Article

Deadlines for proving debts in corporate insolvencies:

An Anglo-American analysis

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Abstract:

This article examines one of the key mechanisms in corporate insolvencies, the deadline in proving debt, a subject long overlooked in corporate law communities, raising two specific questions. First, whether does the deadline apply to all debt claims, especially in different insolvency procedures? Second, what remedies are available to forgiving a late claim that missed the deadline for various reasons. This article calls for a consistent approach on both whether to impose a deadline in the first place and on whether to offer relief to late claimants. In addition, the article proposes the adoption of the good faith principle on office-holders when dealing with a late claim that has been clearly recorded on the company's books.

I Introduction

This article is dedicated to commemorating the great life of my PhD supervisor, the late Professor Roman Tomasic, who sadly passed away last year. Tomasic's departure is a heavy loss to our international corporate law research community. Throughout his life, Tomasic remained an active researcher, advising and mentoring scholars of future generations, with myself included. Tomasic smiles and is a happy person in his fruitful life, and I am sure he is smiling at me when he reads this article from the heaven.

In line with Tomasic's research interests, this article investigates a significant legal mechanism in corporate insolvencies: the deadline for proving debts, a subject which is key for creditor protection but seems to be neglected for long by researchers. The deadline, commonly known as 'the bar date' in the USA[1] and officially called 'the last date for proving' in the UK,[2] is to compel creditors to lodge their debts or claims before a fixed point of time, beyond which the claim can be legally disregarded. Without using a deadline, both finality and efficiency of

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[1] *Re DIX*, 95 BR 134 (BAP, 1988) (*DIX*); S P Mosley, 'Bankruptcy: Excusable Neglect: Late Filings of Bankruptcy Proofs of Claims Are Not Limited to Those beyond the Filer's Ability to Control: *Pioneer Inv Servs Co* v *Brunswick Assoc Ltd. Partnership*, 113 S Ct 1489 (1993)' (1994) 16 *University of Arkansas at Little Rock Law Journal* 47.

[2] The Insolvency (England and Wales) Rules 2016 (UK) r 14.32(2) (The Insolvency Rules 2016).

managing the insolvent company's estate could be undermined.[3] Prove your debt before the deadline; otherwise, your debt is treated as dead. It looks very straightforward, but in reality, it is not as simple as that.

At least two key issues about the deadline for proving debts remain under-investigated. The first is whether all debt claims should be proved before a deadline, and many confusing explanations can be found. Second, more important, what remedies are available for creditors who submit debt claims after the deadline. Many may read the deadline at its face value, believing that a late claim will be automatically barred; in reality, again, it is not the case. This article investigates the conditions under which a late claimant can be forgiven.

To untangle these two questions, this article conducts a comparative analysis between the jurisdictions of the USA and the UK.[4] Choosing them is partly because these two jurisdictions are still among the most influential nations shaping the global legal debate and partly because of the rich experiences generated from legal cases of great quantity adjudicated in both the USA and the UK courts.

To this end, the rest of the article proceeds in three parts. Part II examines where a debt claim deadline can be imposed, questioning the justification of distinctive treatments to debt claims. Part III explores the remedies for late claimants who missed the deadline. Part IV concludes, calling for more empirical studies on the justification of a debt-proving procedure in corporate insolvencies.

II Do I need to prove my debt or claim before the deadline?

Before exploring whether a creditor needs to lodge a proof of debt before the deadline, the question of who is entitled to set a deadline is to be investigated first. A comparison between the USA and the UK can generate surprising results.

A The authorities setting the deadline for proving debts

For simplicity, only the dominant corporate insolvency procedures in these two jurisdictions are examined: in the USA, this means Ch 7 for liquidation and Ch 11 on reorganization[5] and in the UK, it covers liquidation (also known as winding up), administration (a major corporate rescue procedure) and company voluntary arrangement (CVA) (usually referred as its acronym CVA).[6]

[3] K J Caputo, 'Customer Claims in SIPA Liquidations: Claims Filing and the Impact of Ordinary Bankruptcy Standards on Post-Bar Date Claim Amendments in SIPA Proceedings' (2012) 20 *American Bankruptcy Institute Law Review* 235 at 263; A K Punyani, 'Debtor-Filed Acknowledgments of Creditors' Claims: An Alternative Approach to Proof of Claim in Chapter 13' (2006) 28 *Cardozo Law Review* 511 at 521; J P Hennigan, Jr, 'Under What Circumstances May a Bankruptcy Court Excuse a Creditor's Untimeliness in Filing a Proof of Claim?' (1992) 30 *Preview of United States Supreme Court Cases* 99 at 101.

[4] Given the complexity of the four jurisdictions, England, Wales, Scotland and North Ireland, in the UK, this article only chooses the law in England and Wales to represent the UK law for simplicity.

[5] For an overview of the USA bankruptcy law system, see E Warren et al, *The Law of Debtors and Creditors: Text, Cases, and Problems (*8th ed, Aspen, 2021).

