Bankrupts. See among others Seligson, "Preferences under the Bankruptcy Act", Vanderbilt Law Review, 1961, n.º 15, pp. 115 y ss.; Oditah, "Assets and the treatment of claims in insolvency", Law Quarterly Review, 1992, n.º 108, pp. 459 ff. See the treatment of and exception to pari passu through the Insolvency Set-off carried out by Bridge, "Collectivity, managment of estates and the pari passu rule in winding-up", *Vulnerable transactions in corporate insolvency*, [Armour/Bennet(eds.), London, 2003, pp. 1 y ss., specially pp. 26 ff.

[15] Lopucki/Mirick, *Strategies for Creditors in Bankruptcy Proceedings*, 5 .ª ed., New York, 2009. A good perspective, especially when comparing employees, public tax creditors, managers, etc., in Symes, *Statutary Priorities in Corporate Insolvency*

where this exceptional and particular right takes all its virtuality and endows itself with its special physiognomy. But why or where do we anchor the ratio of granting privileges or causes of preference to some or other creditors and deny it to others who are preterred or not even mentioned in the insolvency law as it happens with the ordinary ones [16]? Where the satisfaction of some is to the detriment of others, where equity and the principle of equality and parity collide with those of proportionality and preference. And where the objectives and interest of the contest or bankruptcy can be seen from a myriad of totally opposed, conflicting pretensions [17]. Perhaps those who, from the point of view of the economic analysis of law, claim that the function of a bankruptcy rule is none other than "to maximise the collective return to creditors" are not mistaken [18].

It is the legislator who has chosen to erect the tutelary building of credit through preference, who has amputated and degraded or overvalued and ultraprotected certain credits — such as, for example, credits for extra-contractual liability — and therefore privileges or causes of preference, who has also left the door open to a dissociation of the

Law. An Analysis of Preferred Creditor Status, Australia, 2008, especially chapters 4, 5 and 6, pp. 51 to 188.

16 Categorically McCormack/Keay/Brown, *European Insolvency Law. Reform and Harmonization*, cit., p. 112 It is based on two arguments for the priorities vis-à-vis unsecured creditors, on the one hand on the whole of property rights and freedom of contract, on the other hand it is based on "the proposition that recognizing the priority of security rights will lead to more credit and at lower cost and this in turn will help to stimulate economic activity and lead to better economic conditions for all.", In this way, **priority facilitates the expansion of credit and economic activity**.

17 In the wake of the current financial and economic crisis, the possibility of a state's insolvency has been raised as anathema, breaking with but also examining old dogmas, see the interesting view developed by Hornfischer/Skauradszun, "Von der Staateninsolvenz zur Insolvenzfähigkeit von Staaten", KTS, 2012, no. 1, pp. 1 ff. 1 et seq, especially pp. 19-21.

18 Jackson, Logic and limits of Bankruptcy Law, Cambridge, Mass., 1986, pp. 7 ff. notes that insolvency law is best seen as a "collectivized debt collection device" and as a response to the "common pool" problem created when different "co-owners assert rights against a common pool of assets". On this theory see the analysis in Finch, Corporate Insolvency Law, 2nd ed., Cambridge, 2009, pp. 32 on the different views of corporate insolvency law.

category of privileges in patrimonial law according to the bankruptcy or not. What preserves and statifies this position, or on the contrary, changes and modalises it, is an option. Just as it would be to create a bankruptcy without classes, or without preferences, or by deducting or "expropriating" a certain percentage or percentage of value from the preferential or privileged credit and that serves or benefits unsecured creditors, ordinary creditors, is a purported principle of the inalterability of legitimate causes of priority violated if some of them are changed, or can it be done at the legislator's whim and convenience (at the service of certain interests) freely? [19]

It is the toll or price to the "disdain" to a certain extent of the par condicio creditorum. The rank, the priority, the order has a legal and typified logic. Once again it has succumbed to the temptations of the non-unification of private property law. A different matter is that after this choice, the one of the immunity of certain creditors through adding to the credit a quality/quality, preference, priority, is that it enables and leads the creditor to a complete safisfaction through the good on which it is materialized, the "reality" of the privilege, this one. Or, otherwise, who verifies the capacity of the good on which the privilege falls? [20]

Establishing ranks is not comfortable, nor superficial, and it is true that rank is not a right, but it hierarchizes, prelates and prefers, and only by preordering ranks are rights preferred. There is no other

[19] As we will see below, since works such as the Cork report, and proposals in Austrian law to move towards a classless insolvency, it is not possible to ignore the strong criticism that a "carve-out" of this type, a deduction of a percentage, could generate both for creditors and debtors. Thus, it is argued that while a secured or preferential creditor could lose the benefit under a carve-out regime, this would not be of any benefit to the debtor, since it would be the biggest losers who would receive less funds. See the contribution of Harris/Mooney, "Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy", Cornell L. R., 1997, vol. 82, pp. 1349 et ff., p. 1357.

[20] As Ciccarello, voce Privilegio (dir. priv.), cit., p. 725 "… the law is the source of the privilege insofar as it "has its immediate foundation in the will of the legislator" and only the law can alter that order of values fixed by the law with the principle of par condicio. On the other hand, this is one of the main pillars and elements of discrimination of the privilege by other legitimate causes of priority (pledge and mortgage)".

alternative, no matter how variable or distinctive it may be. At the same time, we do not hide the fact that the key to a more correct competitive system involves a drastic reduction and at the same time rationalization of the privileges, in reality, of the existing jungle and sclerotized system of privileges that have only ended up generating an authentic impassable forest, but blaming them for all the evils exceeds a minimum congruence [21].

It is obvious that a bankruptcy law should not be a wishing well with whose help the economic problems of debtor and creditors can be ended, since there is no doubt that the debtor's economic crisis constitutes a harmful event for each and every one of his creditors, although they will be affected in different ways. That is why they

[21] It has even been proposed in the case of security interest priority to limit its enforcement right to only a fraction of the *collateral*. *Vid.* SCHWARTZ, «Priority contracts and priority in Bankruptcy», *Cornell L. R.*, 1997 (82), pp. 1396 ff., p. 1397; BEBCHUK/FRIED, «The Uneasy Case for the priority of secured claims in Bankruptcy», *Yale L.J.* (105), 1996, pp. 857 ff., p. 909-911 proposes as a rule a fixed-fraction of 75%. HUDSON, «The case against secured lending», IRLE, 1995, p. 45, for whom, although the fraction is disputed, he prefers to place it at around 80%. It has even been suggested that junior creditors should be converted into unsecured creditors. *Vid.* MANN, «The first shall be last: A contextual argument for abandoning temporal rules of lien priority», *Tex. L. R.* (75) 1996, pp. 11 ss., p. 45 a 49. More recently, the Enterprise Act 2002 proposes that a certain percentage of floating charge enforcements be set aside in favour of unsecured creditors, although the percentage that would be implemented by statute has not yet been legally established. This idea is not new, as it already responds to the framework established in its day by the Cork Committee Report on Insolvency Law, which recommended that 10% of these executions be given to ordinary or unsecured creditors. MILMAN, "The 10 Per Cent Fund", Insolv. L., 1999, pp. 47 et seq. As the chairman of this committee, Sir Kenneth Cork, rightly pointed out, it was intended that: «**First, the almost total abolition of preferences; secondly, restrictions on the reservation of title; thirdly, creditors having fixed charges to be restrained from realising their security for 12 months after the appointment of a receiver… therefore it seems fair to some of us… to give the unsecured creditors a stake, say 10 per cent, in the net realisations of the receiver**». As can be imagined, the greatest opposition came from the Banks and when the Insolvency Bill resulting from the Cork Report was published in 1984, the 10% provision was not included. Vid. MCCORMACK, «The Priority of Secured Credit», cit., p. 391. GOODE, «Is the Law too Favourable to Secured Creditors?», *Can.Bus.L.J.*, 1983-1984, vol. 8, pp. 53 et ff., p. 75.

must share, however, to different degrees, the heavy slab of sacrifice that derives from the common debtor's bankruptcy; A good bankruptcy law must produce, as an effect, both a greater promptness in the treatment of material insolvencies that can be channelled through viable economic solutions, reorganisation, helping creditors and debtors to cooperate in the face of the insolvency problem (which on occasions, more than desired, is quite impossible), and a rapid, effective and fair liquidation, as far as possible, of the bankrupt's assets [22].

