A new dawn for cooperative territoriality in maritime insolvency[°]

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1. Introduction

The crisis hitting the shipping industry in the 2010s, which culminated in the insolvency of the Korean shipping giant Hanjin Shipping,[1] led to increased attention in legal scholarship for the legal issues arising in insolvencies of shipping companies or *maritime insolvency*.[2] This renewed attention was also reflected in the *Comité Maritime International* ('CMI'), which installed an International Working Group ('IWG') on Cross-Border Insolvencies[3] in this period to tackle the existing legal issues surrounding maritime insolvency. Nowadays, the storm of maritime insolvencies has died down, resulting in less attention for this matter in legal literature as well.

However, despite laudable efforts, among others within the IWG on Cross-Border Insolvencies, domestic and international lawmakers have remained rather inert in taking legislative action on maritime insolvency issues. As a result, the legal issues which complicated the administration of Hanjin's insolvency and of other maritime insolvencies remain largely unresolved. Given that two fields of law concur in a maritime insolvency, i.e. not only maritime law but also insolvency law, the fact that the insolvency community has paid little attention to maritime insolvency[4] compared to the maritime community, probably also contributes to why legislative action has remained limited.

Within this context, the current contribution aims to revive the scholarly debate on maritime insolvency, with the ambition to provide for recommendations which can find support both in the maritime as well as in the insolvency community. Admittedly, in recent years, shipping companies have become more resilient against the risk of insolvency, partially thanks to advanced economic and organisational strategies developed after the latest crisis.[5] However, concluding that shipping companies have become immune from the risk of insolvency would

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1 A succinct overview of what happened in Hanjin's insolvency can be consulted in Minjee Kim, "Cross-Border Insolvency and Debt Reconstructing Law Reform in Singapore: Reflections on the Hanjin Shipping Case" (2019) 19 Austl J Asian L 237-238

2 Most notably resulting in two monographs on this matter: Lia Athanassiou, *Maritime Cross-Border Insolvency under the European Insolvency Regulation and the UNCITRAL Model Law* (2018 Routledge) and Erik Göretzlehner, *Maritime Cross-Border Insolvency. An Analysis for Germany, England & Wales and the USA* (2019 Springer)

3 See < https://comitemaritime.org/work/cross-border-insolvencies/ > accessed 31 March 2024

4 In the two largest professional associations in the field of insolvency law, INSOL International and the International Insolvency Institute, only a single brief commentary on maritime insolvency can be found: Ilana Volkov, "The Chapter 15 Case of Hanjin Shipping" (2018) INSOL US Column, < https://www.insol-europe.org/download/documents/1532 > accessed 31 March 2024

5 Huizhu Ju, *et al*, "An investigation into the forces shaping the evolution of global shipping alliances" (2023) Maritime Policy & Management 3

probably be dangerously hubristic.[6] Accordingly, the time of relative economic prosperity in which the shipping industry finds itself currently should be utilised to address the existing legal issues in a maritime insolvency.

2. Legal issues in a maritime insolvency

2.1. Clash of opposing paradigms

The special nature of ships lies at the core of maritime insolvency issues. Financially, firstly, ships are central to a maritime insolvency given their typically high value, hereby acting as prime collateral to satisfy the creditors in the insolvency. Secondly and most relevantly from a legal perspective, rights on ships are adapted to the special nature of the ship as an inherently mobile asset. For this reason, they deviate from the way in which rights on land-based assets are traditionally administered in insolvency. This results in clashes in a maritime insolvency between two fields of law, i.e. maritime law and cross-border insolvency, which are based on diametrically opposite paradigms of, respectively, territoriality and universalism.[7]

In the field of maritime law, the issues in a maritime insolvency primarily relate to security interests on ships, which broadly include maritime liens, ship mortgages, and maritime claims giving rise to arrest the ship.[8] Following the paradigm of territoriality, these security interests are typically administered and enforced on a territorial basis, following the location of the ship which they encumber.[9]

The field of cross-border insolvency law, in turn, regulates insolvencies with international components and its paradigm of universalism implies that the worldwide insolvency must be governed by a single domestic insolvency regime. This single domestic regime is determined following the country in which the debtor has its centre of main interests. Main insolvency proceedings are opened in this country which, in principle, administer all worldwide assets of the debtor according to its own domestic insolvency regime.[10] Applied to a maritime insolvency, universalism implies that all security interests on ships of the debtor must be

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6 Remarkably, the Belgian preparatory works to its new Maritime Code nuanced the need for specific attention to maritime insolvency issues by stating that "*Incidentally, shipowners rarely go bankrupt*" (Eric Van Hooydonck, *Derde blauwboek over de herziening van het Belgisch Scheepvaartrecht* (2012 Commissie Maritiem Recht) 161) to be overtaken by reality only a few years later.