[6] Three excellent UK textbooks on corporate insolvency law is worth recommending: R. Goode and K V Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th ed, Sweet & Maxwell, 2018), A Keay and P Walton, *Insolvency Law: Corporate and Personal* (5th ed, LexisNexis, 2020); V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd ed, Cambridge University Press, 2017).

Generally speaking, a debt-proving deadline can be set either directly by statutes, by law courts or by office-holders on the case-by-case basis. In the USA, under the current Federal Bankruptcy Rules, in a Ch 7 liquidation, a statute-mandated deadline is automatically triggered: creditors must file the proofs of claims within 70 days in a voluntary case and 90 days in an involuntary one.[7] More specifically, in a voluntary Ch 7 procedure, the 70-day limitation period starts when the debtor files the liquidation petition, and in an involuntary one, the 90-day limit commences at the time when the bankruptcy court agrees with the petitioning creditor's liquidation request. The time appears to be very short and the policy intention is to facilitate a quick liquidation of the debtor.

Although the 70- or 90-day period looks very harsh, the USA Federal Bankruptcy Rules do offer two concessions. First, if the creditor is a government agency, the deadline is enlarged to 180 days[8] on the grounds that the sovereignty of the state is traditionally given a special status in the USA and that most government debts are non-consensual;[9] as predicted, the generous concession offered to government agencies invites much criticism.[10] Second, for a creditor who is an infant or is an incompetent person, the court may extend the deadline for the sake of justice if the extension does not unduly protract the management of the case;[11] in this scenario, the bankruptcy rules give no clear guidance as for how long the extension can be, and this is probably intended to be fully subject to the discretion of the bankruptcy judge.

However, in a Ch 11 reorganization, the deadline arrangement is different. For disputed, contingent or unliquidated debts in a Ch 11 case, there is no statute-mandated deadline for proving debts; instead, this power is given to the bankruptcy court and the bankruptcy rules authorise the court to fix a time as the deadline; and in particular, it is subject to the discretion of the court deciding how long the deadline should be in a Ch 11 case.[12] The different arrangements on the debt proving deadline between Chs 7 and 11 may simply lead to confusion not only to legal communities but also to the general public. Chapter 7 needs to be done efficiently and this is supposed to apply to Ch 11 equally.[13]

Unlike the USA's preference of either a statute-mandated or court-sanctioned deadline, the UK takes a totally different approach. First, there is no deadline directly specified by any statutes, procedural and substantial. Second, partly because the UK does not have a special bankruptcy court system, it is usually the office-holder setting a deadline for debt proving,[14] although, by law, the court may or may not 'fix a time or times with which creditors are to

[7] Federal Rules of Bankruptcy Procedure r 3002.
[8] Above, at r 3002(c)(1).
[9] See generally F R Hill, 'Toward a Theory of Bankruptcy Tax: A Statutory Coordination Approach' (1996) 50 *Tax Lawyer* 103 at 111.
[10] See C M Jenks, 'The Tax Collector in Bankruptcy Court: The Government's Uneasy Role as Creditor in Bankruptcy' (1993) 71 *Taxe*s 847.
[11] Federal Rules of Bankruptcy Procedure (n 7) r 3002(c)(2).
[12] Above, at r 3003(c). See also B A Harrill, 'Equitable Standards of Excusable Neglect: A Critical Analysis of *Pioneer Investment Services Co v Brunswick Associates Limited Partnership*' (1994) 11 *Bankruptcy Development Journal* 181 at 185.
[13] *Pioneer Investment Services Co v Brunswick Associates Ltd Partnership* (6th Cir, No 90-6339, September 6, 1991) slip op 193a (*Pioneer Investment Services Co 1991*).
[14] For example, *John Doyle Construction Ltd (in liq) v Erith Contractors Ltd* [2021] EWCA Civ 1452 (*John Doyle Construction Ltd*): the liquidator sets a deadline for debt proving); *Tucker (in liq) v Gold Fields Mining LCC* [2009] EWCA Civ 173 (*Tucker*): a deadline for proving debts was set in a CVA proposal); 'Notice of Intended Dividends: Lehman Brothers Holdings PLC', *The London Gazette*, 9 August 2017 (a deadline was set for unsecured claims by the administrator).

prove their debts or claims.'[15] In theory, the court is given the power to do so, but in practice, it remains rare. Occasionally, an office-holder may seek a general court approval of the distribution plan, which comprises of the significant debt proving deadline and this is essentially to give the office-holder a bombing shelter in case of any potential challenges ahead.[16] Similar to what happens in the USA Ch 11, the time scale of a deadline is subject to the discretion of the office-holder in all insolvency procedures in the UK. The only restriction to UK office-holders is that the deadline should be set 'not less than 21 days from the date of notice'.[17]

The aforementioned survey suggests that perhaps the legislation-imposed deadline in the USA Ch 7s is more preferable since its great strength is the creation of certainty. Certainty in most cases will lead to better compliance. The UK's approaches, together with the USA Ch 11 arrangement, do provide some flexibility but certainty may be sacrificed. Certainty may be further complicated or undermined if the law says that some debts do not need to be proved before a deadline at all.