The practice of these years has cleared up any hint of mirage, neither the agreed solution is the preferred one nor the creditors, especially those who enjoy privileges and who have provided themselves with solid real or pseudo guarantees assimilated to them, are willing to renounce an apex to their rights, among them, the complete satisfaction of their credits [23]. The redoubling of intentions now comes hand in hand with the preventive, the paraconcursal, the refinancing and extrajudicial payment agreements. Given the unequivocal assumptions of bankruptcy, the legislator nevertheless opts for agreements and anterooms that avoid, by means of clear and no less predisposed firewalls, the declaration of bankruptcy strictu senso.

But what is the true value of a credit in insolvency proceedings, and, above all, what is the bankruptcy value of it, absolute value or relative value, regardless of the mechanisms or channels arbitrated by law for the credit to be recognized in the proceedings, as long as it is concurrent, we have to question ourselves about that bankruptcy value

---

[22] Schmidt, „Das Insolvenzverfahren neuer Art. Kernprobleme der Insolvenzrechtsreform nach dem Kommissionsbericht", ZGR (1986), p. 178 ff, especially p. 181; also in Schmidt, „Fundamentos del nuevo derecho concursal alemán", Estudios sobre el Anteproyecto de Ley Concursal de 2001, [García Villaverde/Alonso Ureba/Pulgar (Dirs.)], Madrid, 2002, p. 22. Bork, *Insolvenzordnung,* 7.ª ed., München, 2002, p. X, «Das Hauptziel der Insolvenzrechtsreform ist es sicherlich, Massnahmen gegen die Massearmut zu ergreifen, damit möglichst viel Verfahren eröffnet und durchgeführt und so möglichst viele Insolvenzfälle in einem geordneten Verfahren abgewickelt werden können. Dazu kommt als wesentliche Intention eine bessere Abstimmung vom Liquidation und Sanierung.»

[23] On the disadvantages of not having provided a guarantee, see the reflections of Fischer, "Gläubigerbenachteilungsvorsatz bei kongruenter Deckung?", NZI, 2008, no. 10, pp. 588 ff.

or relative value. Or if one prefers, what is the value of an ordinary credit given the "inattention" they suffer in the insolvency law? Can we speak of that disdain, of that inattention, or on the contrary, are they strengthened in the body of insolvency law?

In fact, a credit is not worth the same if it is relegated or runs the risk of being postponed in the credit classification of a bankruptcy. It is a marginalized credit, as on the contrary it is prioritized and overvalued the credit that enjoys a cause of preference. It is the real possibility of your satisfaction that actually determines the bankruptcy value of a credit. Therein lies its relative value, but also its technical and economic value, because the lower the value, the greater the risk and the greater the creditor's demand if he is in a position to demand.

The satisfaction of credit depends to a large extent on the risk input it assumes, the value of which is incorporated ex ante, a value that is undoubtedly strengthened if the creditor provides himself with real guarantees, or even if he pre-orders his position in a hypothetical pact or conventional subordination agreement, as well as if it is the legislator who grants him a cause of legal preference [24]. But this satisfaction is also valued in terms of the qualitative and quantitative concurrence of the mass of creditors who expect satisfaction of an insufficient patrimony. And when speaking of value, it is inessential on the other hand to intrinsically start from a clear duality, namely, the one that separates or distinguishes between what constitutes the absolute value of a credit, from the one that does it as its relative value. We leave to one side at this moment the reasonable value that every real guarantee possesses and is "regulated" as a defective and contradictory regulation.

The first refers to the nominal value, the value of the credit calculated in abstract. The second one, the true value taking into account its position in an insolvency proceeding whenever it passes the filter or sieve of the credit verification procedure and is classified endoconcursally. And it is this relative value that makes that, in not a few legal systems, both European and Anglo-Saxon, have resorted to legal

[24] Rasmussen, «Debtor´s choice: a menu approach to corporate bankruptcy», *Texas L. Rev*., 1992, n.º 71, pp. 51 y ss.; above all, and by the same author, Rasmussen, «An essay an optimal bankruptcy rules and social justice», *U. Illinois L. Rev*., 1994, pp. 1 y ss., sobre todo, pp. 11 et ff.

mechanisms, also conventional subordination, even in some, moderating subordination through the introduction of a power of equity in the judges, but in short minimize, also annul the bankruptcy value of a credit, a hypocredit.

There is no doubt that privileges give off a particular and special spell; both their causes, their special legal-political considerations relating to the subjective quality of creditors, and their motives and purposes, are an essential part of any insolvency law, it is the living nerve, the core of the entire credit system. As on so many other occasions the successes and failures, the lights and shadows have also come punctually to this new appointment with the legislator. The viability and duration of the bankruptcy rule will depend to a large extent on its success, its moderation and its decisive option of privileging one or the other credits to the detriment of other causes of preference that in the past were brought to bankruptcy.

The privilege has its ***raison d'être*** (although this is not homogeneous for the enormous typology of the same), its cause and its functional justification, that is to say, it is the tool or instrument that allows the protection of the credit, a conflictual protection that allows discriminating and hierarchical and even degrading the concurrent creditors in a deficit patrimony and that, at the same time, allows reducing the transaction costs in the contracting of guarantees within what is a greater or lesser aversion to risk.

However, its abuse, like everything else in life, generates important dysfunctions as well as important denaturalizations. Privilege in itself does not destroy the principle of parity, nor does it lead to the ostracism of ordinary credit, its excessive and selfish use, because in a certain way it betrays itself [25]. In fact, the principle of proportionality,

[25] As Schäfer/OTT, Lehrbuch der ökonomischen Analyse des Zivilrechts, 3rd ed., Berlin-Heidelberg, 2000, p. 557 rightly points out, the provision of guarantees not only satisfies the Prioritätsprinzip but also reduces the Delcredere-Risiko itself. See a later, more generic, but also more detailed work by Piekenbrock, «Insolvenzprivilegien im deutschen, ausländischen und europäischen Recht», *ZZP,* 2009, vol. 122, n.º 1, pp. 63 et ff. Say Brémond, «Notion de privilège», en *Droit des sûretés*, [Jobar-bachellier/Bourassin/Brémond (Dirs.)], Paris, 2007, p. 381, como el privilegio que reposa sobre la noción de «*qualité de la créance*», se inspira

parity, equality, par condicio creditorum is erected in opposition to the principle of preference, when not, it openly opposes it. It has been a constant in the doctrine to conceptualize privilege as a "quality" of credit, especially the special privilege. There is also, to a certain extent, an accessory relationship between privilege and credit [26].

Credit preference is a modalization of the principle of universal patrimonial responsibility and operates precisely when such responsibility acts. The aim is not so much to protect the creditor or creditors from the debtor's behavior as to try to immunize some creditors from the competition and from the legitimate claims of others. Proportionality seeks, however, a different function, to break the conflict in the concurrence of ordinary creditors, so that each credit will be satisfied in the proportion in which the product of the liquidation of the patrimonial asset that composes and integrates the active bankruptcy mass corresponds to the totality of the amount of the ordinary credits. The scenario plays in a framework of no preferences, since creditors with a business privilege or preference escape from this pro-rata rule at least as far as the realisation value of the object good reaches or on which the privilege or preference falls.