7 Martin Davies, "Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity" (2018) 66 Am J Comp L 102-104

8 In the meaning of 1952 Brussels Convention relating to the Arrest of Seagoing Ships, Article 1 and 1999 Geneva Convention on Arrest Ships, Article 1

9 Davies (n 7) 103

10 Jay L Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276

administered in main insolvency proceedings following the corresponding domestic insolvency regime, regardless of the location of the ship outside of this jurisdiction. In this way, thus, the traditionally territorial enforcement of security interests on ships is hampered.[11]

2.2. Potential safeguards for security interests on ships

Despite the universalist starting point taken, cross-border insolvency instruments often provide for certain territorial exceptions to protect certain specific categories of creditors. These territorial exceptions could form a safe haven to the administration of security interests on ships in a maritime insolvency, hereby appeasing the clash of paradigms in a maritime insolvency.

Singapore, for instance, enacted the universalist UNCITRAL Model Law on Cross-Border Insolvency ('MLCBI') into its domestic law with certain safeguards for security interests on ships. Thanks to its nature as a model law, the MLCBI can be adapted by enacting states to suit their domestic legal and socio-economic context. Accordingly, Singapore adapted the model law to its domestic context, allowing for a territorial carve-out for security interests on ships.[12] As a result, under Singaporean law, security interests on ships could be enforced territorially in a maritime insolvency, notwithstanding the universalist starting point of the MLCBI.[13]

In the EU, in turn, the 2015 recast European Insolvency Regulation ('EIR'), directly applicable in all EU Member States with the exception of Denmark, provides for a cross-border insolvency system with a similar universalist spirit as the MLCBI. However, several territorial exceptions to the universalist starting point are included in this instrument. Most relevant to maritime insolvency is the near-infamous[14] Article 8 EIR, which grants territorial protection to rights *in rem*. Although the scope of this protection ground is clouded with uncertainty, broadly, it

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11 As happened in *In re Hanjin Shipping Co* 2016 AMC 2126 (US Bankruptcy Court D NJ)

12 Insolvency, Restructuring and Dissolution Act 2018, Third Schedule, Article 20(6) *jo* Singaporean Companies Act, s 262(3); see Belinda Ang, "Arrest and Insolvency, the Legal Tensions between Two Regimes. The Singapore Experience with Cross-Border Insolvency" (Singapore, NUS Centre for Maritime Law Arrest Conventions Colloquium, 29 November 2016) < https://www.judiciary.gov.sg/docs/default-source/news-docs/arrest-and-insolvency-paper-20-nov-2016-with-non-circulation-notation-submitted-21nov-amended-9decamlatest.pdf > accessed 31 March 2024

13 c*ontra* under the US enactment of the MLCBI, see *In re Hanjin* (n 11) and *Evridiki Navigation Inc v Sanko SS Co* 2012 AMC 1817 (Maryland District Court)

14 In the words of Mankowski: "*Nearly everything in it is controversial and surrounded with uncertainties*" Peter Mankowski, "Dingliche Mobiliarsicherheiten im internationalen Insolvenzrecht" 11 (2011) NZI 485

includes secured rights of creditors with a particularly strong connection to a particular asset of the debtor,[15] such as, par excellence, mortgages and hypothecs.[16]

Within the broad category of security interests on ships, the application of Article 8 EIR is particularly ambiguous to maritime liens. Maritime liens are a strong form of security granted by operation of law to a limited number of maritime claimants,[17] such as, notably, salvors, seafarers, and tort claimants.[18] The holder of such maritime lien is granted a particularly strong form of security on the ship with paramount priority over other creditors, hence suggesting their *in rem* nature. However, under the criteria of Article 8 EIR, it is highly uncertain whether they are protected. For one, although Article 8(2) EIR itself refers to "*liens*" as a particular kind of rights *in rem*, other language versions refer to "*pledges*" instead.[19] Nevertheless, from the broad reference to *liens* in this provision, it cannot be deduced that *maritime* liens are also targeted, because, as put succinctly by GILMORE and BLACK:

> *"The beginning of wisdom in the law of maritime liens is that maritime liens and land liens have little in common. A lien is a lien is a lien, but a maritime lien is not."*[20]

In addition, the preparatory works to the EIR also suggest that maritime liens are not protected by Article 8 EIR. More specifically, the rationale cited to justify the restrictions to the scope of Article 8 EIR is that including certain "*privileges"* within its scope would render Article 8 EIR meaningless.[21] Since maritime liens are referred to as *maritime privileges* in civil law legal systems, this passage raises even more doubts as to whether maritime liens can enjoy *in rem* protection under Article 8 EIR.

In the last decade, the Court of Justice of the European Union ('CJEU') has clarified the scope criteria of Article 8 EIR in *Lutz*[22] and *Senior Home*.[23] Nevertheless, uncertainty persists with

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15 Bob Wessels, *International Insolvency Law Part I, Global Perspectives on Cross-Border Insolvency Law* (4th ed, Kluwer 2015) para 10639

16 See EIR, Article 8, 2.

17 William Tetley, *Maritime Liens and Claims* (2nd ed, 1998 Les Éditions Yvon Blais Inc) 59-60

18 Broad international consensus exists that these categories of claims give rise to a maritime lien, while on others more international diversity exists. See also, Ifeoma Obi, *Recognition and enforcement of foreign maritime liens : re-assessing the goal of international uniformity and the role of private international law* (Doctoral dissertation, University of Tasmania 2021) 54-58ff

19 Giorgio Berlingieri, "Defaulting Shipowners and the Regulation of their Insolvency Status" (*CMI* 7 May 2014) 5 < https://comitemaritime.org/work/cross-border-insolvencies/ > accessed 31 March 2024

20 Grant Gilmore and Charles L Black, *The Law of Admiralty* (2nd ed, 1975 The Foundation Press) 589

21 Miguel Virgos and Etienne Schmit, Report on the Convention on Insolvency Proceedings (1996) Council 6500/96 (Council Document) para 102

22 Case 557/13 *Hermann Lutz v Elke Bäuerle* [2015] ECLI 227

23 Case 195/15 *SCI Senior Home v Gemeinde Wedemark and Hannoversche Volksbank eG* [2016] ECLI 804

respect to its application to maritime liens. This uncertainty follows primarily from the fact that the CJEU has determined that the classification under the relevant domestic law as a right *in rem* is conclusive for its corresponding classification under Article 8 EIR.[24] This method is particularly problematic for maritime liens for two interconnected reasons.

Firstly, designating the relevant domestic law to determine the classification of maritime liens is challenging because of the international variety in conflict rules on maritime liens.[25] Thus, by referring to domestic law, Article 8 EIR transposes the legal uncertainty surrounding this conflict question into the administration of maritime insolvency. Secondly, when the relevant domestic law has been determined, uncertainties persist because internationally diverging views exist regarding the exact classification of maritime liens, including classifications as procedural,[26] personal,[27] and proprietary *'in rem'* rights.[28] As a result, the protection of maritime liens under Article 8 EIR risks becoming rather arbitrary, running counter to the strong functional and conceptual similarities of maritime liens across borders. Overall, the conclusion is that maritime liens are not as unequivocally protected under Article 8 EIR as purported by certain authors.[29]

2.3. Knock-on effects

The above analysis illustrates how, although certain safeguards exist in cross-border insolvency instruments that could protect security interests on ships, these safeguards themselves are also a source of uncertainty. As a result, they create further issues in the administration of a maritime insolvency, as further highlighted per cross-border insolvency regime in the paragraphs below.