B Does the debt need to be proved before a deadline or not?

In the USA Ch 7 liquidations, all debts, secured, preferential and unsecured, must be proved before the deadline, which is compulsory for all.[18] Of course, in reality, for most no-asset Ch 7s, especially of individuals, there is no need for creditors to file proofs of claims since there is no distribution.[19] By contrast, in a Ch 11, only disputed, contingent or unliquidated debts should be proved with the bankruptcy court before the court-imposed deadline and for the rest of debts, the creditors could simply rely on the debtor-filed schedule of liabilities, which lists all known creditors and their respective claims, for the purpose of both voting and dividend distribution.[20]

Why are creditors treated differently between Chs 7 and 11? The most cited explanation is that Ch 7 aims for a 'prompt closure and distribution of the debtor's estate',[21] whereas Ch 11 is intended to create a more amicable atmosphere so as to pave the way for reorganization or rehabilitation.[22] This is not very convincing. In a Ch 11, the debtor is required to submit a schedule of liabilities listing all known creditors and their claims, but what should not be forgotten is that in a Ch 7, the debtor is equally obliged to send a schedule of liabilities to the

[15] The Insolvency Act 1986 (UK) s 153 (The Insolvency Act).
[16] *Re Premier FX (in liq)* [2022] EWHC 232 (Ch) (*Premier FX*): in this case, the liquidation distribution plan comprising of the deadline for proving debts was approved by the court; *Re Nortel Networks UK Ltd* [2015] EWHC 2506 (Ch) (*Nortel Networks UK Ltd*): the administrator in this case got the court approval of the administration distribution plan containing the debt proving deadline.
[17] The Insolvency Rules 2016 (n 2) r 14.30.
[18] Federal Rules of Bankruptcy Procedure (n 7) r 3002; *Re Integrity Directional Services, LLC* (WD Okla, Bankruptcy Case No 19-11494-JDL, 17 January 2020) slip op 362 (*Integrity Directional Services*).
[19] US Courts, *Chapter 7: Bankruptcy Basics* (Webpage) <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (accessed 3 February 2023); L A Helbling and C M Klein, 'The Emerging Harmless Innocent Omission Defence to Nondischargeability under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion over Reopening Cases and Amending Schedules to Add Omitted Debts' (1995) 69 *American Bankruptcy Law Journal* 33 at 41.
[20] Federal Rules of Bankruptcy Procedure (n 7) r 3003(a)(b). See also P J Maselli, 'When Is It Never Too Late to File a Proof of Claim?' (1993) 98 *Commercial Law Journal* 304 at 305.
[21] *Pioneer Investment Services Co v Brunswick Associates Ltd Partnership et al* (6th Cir, No 91-1695, 24 March 1993) slip op 1491 (*Pioneer Investment Services Co 1993*).
[22] F W Koger and R B True, 'The Final Word on Excusable Neglect' (1993) 98 *Commercial Law Journal* 21 at 24. See also Hennigan, Jr (n 3).

bankruptcy court.[23] The puzzle is that why a schedule of liabilities in a Ch 11 case is trustworthy by default but its counterpart in Ch 7 is not. Empirical data are needed to justify this.

The UK's approach can be quite unique in its own ways. In principle, whatever a liquidation, administration or company voluntary arrangement, creditors do not need to prove their debts unless they are asked by office-holders to do so.[24] Different from what is practised in the USA Ch 7s, a debt proving process is not automatically commenced in the UK corporate insolvency procedures; creditors will not be asked to lodge proofs of debts unless and until a distribution can be made by office-holders.[25] Namely, if there is no asset available to make a distribution, a debt-proving process will never be invoked.[26] Only when a distribution is expected to take place, the office-holder is required to notice creditors to prove their debts before the deadline. Like in Ch 7s in the USA, all creditors, including secured,[27] preferential[28] and unsecured ones, need to lodge proofs of claims with office-holders before being allowed to join insolvency distribution in the UK.

But the UK does have a pragmatic innovation worth recommending. Under The Insolvency (England and Wales) Rules 2016 (The Insolvency Rules 2016),[29] a small debt not exceeding £1,000 does not need to be proved, and the office-holder will notice creditors holding small claims that their debts have been formally acknowledged according to the debtor's records or statement of affairs unless the notified creditor raises a dispute.[30] This may be a significant cost reduction measure since usually small claim creditors are large in number but are proportionally insignificant in value. However, at least, in theory, it equally raises the question as to why the debtor's records on small debts are trustworthy, whereas its records on the rest of debts are not.

Partly because of the oddities of legislative arrangements, missing the deadline seems to be inevitable. Striking a balance between efficiency and equity to protect innocent late claimants proves to be a challenge.