The privilege, like the security right, infers an escape valve to the creditors against certain conducts or strategic behaviors of both the debtor and other potential creditors. It is, accompanying and qualifying the guarantee or the guaranteed credit, the ideal insurance mechanism that immunizes the risks of that same credit against an insolvency scenario. It undoubtedly has a direct and indirect impact on the very functioning of the credit market. But does it mean that the protection of the credit or secured creditor with prelatory cause in a hypothetical concurrence of creditors on the debtor's assets relegates or worsens the quality of other credits and other creditors [27]?

---

en suma, tanto en criterios de justicia distributiva como en los de justicia conmutativa.

[26] Conforme Ciccarello, voce *Privilegio (dir. priv.)*, cit., p. 723 y ss., p. 725; también Ravazzoni, voce *Privilegi*, Digesto Civ., tomo XIV, Torino, 1996, pp. 372 y ss. as the privilege based on the notion of "qualité de la créance", is inspired, in short, as much by criteria of distributive justice as by those of commutative justice.

[27] On these efficiencies and deficiencies, as well as the transfer of the impact of the debtor's crisis to other creditors with less or no possibility of leveraging and privileging their position, see Harris/Charles, "Measuring the Social Costs and Benefits

It is the measure or limit of the risk that a specific creditor is willing to assume, either in a business or legal way. It immunizes the holder of possible connivances or opportunistic decisions on the part of the debtor in the bankruptcy who, having nothing to lose, since at most it will not exceed the cost of the bankruptcy itself, risks arbitrarily adopting decisions that are unbalanced and partisan.

Privilege is sustained as a basic pillar, in its sources, whether legal or conventional, in its absolute typicity and at least in the bankruptcy rule the impossibility of creating new priorities outside of it.

But this typicity is also supported by its unity, despite the fact that it may be invested with specific or general characteristics. Above all, it plays a fundamental and essential role in the executive phase of an insolvency proceeding, at the time of asset distribution, where, apart from their own characteristics of each particular preference, they perform the original function, which is none other than that of performing the function of ensuring priority in the sphere predetermined by the legislator.

Let us not forget that privileged credit means, in the first place, preferential credit and as any preference will have a fundamental raison d'être, exist and be justified in a framework of competition, in this case with other creditors. A framework that does not trap the rule of proportionality or pro rata and distribution that is subject to ordinary creditors [28]. If a creditor can secure the financing it grants by creating a security interest in an asset of the debtor that allows priority satisfaction, then there is no doubt that it is more efficient than the par condicio creditorum rule. But are all creditors or do they all have identical possibilities [29]. What is the risk of distribution undoubtedly

and Identifying the Victims of Subordinating Security Interests in Bankrupcty", Cornell L. Rev, 1996-1997, no. 82, pp. 1349-1372; contra, against this position in favour of secured claims whose satisfaction and shielding favours efficiency even at the expense of the negative impact on other types of creditors, SCHAWARTZ, «Taking the Analysis of Security Seriously», *Va. L. Rev.,* 1994, n.º 80, pp. 2073 y ss.

28 JAEGER, "Par condicio creditorum", Giur. Comm. 1984, no. 11, pp. 88 ff. p. 93 when he states that par condicio creditorum cannot be equated with the higher, pre-juridical and general principle of equality.

29 SCHILDBACH, «Sicherheiten *versus* par condicio creditorum», *BB,* 1983, n.º 34, pp. 2129 y ss., especially p. 2135 where he establishes a series of proposals between the par condicio creditorum and the guarantees in the relations between creditor

suffered by ordinary creditors subject to the principle of proportionality and, if so, what role does it play in the insolvency proceedings [30]? Undoubtedly, nowadays, the principle of par condicio has more myth than reality.

Along the way, the legislator, doctrine, case law and interest groups have done nothing more than limit, distort and degrade the very essence of equal treatment between creditors, precisely where there should be equal treatment. But to reconcile preference with proportionality and to coordinate everything in a bankruptcy scenario seems to be an impenetrable task with results never accepted by all [31]. Who loses part or all of his credits and who has them insured and minimizes the risk of loss, total or partial, in an insolvency, measures the vigour, the robustness of the nature and content of the credits, but also the legislative decisions of a given moment. The distant echo that the footprint of equality once impregnated bankruptcy law still resounds. Preached equality, studied, in its content, in its value, in its usefulness and stability, but in a bankruptcy procedure only those who cannot foresee causes of inequality, which make them different, which differentiates them from that equality, are equal. The paradox of equality has little

---

and debtor. The first, the so-called "me first rules" clause, which establishes the absolute priority status of the claim for recovery, and the second alternative is "the assignment of creditors and debtors to their claims at the various future points in time for possible future claims and the assignment of claims by the debtors to certain specified — if not impossible — claims in the future points in time and circumstances". Brighton, "Is there Anything left for Unsecured Creditors?" 1 Part II, ABIJ, 2009, no. 27, pp. 4 ff.; and, by the same author, Brighton, "What's left for Unsecured Creditors? Q part I", ABIJ, 2008, no. 27, p. 2 et seq. See also Galardo, "Eccezione di dolo, concordato preventivo e par condicio creditorum", Dir. Fall., 2008, no. 3-4, pp. 274 et seq.

30 R. H. Schmidt, Ökonomische Analyse des Insolvenzrecht, Wiesbaden, 1980, pp. 44 et seq., has given an authoritative opinion on the Verteilungsrisiko from the point of view of the economic analysis of law, where the proportional or distribution rule ends up acting or assuming the role of an insurance mechanism that minimises the losses among all of them by establishing the division of these among all of them. Proportionality, par condicio in short, seeks to minimise the risk that unsecured creditors end up bearing the consequences of the full loss of their claims.

31 See the contribution of Henning, "The dual priorities rule and the Insolvent Partnerships Order of 1994", CL, 2010, no. 31, pp. 131 ff, where prioritising, anticipating, pre-ordering is not a simple task.

or no place in the insolvency of creditors, except for the ordinary, the great preterids of the insolvency law. Equality when it comes to having the right to participate in the bankruptcy, but not the right to distribute. However, we must not deny that it does not play any role, albeit more at the level of ideas than at the level of reality.

At the moment of truth, another question overlaps, the effectiveness of guaranteed credit and therefore, with privilege, whether it is preferably negotiable, even legal, and its efficiency in the credit and investment markets. Either the risk of a pro rata distribution in an insolvent patrimony is nullified, or the contractual creditors will hardly grant credit if they are not exempted from this hypothetical equality, or they will contract the same by leading the debtor to resort to other financing mechanisms more prone to dilute the vaporous limits of responsibility and legal personality.

Think of the alternative and the heavy bankruptcy penalty it entails, whether it is the partners who lend capital to the company, but not as a contribution, but as substitutes for it and, therefore, for the share capital, capital in sum of responsibility. Therefore, who is really favoured by a guaranteed credit and who also plays with a preferential cause in a bankruptcy or before the immediacy of a creditor's bankruptcy? It is true that financing costs are reduced, but for whom does it really reduce them, only for the creditor who provides an optimum guarantee? Does it not affect the continuity and solvency of the debtor himself, normally a company? Does it benefit the partners? Does it harm third and external creditors per se [32]?