2.3.1. Under the MLCBI

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24 ibid para 16-20

25 Obi (n 18) 77-131

26 Under English law, see Bankers Trust International Ltd v Todd Shipyards Corporation (*The Halcyon Isle*) [1981] AC 241

27 Under Canadian law, see Todd Shipyards Corp v Altema Compania Maritima SA (*the Ioannis Daskalelis*) (1972) CarswellNat 436; under Dutch law, see René Flach, *Scheepsvoorrechten* (2001 Kluwer) 25.

28 In most civil law countries. This is most clearly expressed under German law by its characterisation of the maritime lien as a statutory rights of pledge on the ship ("*gesetzliches Pfandrecht an dem Schiff*", see § 597 *Handelsgesetzbuch*)

29 cf Athanassiou (n 2) 225 and Göretzlehner (n 2) 133

The issues under the MLCBI created by the uncertainty surrounding security interests on ships relates primarily to the differences between enacting states in providing for a protection ground for security interests on ships. As a result, holders of a security interest on the ship can be treated differently depending on the relevant country in which they are administered, even though, at least in name, these countries have enacted the same cross-border insolvency regime. In one enacting country, such as the US, the ship and its security interests could be considered to fall within the scope of the universalist insolvency proceedings, whereas in another, such as Singapore, they could be carved out from these proceedings. Besides the uncertainty and incoherent administration of the maritime insolvency that this creates, this also encourages opportunistic forum shopping.[30]

2.3.2. Under the EIR

Under the EIR, the issues surrounding maritime liens are further aggravated because ship mortgages unquestionably fall within the scope of Article 8 EIR.[31] This is problematic because these mortgages can receive stronger protection than maritime liens falling outside of the scope of Article 8 EIR, although they typically rank below maritime liens in the priority ranking. As a result, without any apparent justification ground, the priority ranking between maritime liens and ship mortgages risks being inverted in a maritime insolvency, counter to their regulation in maritime law frameworks.

Furthermore, it can be questioned whether the protection standard of Article 8 EIR is even able at all to adequately protect security interests on ships falling within its scope. Particularly the categorization of Article 8 EIR as a territorial exception to the *applicable law* in cross-border insolvency raises questions.[32] In this way, Article 8 EIR could be framed as an exception to the rule that insolvency is governed by the laws of the country where insolvency proceedings have been opened (the *lex fori concursus*).[33] Correspondingly, at first glance, the application of Article 8 EIR to security interests on ships only leads to a territorial departure from the *lex fori concursus*, whereas, procedurally, the ship would remain administered in the main insolvency proceedings. *In concreto*, this would entail that, when the ship is located in a different country than the country where insolvency proceedings have been opened, the ship

30 Göretzlehner (n 2) 118

31 EIR, Article 8, 2. (a) *in fine*; First instance Court Aix-en-Provence (France) 9 July 2012, *Valeria della Gatta* (2013) Il Diritto Marittimo 558

32 See EIR, Recital 22: *"provision should be made for special rules on the applicable law in the case of particularly significant rights and legal relationships (e.g. rights* in rem […])"

33 EIR, Article 7 and Recital 66

would be administered in these insolvency proceedings, albeit pursuant to the law applicable in the country where the ship is located instead of the *lex fori concursus*.

By contrast, however, *outside insolvency*, the effectiveness of the protection provided by security interests on ships is ensured to a large extent by their territorial enforcement, following the location of ship. The security holder typically initiates this territorial enforcement by arresting the ship where it is located; Subsequently, either alternative security is provided to satisfy the arresting creditor or, if this is not feasible, often when the shipowner faces financial difficulties, the ship is sold judicially; [34] Finally, the proceeds of this judicial sale are used to satisfy the competing creditors.[35] Correspondingly, this entire procedure is conducted in the country where the ship is situated initially.

Within insolvency proceedings, such territorial enforcement, segregating the ship from the main insolvency proceedings, cannot be achieved by way of a mere applicable law exception. Notably, however, despite its categorization within the EIR as an applicable law exception, Article 8 EIR may nonetheless provide a more far-reaching protection. This is because, contrary to traditional applicable law provisions,[36] Article 8 EIR does not simply refer to a different law than the *lex fori concursus* to be applied to rights *in rem*. Instead, Article 8 EIR provides that "[t]*he opening of insolvency proceedings* <u>*shall not affect*</u> *the rights* in rem *of creditors or third parties*."[37]

