

2008

Accessing the Effects of Chapter 15: Cross-Border Insolvency Cases in US Bankruptcy Courts from 1995-2006

Roxane DeLaurell

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>



Part of the [Bankruptcy Law Commons](#), and the [International Law Commons](#)

Recommended Citation

DeLaurell, Roxane (2008) "Accessing the Effects of Chapter 15: Cross-Border Insolvency Cases in US Bankruptcy Courts from 1995-2006," *South Carolina Journal of International Law and Business*: Vol. 4 : Iss. 2 , Article 2.

Available at: <https://scholarcommons.sc.edu/scjilb/vol4/iss2/2>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

ASSESSING THE EFFECTS OF CHAPTER 15: CROSS-BORDER INSOLVENCY CASES IN US BANKRUPTCY COURTS FROM 1995-2006

*Roxane DeLaurell**

INTRODUCTION

This article addresses the question of whether or not the changes wrought by reforms to the US Bankruptcy Code, 11 U. S.C. §§ 101-1532 (2006), (“Bankruptcy Code” or “Code”) enacted by Congress in October of 2005, are likely to produce the practical outcomes offered in the first instance as a rationale for the new law; and, if so, may those effects be empirically observed and analyzed.

BACKGROUND

Specifically, this paper focuses on those of the reforms present in Chapter 15 which was added to the Bankruptcy Code in 2005 as part of Congressional approval of the Bankruptcy Abuse Prevention and Consumer Protection Act (CITE). This particular provision was selected for several reasons. As a brand new addition to the bankruptcy code, replacing as it does at least one unique section of the existing law, the legal issues addressed by Chapter 15 are now set against a new legal and regulatory backdrop; from a research perspective the introduction of “new” law creates uncertainty—at least in the short term—and may be said to act as a sort of stimulus to actors in the legal environment.

Second, Chapter 15 is based on a model law previously promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”). This is significant because UNCITRAL drafts such laws with similar guidance and intent as domestic laws in the US.¹ UNCITRAL’s

* Assistant Professor, School of Business and Economics, College of Charleston, Charleston, South Carolina. JD, Bowen School of Law, University of Arkansas at Little Rock; LLM with honors, George Washington University, Washington D.C., PhD, University of Texas at Dallas. The author wishes to thank her graduate assistant Angela Lovett as well as the editors of the Journal for their assistance in bringing this article to publication.

¹ UNCITRAL’s work is similar and often parallel to that of domestic working groups—such as the American Law Institute and National Conference of Commissioners on Uniform State Laws—who promulgate commercial model laws such as the UCC which may be adopted by the various states of the union. See, for

proposed or “model” laws are shaped by international negotiation and advisement with the goal of producing regulations which may later be adopted, as nearly in toto as workable, by as many national legislative bodies as is practicable, promoting increased certainty in international contractual agreements.

For the present study, this latter factor is important because of the high levels of economic relationship and intercourse between the US and the nations comprising the European Union. In this instance, UNCITRAL’s Model Law and the aspects of Chapter 15 considered here mirror the pertinent reforms on international insolvency adopted in the EU at an earlier date.² Thus, opportunities for comparison between the two legal regimes seemed natural and readily viable.

This study of the effects of Chapter 15, and the Model Law upon which it is based, represent a culmination of the author’s previous work concerning bankruptcy, international trade and the effects of UNCITRAL’s work on the world economy.³ This current essay begins with a brief exploration of the roots of the problems which led to Congress’ attempt to reform the treatment of international insolvency in US bankruptcy courts and its adoption of UNCITRAL’s model law.

ROOTS OF REFORM

In 2005, the US Congress passed the farthest reaching bankruptcy reform package in a quarter century.⁴ Aside from the highly-anticipated changes it brought to the conduct of consumer bankruptcy cases in the US, the “Bankruptcy Abuse Prevention and Consumer Protection Reform Act” added

example, the Preface to any of the several editions of *Selected Commercial Statutes*, West Group, St. Paul, Minn.

² The EU regulation is not based on the Model Law per se, but it does make clear, with regard to international insolvencies, that the rule on “center of [debtor’s] main interests” is applicable.