[32] Sceptical, to say the least, of the efficiency of secured credit, Jackson/Kronman, "Secured Financing and Priorities Among Creditors", cit., p. 1145 ff; in the same line, although perhaps a little more forceful, Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories", J. Legal Stud, 1981, no. 10, pp. 1-37; on the contrary, Carlson, "On the Efficiency of Secured Lending", Va. L. Rev., 1994, no. 80, pp. 2179-2214; on the undoubted benefit of secured credit for financing purposes and unequivocally as the optimal means to keep a company from insolvency, Schwarcz, "The Easy Case for the Priority of Secured Claims in Bankruptcy", Duke L. J., 1997-1998, no. 47, pp. 425-490; on the maximisation and injection of liquidity provided by secured credit, Hill, "Is Secured Debt Efficient?", Tex. L. Rev., 2001-2002, no. 80, pp. 1117-1178.

It matters little or nothing to preferential creditors that the par condicio creditorum is, to some extent, a mechanism of proportional distribution among creditors when allocating an insufficient asset. They shy away from any hint of solidarity or solidarity mechanism. Unless the law, as has happened in other comparative experiences, obliges the preferential creditor to renounce a certain percentage of the result of the execution, the preferential one, negotiated above all, also legal although nothing guarantees the full collection of its credit, it is difficult for them to participate jointly and voluntarily in that community of losses that in a certain sense establishes the par condition from a referential equality.

But the reality is that creditors are never treated equally in insolvency proceedings. Some have preferences, others their antithesis, some discount and are adverse to risk, they are more diligent, they enjoy better and more information, taking better care of their interests and ensuring a credit payment that, on not a few occasions, does not favour other creditors who even form part of, or can do so, the same class or classification of credits. But not all creditors are objectively or qualitatively subject to the same community of losses, identical profits or identical losses, either qualitatively or quantitatively. It is the credits per se, their nature, their characters, their content and essence that will ultimately give them their own credit rating in a bankruptcy scenario.

The privilege and, rather, its degree of resistance, is asserted against the other creditors and, especially, against those who, in turn, try to take advantage of their position to collect with preference both in bankruptcy situations and, to a lesser extent, in third party situations. In a certain sense and, above all, at the moment when the credit is due, the existence of the privilege is indifferent for the debtor since the privilege does not bind him at the moment of payment except, as has been pointed out, that the payment is made in fraud or is a simulated payment, but then it is no longer a question of privilege, but of fraud by ordinary creditors or nullity by simulation. Preference acts and is exercised against those who are the common debtor's creditors, but not against the common debtor, who is only tangentially affected by preference in payments with the liquid of his assets. The debtor has either agreed to a cause of business preference or has had no choice but to pass and accept the imposition of a cause of legal preference.

II. SEEKING THE EFFICIENCY OF THE SECURITY

Does the creation of a security right in itself generate value for the debtor's assets, or only for the creditor's assets, what about a rigid and not very dynamic security right, what about a security right in an unregistered trademark that enjoys priority of use and notoriety, does it not generate value for the owner, the licensee or the pledgee?

In a certain sense, is it true that the fact of obtaining financing, even at the cost of securing it with security interests that affect all or the best of the debtor's assets, generates per se a revaluation of the debtor's assets as long as it creates or contributes an additional and positive value to the assets [33]? An increase in value that exponentially reduces the risk of insolvency or insufficiency of assets and therefore reinforces the expectations, if not the rights, of the rest of the credit holders, most of whom are ordinary credit holders and who have not discounted, or have not been able to discount ex ante the risk of insufficiency or to provide themselves with collateral [34].

---

[33] Chianale, Evoluzione e prospettive delle garanzie realli, Torino, 2020, p. 29, referring to the personal privileged status that can be attributed to the creditor, argues that "the sector of security interests for corporate financing now presents a further stage of evolution. The debtor (or a third party provider) may contractually grant an individual a personal preferential status by pledging its assets, in whole or in part, in its favour in the event that it becomes a creditor, instead of a simple security interest with priority over assets and claims. This status culminates in the satisfaction of credit claims on the pledged assets also through their extrajudicial appropriation. The non-possessory pledge, as has been seen, is the instrument which is enabling such a momentous change. The proprietary structure of the collateral derived from Roman law has been transformed into a wide range of powers that can be exercised ratione personae by the creditor directly on the movable business assets of the debtor or of the third party giver. On the social use of collateral, they have already pronounced at the time Harris/Mooney, "A property-based theory of security interests: taking debtor´s choices seriously", Va. L. R., 1994, vol. 80, pp. 2021 y ss., p. 2023. For North American authors, there has been an increase in studies that have subjected secured credit to closer scrutiny, often with the help of economics, in an ongoing debate about whether secured credit is socially useful and, if so, how. While the more recent literature is considerably more rigorous than the earlier literature, it sounds a bit like familiar questions that reflect a fascination with, if not always a concern about the distributional effects of collateralisation.

[34] Jackson/Scott, "The Nature of Bankruptcy: An Essay on Risk Sharing in Bankruptcy and Intercreditor Agreement", Themis, 2002, no. 45, pp. 25 ff, p. 28: "Because

However, does the creation of a security right increase the risk for the rest of creditors, especially ordinary creditors, or, on the contrary, does it compensate for this by generating value, provided that the result of this financing achieves an asset or a positive value that compensates for the cost and externality of creating the security interest [35]? Does the security represent a vehicle for overcoming the conflict between

the lower classes (equity, and commonly general creditors) get so little in the liquidation that follows an insolvency proceeding, they generally want the debtor to continue in business. Accordingly, at least one class, and perhaps others, expect to recover more of their claim if an insolvent debtor is given the opportunity to recover rather than being hastily liquidated. These classes frequently (and often successfully) use legal mechanisms to delay the liquidation of debtor businesses. On the other hand, creditors whose claims are well protected by collateral generally prefer the certain return of an early liquidation. After all, an insolvent debtor's business position may deteriorate as well as improve, and if it deteriorates, a lower value of assets may become available to secured creditors.

Creditors come to the negotiation with their legal priorities intact. It is logical then, to begin by assuming that insolvency is a foreseeable risk — one that would be borne individually by the various claimants. The calculation of this risk may have influenced the decisions of individual creditors as to whether to apply for security and if so, on what terms.

35 This is neither a sterile nor a closed debate, just as the approaches or paradigms from which they are analysed are not neutral, be they functional or economic approaches to law. In our doctrine, this debate has been raised in both directions, both by Garrido, Garantías reales, privilegios y par condictio. Un ensayo de análisis funcional, Madrid, 1999, pp. 61 ff, a theory also held by Carlson, "On the Efficiency to Secured Lending", Va. L. Rev, 1994, n.º 80, pp. 2179 and ff., p. 2194, who rejects this conflict between secured and unsecured creditors, given that the former would introduce value that the latter would enjoy, and who would coin the expression of a symbiotic relationship between both types of creditors. On the other hand, Bermejo, Créditos y quiebra, Madrid, 2002, pp. 110 ff., does point out this conflict and transfer of the risk of secured credit to ordinary credits, which causes a proportional increase in their risk and a reduction in their value. However, he points out that this situation cannot be analysed as if it were a case of non-consensual imposition of costs on ordinary creditors, because the probability of the existence of secured credits is a circumstance that any creditor can anticipate and discount in the design of its credit, be it by raising interest rates, demanding personal guarantees, etc. In this sense, see the strong anchorage of North American law in this debate, significantly authors such as ADLER, «Bankruptcy and Risk Allocation», *Cornell L. Rev.,* 1992, n.º 77, pp. 439 y ss., p. 441; Schwartz, «Taking Security Rights Seriously», *Va. L. Rev.,* 1994, vol. 80, pp. 2073 y ss., p. 2077.

creditors and debtor [36]? Does an omnibus or global pledge, or a pledge over the debtor's entire present and future assets, leverage the debtor into a kind of total economic and financial dependence and prevent him from resorting to other financing **alternatives** [37]?