The exact meaning of this phrase "*shall not affect*" has been the subject of ample debate.[38] However, the consensus view is that this phrase implies that insolvency proceedings cannot have any effect on rights *in rem*, neither substantively nor procedurally.[39] Applied to security interests on ships that fall within the scope of Article 8 EIR, this implies that ship arrests in other countries than the insolvency forum should not be affected by the opening of insolvency

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34 Davies (n 7) 110

35 Lief Bleyen, *Judicial Sales of Ships. A Comparative Study* (Hamburg Studies on Maritime Affairs, vol 36, Springer 2016) 141-143

36 E.g. EIR, Articles 11-13

37 Article 8, 1. EIR (emphasis added)

38 See e.g. Axel Flessner, "Dingliche Sicherungsrechte nach dem Europäischen Insolvenzübereinkommen" in Jürgen Basedow (ed.), *Festschrift für Ulrich Drobnig um siebzigsten Geburtstag* (Mohr Siebeck 1998) 285; Eric Dirix and Vincent Sagaert, "Verhaalsrechten en zekerheidsposities van schuldeisers onder de Europese Insolventieverordening" (2002) Tijdschrift voor Belgisch Handelsrecht 112

39 Gabriel Moss, Ian Fletcher and Stuart Isaacs (eds) *The EU Regulation on Insolvency Proceedings* (2016 OUP) para 8.213 ff

proceedings.[40] Correspondingly, the application of Article 8 EIR can lead to a territorial carve-out of security interests on ships from the universalist scope of the insolvency proceedings.

2.3.3. Under the forthcoming UNCITRAL instrument on applicable law

At UNCITRAL, consultations are underway regarding a new instrument concerning the applicable law in cross-border insolvency,[41] supplementing the existing MLCBI, which focuses only on international recognition of foreign insolvency proceedings and subsequent relief measures. Notably during these consultations, the protection of right *in rem* holders has been the cause of recurrent debate.[42] Interestingly, Article 8 EIR is cited as a source of inspiration for this purpose, while concerns are also raised regarding the legal uncertainty surrounding this provision.[43]

According to the latest draft of this new instrument, a compromise solution is in the pipeline which stipulates that rights *in rem* are governed by the *lex fori concursus*, barring the application of a different conflict rule to rights *in rem* in the relevant enacting state.[44] By explicitly leaving room for departures from the standard rule by enacting states, there is an increased risk that similar issues arise as under the MLCBI. In this way, the risk is that uniformity is only reached in name, rather than in substance, on the matter of the applicable law in cross-border insolvency to rights *in rem*.

Furthermore, the special nature of security interests on ships in relation to rights *in rem* has not been taken into account in the UNCITRAL consultations. However, the fallback option provided in this instrument referring to the universalist *lex fori concursus* is particularly problematic to their territorial administration. Hence, the new UNCITRAL instrument on applicable law risks further complicating the administration of security interests on ships in maritime insolvency.

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40 E.g. District Court Rotterdam (the Netherlands) 29 April 2009, *the Hannes C* (2009) S&S 122; Court of Appeal Antwerpen (Belgium) 4 March 2009, *the MS Nomed Istanbul* (2009-10) RW 884; *Valeria della Gatta* (n 31)

41 The next step in the drafting process will be taken at the UNCITRAL Working Group V (Insolvency Law) Sixty-fourth session New York, 13–17 May 2024, see UN General Assembly Annotated provisional agenda of 7 February 2024 A/CN.9/WG.V/WP.191, para 26.

42 UNCITRAL Note A/CN.9/WG.V/WP.190 by the Secretariat on Applicable law Working Group V (Insolvency Law) on the work of its sixty-third session (Vienna 11–15 December 2023) para 12

43 UNCITRAL Report A/CN.9/1088 of Working Group V (Insolvency Law) on the work of its fifty-ninth session (Vienna 13–17 December 2021), para 59, fn 13 explicitly refers to the uncertainty surrounding the phrase "*shall not affect.*"

44 UNCITRAL Note A/CN.9/WG.V/WP.190 by the Secretariat on Applicable law Working Group V (Insolvency Law) on the work of its sixty-third session (Vienna 11–15 December 2023) 15-16

3. Reconciling cross-border insolvency and maritime law

3.1. Common principles

In summary, the above analysis has highlighted that many uncertainties surround the administration of security interests on ships in a cross-border insolvency for reasons that are both external and internal to specific cross-border insolvency protection grounds. On the one hand, externally, the uncertainty relates to the exclusion of (certain) security interests on ships from potentially beneficial protection grounds. On the other, internally, even when security interests fall within the scope of a protection ground, the exact protection standard is often ambiguous or even inadequate to administer security interests on ships. Ultimately, the end result is the same: inconsistency in the administration of security interests on ships in cross-border insolvency. Therefore, the remainder of this contribution explores potential solutions out of the current web of uncertainties.