III Remedies to late claimants who missed the deadline in both the USA and the UK

Given the perceived harsh results of strictly adhering to the deadline, there is a package of measures in the USA to offer reliefs to late claimants, as one commentator vividly points out that whether to allow a late claim 'presents the recurring conflict between orderly enforcement

[23] Federal Rules of Bankruptcy Procedure (n 7) r 1007(b).
[24] The Insolvency (England and Wales) Rules 2016 r 14.28(1). See also A Keay and P Walton, *Insolvency Law Corporate and Personal* (5th ed, LexisNexis,2020) 580.
[25] *John Doyle Construction Ltd* (n 14); Helbling and Klein (n 19).
[26] *Nortel Networks UK Ltd* (n 16).
[27] *Walker v First Trust Bank* [2011] NICh 14 (*Walker*).
[28] L Conway and D Ferguson, *Employment Rights and Insolvency* (Briefing Paper No 0651, 24 April 2020) 14.
[29] The Insolvency Rules 2016 (n 2) rr 14.1, 14.3.
[30] H Groves and E Bailey, *Bailey and Groves: Corporate Insolvency: Law and Practice* (5th ed, LexisNexis, 2017) 28.22.

of procedural deadlines and equitable concern for substantive rights'.[31] But whether to grant relief depends on the insolvency procedure the debtor has entered into.

A Remedies to late claimants in the USA

First, a late claimant is not bound by the deadline if it has not been properly notified. To make sure that the deadline of proving debts is legally binding, the bankruptcy court must serve an adequate notice to all known creditors and a constructive notice to those unknown to the debtor. It is creditors' constitutional rights to have an opportunity for hearing prior to the deprivation of their debt claims.[32] Whatever in Ch 7 or Ch 11, for known creditors, they should be notified by mail and for unknown ones, especially potential tort claimants, publication in the form of newspaper advertisements should be carried out.[33] Admittedly, publication is never sufficient and is intrinsically flawed but it is a realistic option to strike a balance between adequate notification and practicality.[34]

The key point here is that if a creditor known to the debtor has not been noticed by mail, the deadline imposed by the bankruptcy court does not bind this creditor in either Ch 7 or Ch 11, which is crystal clear.[35] More important, publication cannot replace an adequate notice to a known creditor by mail, even if the creditor has read the publication.[36] One caveat is that, under § 523 of the Bankruptcy Code (1978) (Bankruptcy Code), a creditor known to the debtor in a Ch 7 of an individual is still bound by the deadline if the creditor has not received a notice by mail but has obtained actual knowledge of the existence of the Ch 7 case.[37] The inconsistency here is that if it is a Ch 7 of a business, not of an individual, the known creditor who even has had actual knowledge of the case but has not received the bar date notice by mail will not be bound by the deadline and its resultant discharge. Apparently, such a differential treatment seems to be unreasonable. Some even argue that § 523 of the Bankruptcy Code is unconstitutional since it is incompatible with the actual notice guidance embedded in *New York v New York, NH & HR Co*[38] handed down by the US Supreme Court in 1953.[39]

Needless to say, in Ch 11, this is less likely to happen, given that, as noted before, creditors whose claims have been listed on the debtor-filed schedule of liabilities do not need to file proofs of debts at all. In other words, the majority of creditors in Ch 11s do not need to lodge proofs of debt before the Court-imposed deadlines. In Ch 7, if the debtor is an individual, the uninformed creditor is not bound by the deadline and is free from discharge, which means this creditor can still make a claim against the debtor even following the closure of the Ch 7. But the real trouble is that if the Ch 7 debtor is a company, how the uninformed creditor can

[31] Hennigan, Jr (n 3).
[32] *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 (1950) (*Mullane*).
[33] Federal Rules of Bankruptcy Procedure (n 7) r 9008; above, at n 32.
[34] 'Bankruptcy & Creditors' Rights' (1998) 45 *Washington and Lee Law Review* 691 at 702; *Mullane* (n 32).
[35] *Jones v Arross*, 9 F 3d 79 (10th Cir, 1993) (*Jones*); *Re Laczko*, 37 BR 676 (BAP, 1984); Bankruptcy Code, 11 USC § 523 (1978). See also J N Prevost, 'We Left Them off the List: Now What? Unscheduled Creditors in Chapter 7 Bankruptcies' (1993) 54 *Louisiana Law Review* 389 at 395.
[36] N A Franke, 'The Code and the Constitution: Fifth Amendment Limits on the Debtor's Discharge in Bankruptcy' (1990) 17 *Pepperdine Law Review* 853 at 868.
[37] Bankruptcy Code (n 35). See also above, at 856.
[38] 343 US 293 (1953) (*New York*).
[39] Franke (n 36) 863.

chase a debtor which has legally and physically disappeared after the liquidation case was concluded? There are few debates in the latter scenario.

Second, for a late claimant in either Ch 7 or Ch 11, by common law, the Bankruptcy Court may be willing to forgive the error by assessing whether an informal proof that has been lodged before the deadline can be recognised or whether the late claim is essentially to amend an existing one that has been duly filed. An informal proof should satisfy the three conditions: the nature of the claim has been clarified by the claimant, the amount of the claim was presented and the intent of the claimant was to hold the debtor liable.[40] A typical informal proof is where the late claimant sued the debtor in a State Court but failed to formally submit a claim form to the Bankruptcy Court and apparently, in a lawsuit, the three conditions noted above are routinely met. If acknowledged by the Bankruptcy Court, an informal proof of debt can be allowed to be amended as a duly filed one eligible for both voting and distribution.