We are living in an era where the focus is on efficiency, we might even say on the dynamics of efficiency, a stage of theoretical and dogmatic development that has shifted towards the economy of debt rather than income in the dynamics of the circulation of wealth, both movable, above all, and other assets [38]. Another question is the optimisation and real efficiency of that value that is presupposed in all collateral if it has been efficiently selected and valued ex ante [39].

But, what efficiency are we talking about and for whom in the credit market and which ones for a debtor company in need of financing and where the granting of secured credit can become abusive due to the disproportionate and "inefficient" over-collateralisation required [40]? An example of this — inefficient — situation is

---

[36] Rudolph, cit., 325, argued that the loan guarantee in such a scenario could only be a vehicle for the redistribution of the creditor's risk, the value of which — at least with a perfect capital market — must be zero.

[37] Rudolph, cit., p. 324, reminded us that the market value of a non-privileged, unsecured claim was quite different from that of an unprivileged one: "Der Marktwert ist maximal, wenn die bevorrechtigten Forderungen zu den am wenigsten bevorrechtigten Forderungen gemacht werden."

[38] Key on this point is the article by Iuliani, "Il diritto privato tra crisi economica ed "economia del debito": dinamiche della giustizia e autonomia privata", Riv. crit. dir. priv., 2017, pp. 341 ff, and where this market of goods has shifted towards the market of debt rather than that of income. On efficiency in the law and development literature, see Fiorentini, Il pegno, Trattato dei diritti reali. Diritti reali di garanzia, V, Milano, 2014, pp. 5 et seq.

[39] A time when the duality is not so much due to the mobility or rigidity of the contract, but rather to the status enjoyed by the parties or some of them in the legal relationship. There is no doubt that the field of movable collateral is today a field in ferment, even redefining its paradigm. The words of RESCIGNO, Premessa, I contratti in generale, Trattato dei contratti, [RESCIGNO/Gabrielli (eds.)], 2.ª ed: "il ritorno allo status viene inteso nel senso che per ogni settore di attività i contratti sono destinati a modellarsi secondo tipi e discipline che rispecchiano la posizione sociale delle parti".

[40] On a concept of efficiency, Cheffins, *Company law: theory, structure and operation*, Oxford, 1997, pp. 5 y 6: "A key way in which rational actors can increase

undoubtedly the Supreme Court ruling of 4 November 2019, in a case, in addition to the unilateral substitution of the pledged object, there is a request for nullity of the legal transaction, a subscription of shares in a banking entity on which the new pledge falls. In such a way that the pledge was conditional on the allotment of shares, after having initially been constituted on certain fixed terms, one of them having been cancelled and with its amount the shares that were pledged were subscribed. The security constituted on the nominal value of the fixed-term deposit was subsequently replaced by the pledge of the shares, with the cancellation of the purchase and sale of the shares.

The fact that the latter enjoys immediate and direct power (absoluteness and immediacy) over the good or right that is the object of the guarantee (even over a global and heterogeneous value of goods and assets that can mutate up to a given moment), being able to use it, dispose of it, dispose of it in certain types of movable guarantees, and a preferential and privileged protection in the strictest sense of the

---

their joint welfare is through voluntary exchange. … Furthermore, an economist would characterize the outcome as efficient. This might seem an innocuous description, **but it is important to clarify how economists define efficiency**. When a company manager uses the term, he is probably referring to productive efficiency, which involves accomplishing an outcome at the lowest possible cost. On the other hand, an economist will usually be thinking about allocative efficiency, which relates to the distribution of scarce resources. The concern will be whether assets are being employed in their most highly valued use. If they are, then economists say the resources in question are being used efficiently. Exchanges between individual transactors are potentially an effective medium for increasing allocative efficiency. Parties acting rationally will not agree to enter into a bargain unless each individual involved anticipates being made better off by proceeding. An exchange therefore should increase the personal utility of all concerned and should transfer resources to more highly valued uses. While individual bargains have significant efficiency properties, economic theory has more to say about the aggregate impact of transactions. This occurs through the study of markets. In economic terms, a market is a forum in which those offering to buy and sell products or services interact". Espectacular el artículo sobre ineficiencia de las leyes de Arruñada, "Malas leyes. Aplicación al derecho concursal", *El acreedor en el derecho concursal y preconcursal a la luz del texto refundido de la ley concursal*, Cátedra Uría Menéndez-Icade de regulación de los mercados, [Veiga (Dir.)], Cizur Menor, 2020, pp. 53 y ss., sobre todo, pp. 75 y ss.

word, confers on it a power of aggression and realisation in harmony with the simultaneous weakening of the claims of other creditors, unless they were in a preferential position by rank and time [41].

When speaking of efficiency, reconciling economic reasoning with legal reasoning in the field of collateral is not easy; on the contrary, there is no shortage of creditor resistance to changes in collateral scenarios or frameworks [42]. But it is a factual, functional question, where the solidity and immunity of the guarantee is sought, which in many legal systems and practices involves the functional use of the property or the appropriation of the secured asset as the bastion of any real security [43].

Or consider the role or role that the secured creditor plays and can play or even be dragged into a restructuring process, not to mention

---

41 On the value of possession and its content in the pledge, see Carpi Martín, "Contenido: derechos y obligaciones. Extinction", Tratado de derecho civil. Las garantías, I. Vol. 1, [Prats Albentosa (Dir.)], Madrid, 2016, pp. 683 and following, p. 690 where, in addition, depending on the type of possession of the pledgee, the powers and obligations recognised in the Civil Code are outlined with greater precision.

42 Affirm Dahan/Simpson, "Legal efficiency for secured trasactions reform", cit., who, on p. 628, explain the resistance even of the banks themselves to reforms and the creation of new guarantees, as follows: "It sometimes comes as a surprise that resistance to the introduction of an efficient secured transactions law comes from the persons who could be expected to derive the most benefit from it. Banks, lenders and other creditors who give input at the drafting stage will not always be favourably disposed to the reform, or to some of the features that are precisely designed to make it efficient. They may require some persuading that from their perspective the proposed changes will be preferable to the existing market practice. The lure of increased credit activity may be tempered by fears of increased competition and lower margins. The problem may be compounded if the persons giving input are not the managers who are capable of understanding the broad economic picture but representatives from the legal department who are more concerned at how to document a transaction than its justification in a wider context. Even bankers may not understand all the reasons underpinning the reform. In one country recently, provisions in the draft pledge law designed to facilitate taking security for syndicated loan were struck out because of opposition from bankers who did not understand what a syndicated loan was, or assumed that it was undesirable or unnecessary in the local market".

43 Also Chianale, Evoluzione, cit., p. 27 when it argues: "the function performed by a security interest therefore entails the application of a unitary discipline and does not depend on the classification of the security interest".

a strictly bankruptcy procedure [44]. The functional polyvalence of the guarantee is undoubtedly tinged, but also, unambiguously, with economic efficiency and legal reasoning [45].

Nor can we ignore that the magnitude of this efficiency comes from the hand of an effective instrument, enforcement, whether it is individual or in a scenario of conflictual concurrence of multiple creditors and in which it is possible to face the breach of the obligation with an execution or sale of the secured asset or even an appropriation of the same, not expropriation of value [46]. To scrutinise, to inquire into this matter undoubtedly affects the consistency and existence of the credit and the predisposition of the banks or financial institutions to lend money [47].

---

[44] On this point, see the clear article by Azofra Vegas, "El acreedor con garantía real en los procesos de reestructuración", El acreedor en el derecho concursal y preconcursal a la luz del texto refundido de la ley concursal restructuración", [Veiga Copo (Dir.)], Cizur Menor, 2020, pp. 195 et seq, author who focuses on three situations: (1) when it is intended to impose a cancellation or modification of its real guarantees, (2) before the trance of the dation in payment and, (3) when it is a real creditor endowed with financial guarantees.