An apparent course of action would be to adjust the existing protection mechanisms directly in accordance with the needs of security interests on ships. However, as various other interests must be considered in cross-border insolvency instruments as well, such a course of action risks affecting the coherence of the system and creating compromise solutions that only alleviate the existing issues instead of addressing them at their root. Furthermore, adding specific territorial exceptions for maritime matters is probably infeasible given the universalist starting point underlying cross-border insolvency systems, which only allows for a limited number of broadly framed territorial exceptions rather than *ad hoc* exceptions for specific assets or legal relationships.[45] Therefore, a more principle-based approach to the current issues should be explored, which could lead to a more robust solution to the administration of security interests on ships in cross-border insolvency.

The traditional principle-based starting point in discussions on maritime insolvency is often – admittedly, also in this contribution - the irreconcilable paradigms universalism and territorialism underlying cross-border insolvency and maritime law.[46] Intrinsically, however, “universalism” and “territorialism” are not themselves end objectives pursued in these systems, but rather means to certain more fundamental policy objectives. Therefore, to provide for more robust solutions to maritime insolvency issues, one must look below the

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45 See e.g. the broad scope of MLCBI, Article 1-2 and the basic nature of most its rules, see also Wessels (n 15) para 10210.

46 As illustrated by scholarship with telling titles, such as: Alfred Joseph Falzone III, “Two Households, Both Alike in Dignity: The International Feud between Admiralty and Bankruptcy” (2014) 39 Brook J Int'l L 1175 and Ramsay McCullough, “Law Wars: The Battle between Bankruptcy and Admiralty” (2008) 32 Tul Mar LJ 457.

surface of the traditional framed picture of maritime insolvency as a clash between universalism and territorialism.

When doing so, it becomes clear that, fundamentally, cross-border insolvency frameworks and security interests on ships have more in common than suggested by the traditional way of framing. First of all, cross-border insolvency law and maritime law both address the problem that the funds of a debtor are insufficient to satisfy all competing creditors. Therefore, the ultimate purpose of both is arriving at an orderly redistribution of funds between the parties involved. The categorisation of creditors in different classes and installing a priority ranking between them is essential for this purpose.[47]

A main purpose of this categorisation of creditors in a priority ranking is to enable credit provision, which allows debtors to make certain investments. Given that this credit provision can only be enabled if the resulting debt is secured, an important purpose of cross-border insolvency and maritime law frameworks is to ensure that these secured claims receive adequate protection. Ultimately, this protection of secured claims facilitates investments and, hence, trade in general.[48] Thus, in short, cross-border insolvency law and of maritime law share the objective of facilitating trade.

3.2. Facilitation of trade as common objective

In cross-border insolvency, this objective of facilitating trade takes effect through the aforementioned protection of rights *in rem*, as expressed succinctly in the preparatory works ('the Virgos Schmit Report') to the European Convention of Insolvency Proceedings, which acted as the blueprint for the currently applicable EIR:

> *"The fundamental policy pursued is to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee."*[49]

In turn, the objective of facilitating trade in maritime law is comparable, but specifically targeted to *maritime* trade instead of to trade in more general terms. This is expressed in the way that

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47 cf Francesco Berlingieri, "Essays on Maritime Liens and Mortgages and on Arrest of Ships" (1984 CMI) 20-23 and Horst Eidenmuller, "Secured Creditors in Insolvency Proceedings" (2008) 5 ECFR 273

48 See e.g. EIR, Recital 68; MLCBI, preamble (b) cf Allan Philip, "Essays on Maritime Liens and Mortgages and on Arrest of Ships" (1984 CMI) 11