Similar to an informal proof of claim, the Bankruptcy Court may also open the door for a creditor to amend the correctly lodged proof of claim after the bar date without treating the amendment as a new debt submission or an increase of the claim; it is justifiable for a creditor to make an amendment 'to cure defect in claim as originally filed, to describe claim with greater particularity or to plead new theory of recovery on facts set forth in original claim'.[41] It is worth noting that a debtor-filed schedule of liabilities in Ch 7 is not allowed to be used as an informal proof of claim by any creditor and that it is equally true for creditors who have disputed, contingent or unliquidated claims not to be allowed to cite a Ch 11 schedule of liabilities as an informal proof of debt.[42]

Third, in the absence of the aforementioned two defences, a late claimant may alternatively seek relief by relying on the Federal Rules of Bankruptcy Procedure r 9006(b) (1973) (Federal Rules of Bankruptcy Procedure), which authorises the Bankruptcy Court to extend the deadline for a late claim which missed the bar date due to 'excusable neglect'. Unfortunately, excusable neglect can only be used in Ch 11 according to r 9006(b), which is made for Ch 11 exclusively. But, in principle, a late claimant in Ch 7 can also beg for leniency by quoting excusable neglect enshrined in the Federal Rules of Civil Procedure (1946) r 6(b)(1), which generally authorises a Law Court, including a Bankruptcy Court, to extend the time if 'the party failed to act because of excusable neglect'.[43]

However, it is overwhelmingly held in the USA that excusable neglect can only be invoked to correct a late claim in Ch 11, not in Ch 7, on the grounds that Ch 7 is intended to seek a quick liquidation of the debtor, whereas Ch 11 is tasked with preserving the rights of creditors rather than forfeiting them so as to achieve debtors' reorganization.[44] Critics argue that some Ch 11s are essentially orderly liquidations in the guise of reorganization, which renders the denial of excusable neglect in Ch 7 untenable.[45] In response, the Bankruptcy Court, some argue, tends to interpret excusable neglect very narrowly in a liquidation Ch 11 so as to

[40] *Re Sambo's Restaurants, Inc*, 754 F 2d 811 (9th Cir, 1985). See also Maselli (n 20) 311.
[41] *Re South Atlantic Financial Corporation* (11th Cir, No 84-5165, 5 August 1985).
[42] Above, at n 41. See also *Integrity Directional Services* (n 18).
[43] Koger and True (n 22) 31.
[44] *Pioneer Investment Services Co 1993* (n 21); *Jones* (n 35); *Re DV8, Inc*, 435 BR 738 (Bkrtcy SD Fla, 2010); *Re Cole*, 146 BR 837 (D Colo, 1992). See also Maselli (n 20) 309.
[45] Harrill (n 12) 205.

comply with the spirits of Ch 11.[46] This article is of view that the inconsistency between Chs 7 and 11 as for whether excusable neglect can be applied cannot be sufficiently justified.

Whether excusable neglect should apply in Ch 7 only goes halfway in the debate. The more contentious issue is how to define excusable neglect since the Federal Rules of Bankruptcy Procedure has not given any clues over what constitutes excusable neglect.[47] Arguably, the two leading precedents help explain what excusable neglect is. The first is *Re Magouirk* (*Magouirk*), in which the USA Court of Appeals Ninth Circuit, in 1982, summarised five factors in determining whether excusable neglect can be established:

> (1) whether granting the delay will prejudice the debtor, (2) the length of the delay and its impact on efficient court administration, (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform, (4) whether the creditor acted in good faith, and (5) whether clients should be penalised for their counsel's mistake or neglect.[48]

The *Magouirk* guidance is influential and has been relied upon by many precedents.[49] But the USA Supreme Court in 1993, when adjudicating *Pioneer Investment Services Co v Brunswick Associates Ltd Partnership et al* (*Pioneer*),[50] the second leading precedent, overruled the fifth factor of the *Magouirk* test, highlighting that clients should be responsible for their lawyers' mistakes in missing the deadline.[51] Needless to say, although much guidance has been offered by common law, the Court usually makes a difficult balancing choice when assessing whether excusable neglect can be acknowledged. Even in *Pioneer*, only a 5:4 majority agreed that the late claimant should be forgiven.[52] The same thorny difficulties are also faced by the UK judges.

B How can a late claim be exonerated in the UK?

A frustrated American lawyer may find little relief if she travels from New York to London since the UK law, including statutes and common law, creates more inconsistencies or contradictions on late claim treatments, albeit in different ways.