[45] Chianale, Evoluzione, cit., p. 27, rightly argues that every legal system that adopts a functional criterion of the guarantees must regulate the opposability of the guarantees to the debtor's bankruptcy of creditors by intervening on the different "esito" traditionally linked to the difference between the real right of guarantee and the property: if the guarantee function prevails, there is no reason to grant, in the debtor's bankruptcy, a greater protection to the creditor assisted by the property in guarantee than that assisted by a traditional real right of guarantee.

[46] Rudolph, cit., p. 326 reminds us by means of an unrealistic example as "There is no easier way for a company to meet its credit obligations than to distribute all its assets as dividends to its shareholders, leaving the creditors with an empty shell". And he points out: "Creditworthiness need not be a standard of ethical behaviour, which can be attached to the person of the borrower. Rather, creditworthiness can be interpreted as the consequence of a determined behaviour of the borrower, and this behaviour will in turn depend on the behaviour of the bank".

[47] Dahan/Simpson, cit., p. 637 conclude that legal inefficiency may not only reduce the economic benefit that might otherwise result from the law (e.g. a lower interest rate for a secured loan compared to that of an unsecured loan), it may also have a deterrent effect. This is particularly relevant for factors where the economic impact is difficult to measure. If the legal process is complex or time-consuming, or if there is uncertainty, potential players may never pass the decision threshold and not proceed with the transaction.

And taking the reasoning to its ultimate consequences, a functional analysis and implementation of collateral ends up diluting at least in the objective scope of movable collateral the duality between rights in rem and rights in rem. They all fall within its objective scope of action. But can it really be said that a security right is efficient in bankruptcy proceedings and, in this case, how is it efficient?[48]And going one step further, is it possible in a restructuring agreement to cancel a security interest, whether movable, with or without a registry base, or real estate collateral?[49]Is it possible to convert the debt secured by pledge into other financial instruments of a different rank, characteristics or maturity from the original one? And what about creditors with dissenting security interests? [50]

Efficient collateral that optimises the ease of enforcement is a key part of both the initial and the final gearing of collateral [51]. The use

[48] And although we will return to this question, Cordero, Tratado de los derechos de garantías, I, 3rd ed., cit., p. 649, reminds us of "the endless and sterile debate on whether, in theoretical terms, (real) security rights are socially efficient or inefficient in a bankruptcy situation, and in which supporters of a negative answer tend to emphasise these adverse consequences that the guarantees produce in the mass of creditors, costs that are not duly compensated to those who suffer from them". The most critical voice, without doubt, and not without reason, on this efficiency and justice, Carrasco Perera, Los derechos de garantías en la Ley concursal, Cizur Menor, 2009, pp. 44 and ff.

[49] Azofra Vegas, "El acreedor con garantía real en los procesos de reestructuración", cit., p. 201, highlights the enormous "restructuring" potential of the conversion of the debt into any other financial instrument with characteristics, rank or maturity different from those of the original credits. It recognises how cancellation may be necessary, for example, to facilitate the disposal of the encumbered assets or rights in cases where the real value of the collateral has fallen below the maximum mortgage or pledge liability.

[50] Although strictly speaking it was not a cancellation of a security interest, in the Eroski case, the order of Bilbao Commercial Court no. 2 of 13 February 2015, the dissenting secured creditor experienced a downgrading of the value of its collateral, as the enlargement of the circle of secured creditors was permitted, despite the clear and manifest opposition of the secured creditor. Ultimately, any forcible enlargement of the claims secured by the mortgage enjoyed by the dissenting creditor ultimately, and especially in the scenario of a default on a refinancing agreement, ends up being detrimental to the dissenting creditor.

[51] It offers an analytical but also leximetric study with the aim of improving the understanding of the enforcement of bank loans in the European Union, Steffek,

of legal efficiency criteria provides a basis for bridging the gap between economic analysis and legal reasoning. But do both extremes, namely good and efficient collateral and ease of enforcement [52]; reduce the cost of secured credit and systemic risk?

But what is the value of a going concern in insolvency and what can be expected from collateral on its main assets?[53]Does a secured creditor have or has had an interest in filing for insolvency proceedings in a timely manner, does he really have a conservative interest in the continuity and preservation of the company or, in case of insolvency proceedings, does he attract a sufficient and probably over-collateralised write-off and waiting period for the secured creditor?

Is the immunity and shielding that the insolvency and financial collateral rules themselves shield and provide to the secured creditor efficient, so that he can divest himself of his collateral and participate in

"Enforcing Bank Loans in the European Union. A Comparative and Leximetric Analysis", *Festschrift für Klaus J. Hopt zum 80. Geburtstag am 24. August 2020*, [Grundmann/Merkt/Mülbert (Edis.)], Berlin, 2020, pp. 1219 et ff.

52 They ask for a concept of legal efficiency, Dahan/Simpson, "Legal efficiency for secured transactions reform", cit. p. 633, what do we mean by "legal efficiency"? We use it as an indicator of the extent to which a law and the way it is used provides the benefits it was intended to achieve. We look at the concept against the background of secured transactions legislation because we prefer to link it to our experience in transition countries, but we believe it is capable of much wider application.

53 According to Jackson/Scott, "The Nature of Bankruptcy", cit., p. 27 and 28 the going concern value does not exceed the liquidation value in all cases. Assuming a higher going concern value depends on the existence of two factors: the debtor's assets must be worth more if they remain together than if they are separated and sold, and the debtor's long-term prospects must be better than the short-term prospects. Where either of these factors is absent, the welfare of the group as a whole will be enhanced by an early liquidation of the debtor, as opposed to a collective proceeding in which some interests stand to gain more at the expense of others. A primary justification for bankruptcy law, then, is to provide incentives to claimants so that each of them individually, as well as at the group level, finds it optimal to either wait or collect immediately, depending on the underlying empirical realities and the interests of the claimants as a group. Whatever course the law encourages the parties to take, the primary objective will necessarily be to maximise the total welfare of the group. The dilemma, however, is that the law cannot ensure that the interests of any particular group of claimants coincide with the interests of the whole.

the insolvency proceedings by reaching an agreement or by subsuming himself in the insolvency liquidation and not by his own individual means of execution exogenously to the insolvency proceedings? It should not be forgotten that one of the costs of the guarantee is precisely that of having discounted the behavioural control and monitoring of its activity both before and during the insolvency proceedings [54].

But what is the value of a going concern in insolvency and what can be expected from the security over its main assets?[55]Does a secured creditor have or has had an interest in filing for insolvency proceedings in a timely manner, does it really have a conservative interest in the continuity and preservation of the company or, in the event of insolvency proceedings that may end in a composition agreement, does it attract a sufficient and probably over-guaranteed write-off and a waiting period for the secured creditor?

Is the immunity and shielding that the insolvency law itself and the financial collateral law shields and provides to the secured creditor efficient, so that he can divest himself of these and participate in the insolvency proceedings by reaching an agreement or subsuming himself in

[54] Cordero, Tratado de los derechos de garantía, cit., p. 650, reminds us that the supporters of guarantees and their efficiency in bankruptcy argue that any restriction of the effects of the guarantee in bankruptcy has a perverse effect, since the creditor will be shielded from the rigours of bankruptcy through the procedure of constituting over-guarantees disproportionate to the value of his claim.