49 Virgos Schmit Report (n 21) para 97

security interests on ships take on different forms than security interests on land-based assets to adapt to the special nature of the ship as collateral. This explains, for instance, why, in civil law countries, a ship can be encumbered with a hypothec, whereas this security is typically reserved to immoveable assets.[50]

Another illustration of this special nature of security interests on ships relates to the opaque or even secret[51] nature of maritime liens in the sense that lienholders are granted a strong form of security on the ship without any registration or other form of publicity required. This allows lienholders to obtain security on the ship swiftly, given that, otherwise, the ship risks setting sail to its next destination leaving their claim unsecured. Thus, the opaque nature of maritime liens facilitates short-term credit to be provided for activities necessary for the expeditious operation of the ship avoiding that those creditors demand immediate payment and halt the expeditious operation of the ship. In this way, maritime liens are pre-eminently adapted to facilitate maritime trade.[52]

3.3. Giving effect to the facilitation of maritime trade

It can be concluded from the analysis above that the objective of facilitating trade should take central stage in designing a solution to maritime insolvency issues. A perhaps more challenging task is giving effect to this common objective in the provisions of current cross-border insolvency instruments. For this purpose, a balance must be sought between advancing this objective in relation to security interests on ships without affecting the overall coherence of the cross-border insolvency instruments in question.

Firstly, therefore, the question is how the objective to advance trade underlying security interests on ships can be aligned in *concreto* within cross-border insolvency instruments. If the objective of cross-border insolvency, and particularly its specific protection grounds for rights *in rem*, is to advance trade in general, this should include maritime trade. Therefore, since the system of security interests on ships has proven to protects the facilitation of maritime trade in particular, it is submitted that the goal of the cross-border insolvency protection grounds should simply be to allow for the application of the former system to its fullest extent.

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50 For this reason, one Dutch commentary even went as far as calling the ship hypothec a "*hybrid monstrosity*", see WF Lichtenauer, *De ontwikkeling van het Nederlandsche Zeerecht onder den invloed van de wetenschap en de handelspraktijk, met bijzondere inachtneming van de Rotterdamsche invloeden* (1934 Themis) 135.

51 *The Yankee Blade* 60 US 89 (US Supreme Court 1856)

52 Philip (n 48) 11

If done otherwise, any intrusion by cross-border insolvency rules risks affecting the coherence of this system specifically designed to facilitate maritime trade. In this way, it would also run counter to cross-border insolvency's own objective to facilitate trade. Therefore, in a maritime insolvency, a fully territorial carve-out of security interests on ships seems most appropriate to advance the fundamental policy of cross-border insolvency of facilitating trade.

Despite this preference for a territorial carve-out for security interests on ships from a normative perspective, it is doubtful whether including this would be feasible in the existing cross-border insolvency instruments. Given the universalist starting point of these instruments, their lawmakers are reluctant to add territorial exceptions, especially not when they are as far-reaching as a full carve-out. In addition, the general nature of these instruments precludes the addition of sundry exceptions for specific interests.[53] Overall, thus, the addition of a territorial carve-out for security interests on ships would probably infringe the coherence of cross-border insolvency instruments too considerably.

Therefore, alternative options must be explored which are less infringing on the coherence of cross-border insolvency systems. Inspiration can be sought for this purpose in the theoretical approaches to cross-border insolvency systems, in particular LOPUCKI's theory of *cooperative territoriality*.[54]

3.4. *Cooperative territoriality*

As suggested by its name, this theory takes territoriality as starting point in cross-border insolvency, meaning that the country in which the assets of the debtor are located determine its insolvency regime.[55] In this way, this theory aligns with the territorial administration of security interests on ships. In addition, the theory of cooperative territoriality calls for cooperation between the actors in the insolvency administering assets of the debtor in different countries.[56] In this way, local interests in the insolvency are deemed to be most adequately protected, while ensuring simultaneously that the worldwide insolvency is administered coherently and efficiently.[57]

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53 Nevertheless, the EIR already includes an explicit protection ground concerning ships, albeit in relation to the protection of the debtor in relation to registered rights (Article 14) and in relation to the protection of third-party purchasers (Article 17)