First, some argue that there is no time limit for creditors to lodge proofs of debt in corporate insolvencies in the UK;[53] this is half right and half wrong. By the UK law, missing the deadline in corporate insolvencies does not extinguish the contractual rights of creditors, and only the Limitation Act 1980 (England and Wales) can have such a drastic effect if the creditor remains silent for up to 6 years.[54] Debt is part of human rights and should be seriously honoured.[55] This is true. However, the problem is that if a creditor fails to lodge a proof of debt before an office-holder-imposed deadline, the late claimant will not be eligible for the proposed distribution.[56] If there is a first and final distribution in a company winding up, administration

[46] *Re Centric Corporation*, 901 F 2d 1514 (10th Cir, 1990). See also Koger and True (n 22) 28.
[47] *Pioneer Investment Services Co 1991* (n 13).
[48] *Re Magouirk*, 693 F 2d 948 (9th Cir, 1982) (*Magouirk*).
[49] *DIX* (n 1).
[50] *Pioneer Investment Services Co 1993* (n 21).
[51] Mosley (n 1) 55.
[52] Harrill (n 12) 196.
[53] *Re Lowston Ltd* [1991] BCLC 570.
[54] *John Doyle Construction Ltd* (n 14).
[55] *Tucker* (n 14).
[56] The Insolvency Rules 2016 (n 2) r 14.27. See also S A Frieze, *Personal Insolvency: Law in Practice* (Sweet & Maxwell, 2004) 117.

or company voluntary arrangement, failing to submit a claim before the deadline means that the debt is essentially eliminated. The practical consequence can be fatal if the no-time-limit argument is blindly accepted.

Second, in the UK, it seems that the prevailing judicial attitude towards where to seek a balance between procedural efficiency and substantial rights seems to lean considerably in favour of the latter. In *Re R-R Realisations Ltd* (*R-R Realisations Ltd*), when gauging whether the disruption caused by the late claims in the company's winding up distribution can be tolerated, the English High Court stresses that '[A]s between injustice and inconvenience of anything like equal degree, it is injustice that must be rejected.'[57] The message is clear: It is substantial justice rather than procedural convenience that should be prioritised under English law. This point was later reaffirmed in *Lomax Leisure Ltd (in liq) v Miller*, where Lady Justice Arden DBE of the Court of Appeals of England and Wales unequivocally states that 'the objective of a liquidation is not, after all, to achieve finality; it is also to achieve a distribution of assets in accordance with the statutory scheme – that is, on the basis of a pari passu distribution to creditors.'[58]

Mainly due to such a legal or judicial philosophy, a late claim is legitimately allowed in the UK. This is a surprise. Does this mean that the office-holder-declared deadline for proving debts is meaningless? The answer is no. For a late claim, there are two outcomes. The first outcome is a happy one, at least in theory. In this scenario, having already missed the deadline for proving the debt, the late creditor is not allowed to join the intended distribution, which is subject to the deadline, but in subsequent distributions, this creditor will be eligible for a catch-up dividend. This happy scenario is based on the assumption that the missed distribution was not a final one and that there will be enough left for future distributions. This can happen since an interim distribution is not uncommon in practice in liquidation or winding up,[59] administration[60] and company voluntary arrangement[61] but it may be too risky for late claimants.

The second outcome is the evidence of the real teeth of the deadline. On the one hand, it is made clear that a late claim is not allowed to disrupt the distribution that has already been made to other creditors and that the recipients got the good title of the dividends,[62] which is also in line with what happens with the first outcome. On the other hand, if there is no further distribution, the late claim is, in substance, eliminated since no assets are available for whatever a catch-up dividend or a further distribution.[63] By law, the late claim is still legally valid and is enforceable but no assets can be attached to meet the claim;[64] the legal acknowledgement is an empty promise and is useless. In practice, it is not unusual to see that there is only one first and

[57] *Re R-R Realisations Ltd* [1980] 1 WLR 805 (*R-R Realisations Ltd*).
[58] *Lomax Leisure Ltd (in liq) v Miller* [2008] EWCA Civ 525.
[59] For example, 'Notice of Intended Dividends: Rud Info System Limited', *The London Gazette*, 8 July 2021 (an interim distribution was made in the creditors' winding up of the company).
[60] For example, 'Notice of Intended Dividends: MF Global Overseas Limited', *The London Gazette*, 14 June 2013 (the second interim distribution took place in the administration of the company).
[61] For example, 'Notice of Intended Dividends: Semester Recruitment Limited: Company Voluntary Arrangement (CVA) Approved 06 August 2012', *The London Gazette*, 12 September 2013 (an interim dividend for unsecured creditors was made in the company voluntary arrangement of this company).
[62] The Insolvency Rules 2016 (n 2) r 14.40(1).
[63] The Insolvency Act (n 15).
[64] *John Doyle Construction Ltd* (n 14).

final distribution in a winding up,[65] administration[66] or company voluntary arrangement,[67] and this is why late claimants should fight and fight hard like their USA counterparts. At issue is what grounds can be relied upon for this battle in the UK.