[55] According to Jackson/Scott, "The Nature of Bankruptcy", cit., p. 27 and 28 the going concern value does not exceed the liquidation value in all cases. Assuming a higher going concern value depends on the existence of two factors: the debtor's assets must be worth more if they remain together than if they are separated and sold, and the debtor's long-term prospects must be better than the short-term prospects. Where either of these factors is absent, the welfare of the group as a whole will be enhanced by an early liquidation of the debtor, as opposed to a collective proceeding in which some interests stand to gain more at the expense of others. A primary justification for bankruptcy law, then, is to provide incentives to claimants so that each of them individually, as well as at the group level, finds it optimal to either wait or collect immediately, depending on the underlying empirical realities and the interests of the claimants as a group. Whatever course the law encourages the parties to take, the primary objective will necessarily be to maximise the total welfare of the group. The dilemma, however, is that the law cannot ensure that the interests of any particular group of claimants coincide with the interests of the whole.

the insolvency liquidation and not by his own individual means of execution exogenously to the insolvency proceedings? It should not be forgotten that, among the costs of the guarantee, is precisely that of having discounted the control of behavioural behaviour and monitoring of its activity both before and during the insolvency proceedings [56].

But what happens if there is no truly competitive market where recovery rates are not high and recovery times are not excessively long, especially if the guarantee enforcement mechanisms are slow and not very dynamic, as well as costly? How long does it take to enforce a guarantee and what is its price? Does the quality of the debtor and the object given as security differ?

Let us think of the vigour and strength that a guarantee such as the fiduciary transfer ends up providing [57]. And where nobody ignores the guarantee function inherent to it, a sufficient and suitable cause for the transfer/acquisition of the property, but can the same occur within this supposed flexibility with a sale with a retroactive agreement and that seeks an analogous function [58]? And the security function that radiates

---

[56] Cordero, Tratado de los derechos de garantía, cit., p. 650, reminds us that the supporters of guarantees and their efficiency in bankruptcy argue that any restriction of the effects of the guarantee in bankruptcy has a perverse effect, as the creditor will be protected from the rigours of bankruptcy by the procedure of constituting over-guarantees disproportionate to the value of his claim.

[57] Obligatory reference to authors such as Anelli, *L´alienazione in funzione di garanzia*, Milano, 1996, quién en p. 89 subraya que la esencia de la estipulación comisoria puede sintetizarse en la «predisposizione di una modalità di estinzione alternativa e secondaria del credito mediante il trasferimento (passaggio) al creditore della proprietà della cosa costituita in pegno o oggetto di ipoteca: tale effetto traslativo, in funzione satisfattiva, è programmato e stabilito già prima del verificarsi dell'inadempimento, al momento della costituzione della garanzia (…) Si tratta di una regolamentazione ex ante della fase patologica del rapporto obbligatorio: questo è, all'essenza, il fenomeno negoziale cui la legge disconosce validità»; Cipriani, "La cessione di crediti a scopo di garanzia tra patto commissorio e patto marciano", Riv. dir. imp. , 2010, pp. 123 y ss.; also Giglioti, "La cessione del credito a scopo di garanzia: profili sistematici", Studi in memoria di Giovanni Gabrielli, I, Napoli, 2018, pp. 1059 y ss.; o la monografía de la profesora Salvatore, *Trasferimenti di proprietà tra garanzia del credito e liquidazione dei beni*, Napoli, 2018. Clásico en la doctrina italiana el trabajo de Varrone, *Il trasferimento della proprietà a scopo di garanzia*, Napoli 1968.

[58] On the conceptual and practical basis of the guarantee function in alienation or "alienazioni commisorie", see, Moscogiuri, "L´esdibitazione nell´attuazione del patto

from an alienation that is ultimately commission-based? In many legislations, the structure of ownership and apprehensibility that the guarantee can ultimately play in the end does not fall on deaf ears [59]; although we must not forget that this development is essentially and fundamentally in the financial and banking framework as sophisticated,

marciano disciplinato dall´art. 48-bis T.U.B.", Orizzonti del diritto commerciale, 2019, n.º 1, pp. 151 y ss., sobre todo, p. 176 cuanso sostiene: "la costruzione del patto commissorio come alienazione in garanzia, sia quella del patto configurato nei termini del contratto con esclusiva funzione solutoria, sembrano contenere una verità di fondo. Se così si può dire, l'errore sta nel considerare le due concezioni come alternative, cioè non conciliabili l'una con l'altra. In realtà, entrambe le funzioni, intese per ora genericamente, sembrano coessenziali alla stipulazione commissoria, tanto che parte della dottrina più recente ritiene le due causae — solvendi e cavendi — coesistenti, in maniera simultanea o, eventualmente, consecutiva. Può dirsi, anzi, che le due funzioni sono in rapporto di vicendevole implicazione. Ma occorre chiarire questo punto, perché una conclusione sincretistica, alla fine, risulterebbe semplicemente ambigua, se non intrinsecamente erronea, e forse priva di ogni utilità pratica e sistematica. Posto che le espressioni funzione di garanzia e funzione solutoria hanno una forte carica di indeterminatezza, può essere utile, per non cadere nelle trappole di una terminologia polisensa, seguire le riflessioni condotte sulla figura della cessione del credito. Un banco di prova estremamente sensibile in quanto, notoriamente, tale cessione può svolgere l'una o l'altra finalità, propriamente intese sotto il profilo della fondamentale connotazione funzionale del negozio".

59 An excellent retrospective in Rodríguez-rosado, "La transmisión de propiedad en garantía en Alemania y los problemas para su aceptación en derecho español", Revista de Derecho Civil, 2017, vol. IV, No. 3, pp. 63 et seq, and where he specifies, p. 87, the greatest difficulties in understanding the figure in its relationship with the transfer of possession, thus, he points out: "The greatest problem presented by the transfer of property in guarantee in the German system, and what has caused the greatest controversy, is the perception that the figure constitutes a fraud to the rule that requires the transfer of possession in the pledge. In order to understand the issue properly, it must be borne in mind that the German security trust is primarily a security interest in movable property — it can be said that a transfer of ownership in security over real estate is a school case in Germany. And that practice brought it into being in order to allow the creation of a movable security that did not require a transfer of possession, as is always the case with a pledge (§1205 BGB). By transferring ownership by way of security, which is also permitted by means of a constituto possessorio — which does not apply to the pledge — a figure is achieved which fulfils the function of a pledge, with certain relaxations as to its modes of operation — remember the freedom of agreement as to the form of execution — and clear risks for the guarantor, but which allows the guarantor-transmitter, normally a debtor, to remain in possession of the thing while enjoying the credit".

professional creditors and without suffering a priori from the hindrances of an information asymmetry when objectively discounting the risks of insolvency or default of the debtor [60].

Are the financial executions of professional entities facilitated above all according to the type of debtor, whether the debtor is a small entrepreneur or even an individual, or a listed company for example [61]? Not all debtors, at least a priori, are treated equally when it comes to the enforcement of their collateral, nor when it comes to the granting of credit, given that their bargaining power is very different. What leeway does a consumer have, what leeway does an individual entrepreneur or a self-employed person have, and what leeway does a group of companies whose parent company is listed have?

Is the loan or financing adjusted to the needs and preferences of the debtor, as well as the guarantee granted (over-guarantee in not a few cases) when we are dealing with a small or micro enterprise or an individual

---

[60] Harris/Mooney, cit., p. 2024 already explored this avenue when they noted: "examines the creation of security interests as a subset of the law governing private property. The well-accepted rights of property owners-to use and freely and effectively to alienate their property and to be secure in their ownership-form the basis of our normative theory of secured transactions. Like broader theories of property law, which generally validate the decisions of debtors to transfer their property outright, our theory generall validates the decisions of debtors to transfer their property for collateral purposes. And like the broader theories, our theory respects personal autonomy and freedom of contract. In developing our theory, we seek to put to rest any general skepticism about the value of security interests and biases against the creation and effectiveness of security interests. Alternatively, we hope to elicit from the skeptics a more explicit and principled critique of security". Esto ha llevado a Chianale, *Evoluzione*, cit., p. 19 a sostener que una similar evolución estructural de la garantía real se "staglia la sempre maggiore specificità della posizione del creditore bancario, che di tale evoluzione appare essere il principale, se non addirituta l´unico beneficiario. Lo sviluppo attuale delle garanzie reali mostra così l´ipocrisia che si cela nella definizione unitaria abitualmente data del *ceto creditorio*, che in realtà va scomposto in differenti categorie, sulle quali primeggia il finanziatore bancario".