54 See Lynn M LoPucki, "The case for cooperative territoriality in international bankruptcy." (2000) 98.7 Mich L Rev (2000) 2216

55 ibid 2219-2220

56 ibid 2219

57 ibid 2239-2242, 2251

Although, ultimately, cooperative territoriality had to yield to universalism as main theory underlying the cross-border insolvency instruments currently in place, traces of the former can be found nonetheless in these instruments. Most notably, the 2015 recast of the EIR introduced certain coordination and cooperation mechanisms, particularly with respect to the insolvency of groups of companies.[58] UNCITRAL followed suit by introducing comparable cooperation and coordination mechanisms in a new Model Law on Enterprise Group Insolvency.[59] Since these systems do not consolidate group insolvency proceedings in a single jurisdiction, but only provide for cooperation and coordination mechanisms, a *de facto* system of cooperative territoriality has been introduced to administer group insolvencies.[60]

Therefore, if framed under this same paradigm of cooperative territoriality, the introduction of a territorial exception for rights *in rem* could be justified more convincingly. In fact, such a solution could even be achieved without major legislative action needed. Under the EIR, for one, the explicit inclusion of security interests on ships as an illustration of a particular kind of right *in rem* - in the same vein as has been done for hypothecs and mortgages -[61] could lead to their territorial carve-out under Article 8 EIR. Admittedly, issues would persist concerning to the meaning of the phrase *"shall not affect"* under Article 8 EIR, but these do not only occur in relation to security interests on ships. Thus, in any case, this phrase should be further clarified through CJEU case law or should be addressed during the next revision of the EIR. Besides, to allow for the coordination and cooperation necessary to give full effect to *cooperative* territoriality, recourse can simply be made to the existing cooperation and coordination mechanisms in the EIR.

Under the UNCITRAL instruments, in turn, the responsibility to include safeguards for security interests on ships lies mostly with enacting states. Because of the typical nature of these UNCITRAL instruments as model laws with a general scope, the inclusion of specific provisions for security interests on ships within these instruments would probably be infeasible.[62] Therefore, enacting countries themselves should take the impact into account which the introduction of an UNCITRAL instrument into their domestic law has on security interests on ships.

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58 EIR, Article 41-44 and Chapter V, section 1

59 UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) ('MLEG)'

60 As reflected in the EIR, Chapter V, section I and in the MLEG; see also, Irit Mevorach, "Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge" (2014) 9:1 Brook J Corp Fin & Com L 113

61 EIR, Article 8, 2. (a)

62 *supra* fn 47

Within this context, the theory of cooperative territoriality should be promoted as a suitable paradigm to advance maritime policies without affecting the coherence of these UNCITRAL regimes too substantially. For this purpose, the work done by the CMI on cross-border insolvency can be instrumental. Not only can it raise awareness on this matter, but also provide potential solutions to maritime insolvency issues which can inspire countries enacting the UNCITRAL cross-border insolvency regimes.

4. Conclusion

Advancing the theory of cooperative territoriality to the administration of security interests on ships does not require a radical paradigm shift. Instead, cooperative territoriality offers a solution in which the objectives of cross-border insolvency law and maritime law are aligned, while being framed within an acclaimed theory of cross-border insolvency. This latter aspect is particularly instrumental in bringing the insolvency community on board as well to advance this potential solution.

Furthermore, cooperative territoriality would not be a compromise solution, but rather a golden mean between insolvency and maritime law: the objectives of both systems would simply be aligned without one necessarily having to give leeway to the other. In this way, cooperative territoriality has the advantage over DAVIES' "*middle path of reciprocal comity,*" given that pursuant to this proposal, either the cross-border insolvency regime, or the maritime regime have to give leeway to each other depending on the timing of the relevant procedures.[63] In addition, the simplicity of cooperative territoriality, with its clear preference for the territorial enforcement of security interests on ships regardless of timing, makes this an attractive option.

In any case, with a new UNCITRAL regime on applicable law in insolvency anticipated and with a new revision round of the EIR approaching soon,[64] the time is ripe to draw more attention to maritime insolvency issues again.

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63 Davies (n 7) 106-125

64 EIR, Article 90,1. sets 27 June 2027 as ultimate date for a report on the application of the EIR and where necessary by a proposal for adaptation of this Regulation.