Third, unlike in the USA, there is no kind of informal proofs recognised under the UK law but amending an already duly filed proof of debt is definitely allowed, especially given the legal relaxation to late claims, as examined before. The UK's refusal to recognise an informal proof of debt, in fact, betrays its generosity philosophy towards late claims. An example can be found in the recent *Re Premier FX (in liq)* (*Premier FX*)[68] case handed down by the High Court of England and Wales. The company originally entered into the administration procedure, which was later converted into winding up; the late claimant submitted his proof of debt to the administrator previously but forgot to make a resubmission in the subsequent winding up to the liquidator before the deadline of 28 June 2021; the late claim was rejected by the liquidator and the following judicial challenge was unsuccessful.[69] Under the USA common law, the three conditions of an informal proof of debt are met: the nature of the claim, the amount of the claim and the creditor's intent to hold the debtor liable, which means that the late claimant in *Premier FX* should be allowed to join the distribution, despite having missed the deadline. But both the UK common law and statutory rules never touch this subject, although the UK law generally tolerates late claims as examined before. This trans-Atlantic comparison suggests how contradictory the UK law is.

Thankfully, there is clear evidence that amending a claim after the deadline is permitted in the UK. For example, in *Walker v First Trust Bank*,[70] the secured creditor forgot to add a value, as required by the insolvency rules,[71] in its proof of debt, and the Court ruled that the liquidator's refusal to accept this claim was unlawful since the creditor should be allowed to amend its claim by clarifying it at a later stage. This is the same with what is practised in the USA.

Also, like its USA counterpart, the UK law does not allow an increase of the claim after the deadline, treating it as a late claim which may be eligible for a subsequent distribution, if there is one.[72] The real trouble for a late claim is that if the current distribution is the final one or if any future distributions are anticipated to be insubstantial, how to argue with the office-holder so as to get the claim accepted for the imminent distribution?

Fourth, now, it seems to be the final game: How to legitimately acknowledge a late claim and to allow it to join the intended distribution? On this question, the UK law looks very weird. The Insolvency Rules 2016 r 14.32(2) answers that 'the office-holder is not obliged to deal with a proof delivered after the last date for proving, but the office-holder may do so if the

[65] For example, 'Notice of Intended Dividends: A Little Present Limited', *The London Gazette*, 17 March 2023 (the distribution is the first and final one).
[66] An example can be seen at 'Notice of Dividends: Plush Realisations Limited', *The London Gazette*, 1 August 2008.
[67] An example can be seen at 'Notice of Intended Dividends: London Street Restaurant Limited', *The London Gazette*, 17 November 2010.
[68] *Premier FX* (n 16).
[69] Above, at n 68.
[70] *Walker* (n 27).
[71] The Insolvency Rules 1986 (England and Wales)) r 4.75(1)(g), which was later amended to The Insolvency Rules 2016 (n 2) r 14.4(1)(g). See also T Ross, 'Proofs and Proxies' (1989) 2 *Insolvency Intelligence* 14 at 15.
[72] The Insolvency Rules 2016 (n 2) r 14.40(1).

office-holder thinks fit'. The irresponsibility of this provision is that it does not tell office-holders how to exercise their discretion in this situation, with no specific guidance offered. The law leaves this difficult question to office-holders. This article attempted to find how this discretion is exercised in practice but could not identify any ascertainable trends. However, there is one recent case which can at least offer a glimpse of how office-holders behave when facing a late claim.

This is *Premier FX* examined before. In this case, since the late claimant did not lodge a proof of debt as required by the liquidator before the deadline, 2 months later, the liquidator informed the late claimant that his claim had not been considered for distribution; the interesting point, in this case, is that during the subsequent court battle, the liquidator's stance was 'neutral', which means that this office-holder essentially declined to exercise the discretion conferred to him by the insolvency rules.[73] Presumably, for the liquidator, since there was no guidance of how to exercise his discretion, the best alternative was to leave this question to the court. The ball is now in the hands of judges.

For judges, whether a late claim can be tolerated first depends on the principles enshrined in The Civil Procedure Rules 1998 (England and Wales) r 3.9–(1), which assesses whether to grant relief to a late claimant on the basis of the factors, including (a) efficiency of the company estate's management; (b) whether non-compliance was intentional; (c) good reasons for non-compliance; (d) whether the party in default has complied with other relevant rules; and (e) effect of granting relief on other parties concerned. Unfortunately, there are few cases where r. 3.9 is relied upon in sanctioning late claims in corporate insolvencies in the UK.

However, there is a rich source of case law in the UK on whether to grant relief to late claimants. Arguably, there are four milestone precedents. Technically speaking, these four cases are not exactly about missing the deadline for proving debts but the principles summarised in them are applicable to late claims in insolvencies, corporate and personal, as is found in the USA.[74] The first is *David v Frowd* (*David*), adjudicated by the Court of Chancery in 1883.[75] This case clarified that a late claim can be considered if the non-compliance party bears no wilful default or shows no absence of reasonable diligence.[76]

However, in the second case of *R-R Realisations Ltd* in 1980, the High Court of England and Wales overruled the *David* guidance, highlighting that the elements of wilful default and due diligence are important but are not sufficient to granting relief to late claims, instead, whether forgiveness can be offered depends on how the Court is satisfied 'what is just'.[77] Unfortunately, *R-R Realisations Ltd* essentially means that British judges do not want to be fettered by old principles; judges also want freedom. But the consequence is that it may lead to great uncertainty to litigants behind which are the general public.