[61] He has no doubts in his study at EU level, Steffek, "Enforcing Bank loans", cit., p. 1224, when he points out that "Member States facilitate the enforcement of bank loans most against corporate debtors, somewhat less against entrepreneurs organised as sole traders and partnerships and least against consumers". And on p. 1225 it argues: "Differences in the ease of enforcement in relation to different types of debtors are potentially relevant to the pricing of credit."

entrepreneur, or only when we are dealing with large corporations [62]? And now let us move on to the perimeters of insolvency and cash-flow difficulties in restructuring and refinancing agreements. In hypothetical cases, enforceable equality should avoid aggravating the cost of credit and, incidentally, distorting the mechanisms for granting and then setting up security interest [63]. A priori, an academic view of the efficiency of security interests in the framework of insolvency proceedings prevails, but,

[62] On these issues see the empirical study of preference and cost adjustments between lenders and borrowers depending on the position and type of debtors in a landmark study on whether contract law avoids or is a better solution than bankruptcy by WARREN/WESTBROOK, "Contracting out of Bankruptcy: An Empirical Intervention", Harvard Law Review, 2005, vol. 118, pp. 1197 ff. This article draws on data from an extensive empirical study of commercial bankruptcy cases to cast serious doubt on two of the fundamental premises necessary to support claims that bankruptcy law should be replaced by predetermined procedures established by contract. Various proposals have been made to privatise the bankruptcy process by contract. Proponents of these contractualist approaches assume that predetermined structures negotiated in the market will reduce transaction costs and improve post-default outcomes. While these proposals necessarily materially affect the interests of third parties, their proponents suggest devices that are intended to make that process efficient and non-redistributive. An underlying premise of a contractual approach is that third parties can adjust their prices and terms to account for the effects of proposed bankruptcy contracts. Previous research has challenged this premise by identifying categories of involuntary and misfit creditors who were unable to make such adjustments. This article quantifies that criticism for the first time, showing that in most commercial bankruptcies there are many involuntary or misfit creditors. Second, contract theories necessarily assume that many or most commercial bankruptcies involve relatively few claims, because numerous claims, especially small ones, would impose transaction costs that are substantial enough to make individual negotiation or even unilateral adjustment by each creditor impossible. Indeed, the data reveal that the typical corporate bankruptcy case features many claims that are too small to be adjusted. These data demonstrate that a contractualist system is likely to produce substantial inefficiencies, including a redistribution of wealth to the parties to the proposed bankruptcy contracts. The data support the superiority of a bankruptcy law model that provides an unwaivable collective infrastructure for the resolution of a multi-party economic problem.

[63] CORDERO, Tratado, cit., p. 650, reminds us that the supporters of guarantees and their efficiency in bankruptcy argue that any restriction of the effects of the guarantee in bankruptcy has a perverse effect, as the creditor will be protected from the rigours of bankruptcy by means of the procedure of constituting over-guarantees disproportionate to the value of his claim.

curiously, no one has developed a dogmatic-empirical construction with the weight or solidity to refute a contrary view.

Already in the late 1970s American authors were asking why does the law allow guaranteed funding in the first place? Put another way, why does the law allow a debtor to prefer some creditors over others by securing their claims, rather than requiring all creditors to share in the debtor's assets [64]?

Figures and structures which, despite their general unfamiliarity, have two key extrinsic qualities in the credit and collateral market, namely reliability and rapid solutary execution. Security in their constitution, preservation of the value of the collateral with or without rotation or mutability throughout the legal relationship and, finally, efficient maximisation of the enforcement structures (whether expropriatory per se, seizable, or through auction mechanisms).

However, we must ask ourselves whether a secured loan finds its ideal scenario in an individual enforcement or, on the contrary, in a collective one such as an arrangement with creditors, especially in legal systems where, as in Spain, the exit is facilitated and, to a certain extent, absolute immunity (except for those assets necessary for the arrangement and the continuity of the activity within one year or if an agreement is approved) [65].

---

[64] These were questions posed by JACKSON/KRONMAN, cit., p. 1146 and where they further argued: ""[E]ven assuming there is no principled objection to debtor-created preferences of this sort, what explains the widespread use of secured financing, and why do some classes of creditors typically finance on a secured basis and others on an unsecured one?"; for their part, HARRIS/MOONEY, cit, p. 2026 saw how these questions can explain what is at best a confusion, and at worst a methodological error, found in much of the efficiency literature. Like many before them, Jackson and Kronman examined the phenomenon of secured credit in the context of its distributional effects, specifically, its effects on the expected return to unsecured creditors of an insolvent debtor.

[65] As AZOFRA VEGAS, "El acreedor con garantía real en los procesos de reestructuración", cit., p. 203, points out with regard to the evolution of pre-insolvency institutions, the value of the secured credit does not lie in the mere existence of the security interest, but in its value. And the relevant moment for the assessment of the value of the security interest, in the context of the approval of the RA, is the moment of the subscription of the refinancing, the application for and granting of the approval, with what happens afterwards being irrelevant.

Another question will be whether or not these assets handed over as collateral generate optimal returns in the interim. The same applies to the reinforcement of any creditor's ability to recover claims through the force of contractual autonomy. It is in these two areas that efficiency, or at least the search for it, of modern and dynamic collateral now takes place. More reliability and confidence in certain figures and shielding of contractual autonomy with a view to immediate executions and without problems of conflictual protection against other creditors [66].

Banishment of rigidities, but also of dogmatic abstractions that until now have practically stifled dynamism and financial engineering when it comes to creating new products, modern figures. And among them, the old problem or anathema, advertising. A system of advertising that today, with the rise of new technologies and the blockchain system, can take the demands of advertising to a new dimension, with greater certainty, indelibility, guarantee and extension by being easy to access, avoiding the genuine problem of advertising, its clandestinity and opacity for the market and credit [67].

---

66 Steffek, "Enforcing Bank loans", cit., p. 1225, asks and concludes: "Do banks find a better legal environment in individual enforcement than in collective enforcement? The answers from the Member States show a remarkable pattern aggregated at EU level. Banks find enforcement most advantageous for secured and unsecured claims in insolvency proceedings. There is little variation as to the type of debt (secured or unsecured). What matters rather is that enforcement takes place in collective insolvency proceedings. Focusing rather on the type of debt, by far the worst situation for all types of debtors is the individual enforcement of an unsecured loan".

67 On this point, see the seminar-study, by Professor Akseli, "Blockchain and the Uncitral model law on secured transactions: a question of compatibility", IGKK, 11 April 2019, which addressed the potential use of a blockchain-based distributed ledger platform as a security rights registry, as well as its interaction with the principles of the UNCITRAL Model Law on Secured Transactions ('MLST'). This type of technology has the potential to revolutionise the third-party effectiveness of movable collateral. In this process, modern MLST principles could play a key role in reducing the cost of credit and expanding financial inclusion for small businesses and individuals. The Seminar argues that blockchain technology and distributed ledger through disintermediation have the necessary characteristics to decentralise and streamline the registration of collateral. The technology can also support the creation of security interests in digital assets. These assets include receivables denominated as cryptocurrencies, units denominated as cryptocurrencies, blockchain-based tokens representing negotiable documents, and blockchain-based tokens representing securities.