The third watershed case is *Mitchell v News Group Newspapers Ltd* (*Mitchell*), handled by the Court of Appeals in 2013, in which a two-step approach is established to determine

[73] Above, at r 14.32(2).
[74] *Magouirk* (n 48).
[75] *David v Frowd* [1883] 39 ER 657.
[76] Above, at n 75.
[77] *R-R Realisations Ltd* (n 57).

whether non-compliance can be absolved.[78] The first step is to assess whether the breach of the deadline is trivial, i.e., whether the deadline has been significantly violated or whether the breach was 'a failure of form rather than substance'; if it was not trivial, the second step is to ask the late claimant to demonstrate whether there was a good reason causing the breach.[79] One year later, in 2014, the same Court of Appeals took the opportunity in *Denton v TH White*, the fourth critical case, modifying and expanding the two-step approach embedded in *Mitchell* into a three-step one: the first test is more or less the same, but expression is updated from triviality to seriousness and significance, which means that the Court will assess whether non-compliance is serious or significant; the second step remains unchanged, still asking for a good reason; the third step is a new one, guiding judges to 'probing all the circumstances so as to handle the non-compliance justly'.[80] Nevertheless, essentially, whether to grant relief to late claimants is subject to judicial discretion on the case-by-case basis.

Unlike the USA approach of only giving excusable neglect to Ch 11 creditors, both statutes and common law principles in the UK on late claims universally apply in all insolvency procedures, whatever a liquidation or rescue procedure. Probably because a late claim can be allowed in a subsequent distribution in the UK, there are not many legal battles fought on this in Courts, especially compared with the huge number of cases in the USA, some of which are even elevated to the USA Supreme Court.[81]

IV Conclusion

The Anglo-American comparison can raise at least three major issues about debt-proving deadline compliance in corporate insolvencies. First, the fundamental question is whether a debt-proving process should be required in the first place, especially given that both the USA and the UK law requires debtors to file a schedule of liabilities (it's UK equivalence is a statement of affairs). In the USA, for Ch 7 creditors, secured and unsecured, it is compulsory to submit proofs of debt before the statute-imposed deadline; by contrast, for Ch 11 creditors whose debts have been listed on debtor-filed schedules of liabilities not as disputed, contingent or unliquidated, there is no need to file proofs of debt at all. The distinctive treatment between Chs 7 and 11 creditors, arguably, cannot be justified. A further empirical study seems to be warranted to assess the extent to which schedules of liabilities in Ch 7s are accurate or reliable.

The UK law also exposes its inconsistencies in its own ways. It seems to be a significant legislative innovation in the UK by not requiring creditors who hold claims of £1,000 or less to file proofs of debt. But in principle, little has been offered to justify why debtors' own records on small claims can be trusted, whereas the rest of claims should demand the proving action from creditors. Also, it is worth addressing that, except small claim holders, all creditors in three major UK corporate insolvency procedures, including liquidation, administration and company voluntary arrangement, need to lodge proofs of debt before being allowed to join distribution. A similar empirical study is urgently needed to see the reliability of debtors' own

[78] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.
[79] Above, at n 78.
[80] *Denton v TH White* [2014] EWCA Civ 906.
[81] For example, *New York* (n 38) at 73 S Ct 299; *Pioneer Investment Services Co 1993* (n 21).

records. Insolvency practitioners have no incentive to simply rely on company records to meet creditors' demands since a debt-proving process will usually serve the best interest of office-holders who routinely charge fees by hours in the UK. An evidence-based investigation should be done by an independent scholar, and this article calls our insolvency colleagues to take action.

Second, the remedies for late claims in both the USA and the UK are considerably inconsistent. Judges in the USA routinely rule out the application of excusable neglect on late claims in Ch 7s. This can be very harsh, especially given that sometimes a proof of a multimillion dollar debt may be delayed mistakenly and whether forgiveness can be available depends on the specific insolvency procedure the debtor has entered; this is not fair. The UK does not perform better in offering remedies in a consistent way. Although the UK judicial philosophy, it seems, unconditionally allows late claims, the absence of acknowledging an informal proof makes the UK system less generous instead. For the purpose of both efficiency and practicality, the UK law relaxes the debt proving requirement for small claim creditors, which is indeed a novel measure but it also raises the fundamental question of why debtors' records on claims exceeding the small claim cap cannot be relied upon.

Third, the most uncomfortable issue about enforcing deadlines for debt proving in corporate insolvencies is that, in both the USA and the UK, and probably everywhere in other jurisdictions, there is little discussion of the good-faith principle on the side of office-holders. The case law from both the USA and the UK suggests that in most cases, the office-holder knew the existence of the debt but took advantage of the mistake, excusable or not, of the late claimant by denying the distribution to the latter. This is not done in good faith. Comparably, the UK law may do better since at least a late claim can be allowed to join any future distributions if there is one. Probably, more professional guidance should be made to advise insolvency practitioners on how to apply the debt-proving deadline in good faith. It is easier said than done. Ironically, overall, this article has identified more questions than has given answers.

I will raise these questions to Professor Tomasic when I meet him again.