³ See Roxane DeLaurell, *Globalization of Regulation: The United Nations Convention on Contracts and the International Sale of Goods (2000)* (unpublished dissertation, University of Texas at Dallas) (on file with author) ; Roxane DeLaurell, *The Role of Legal Regimes in New Industrial Theory*, 5 *Asper Rev. Int’l Bus. & Trade L.* 195-207 (2005); Roxane DeLaurell & Robert Rouse, *The Bankruptcy Reform Act of 2005: A New Landscape*, *THE CPA JOURNAL*, Nov. 2006, at 36-39; Roxane DeLaurell, *An Overview of the 2005 Bankruptcy Reform Act: A Teaching Supplement*, 5 *J. LEGAL STUD.* 1, 38-46 (2006).

⁴ See Arthur B. Federman, *Bankruptcy Abuse Prevention and Consumer Protection Reform Act of 2005 Signed Into Law*, 15 *MO. LAW. WKLY.* (N/A) (2005) (discussion of practical implications of the act’s substantive reforms authored by a sitting bankruptcy court judge).

a new chapter to the Code, Chapter 15, which covers international insolvency law.

Of course, previous to the reform act the US Bankruptcy Courts heard cases involving international insolvencies and the Bankruptcy Code addressed the pertinent issues. Chapter 15, however, is intended to promote efficient adjudication of such cases by (1) simplifying the applicable law and (2) bringing the Code into concert with current international trends.⁵

The law previous to the adoption of Chapter 15 contained two particularly problematic areas which complicated the court's administration of international insolvencies: (1) §304 of the Bankruptcy Code, which covered cases ancillary to foreign proceedings, and (2) §109 which covers debtors' eligibility to file in the US courts. Chapter 15 superceded §304 entirely, and—though it remains intact—the new law is designed to effectively remove all international insolvency cases from the purview of §109.

Much of the argument presented in support of Chapter 15's inclusion in the Code characterized its terms as a means of "streamlining" the administration of international insolvency actions.⁶ Chapter 15's reforms are said to increase efficient administration largely as a matter of removing the ambiguity inherent in the old law's eligibility regulations under §§109 and 304. That uncertainty was often exploited by parties to bankruptcy because there are differences between the US bankruptcy law and those available in other nations.

Existing research has previously documented the fundamental and definable differences in insolvency regimes across national borders.⁷ Two of the most important dimensions along which insolvency regimes differ are: (1) extent of debtors' right to reorganization, and (2) protection of creditors.⁸ As a result, under the law as it existed prior to reform, debtors found at times that the easy standard of eligibility presented by §109 granted them a chance at reorganization where none might be offered in their "home" jurisdiction, more

⁵ See Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. LAW J. 713, 713 (2005).

⁶ See Paula E. Garzon, *International Creditors' Rights and Bankruptcy*, 33 INT'L LAW. 379, 379 (1999) and Peter J. Murphy, *Why Won't the Leaders Lead? The Need for National Governments to Replace Academics and Practitioners in the Effort to Reform the Muddled World of International Insolvency*, 34 U. MIAMI INTER-AM. L. REV. 121 (2002).

⁷ See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert W. Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113 (1998).

⁸ La Porta, et al (1998); Marc Solomon, *Foreign Companies and Affiliates Under §109: The Benefits and Risks of "Manufactured" Eligibility*, 23 A.B.I.J. 26 (2004).

traditionally defined. Similarly, creditors might find that arguing for the recasting of a given debtor's case as more properly ancillary to a main filing in another jurisdiction (under §304), could allow the creditor's claim to go forward while US law would not.

Consequently, it may be argued that parties to cross-border bankruptcy, given an option to choose amongst them, will tend to favor rules which preserve their right to choose the US system or not—in essence the law prior to Chapter 15—and disfavor regimes which provide less accessibility in that same way. It is a major contention of this research that as the Model Law is adopted across the globe that the activities of parties to cross-border insolvencies in US courts will, for that reason, be affected in observable ways.

Prior to the reform act, existing code §304 provided for cases ancillary to foreign proceedings regardless of the status of the original proceeding, and §109, as interpreted by the courts, allowed unfettered access to the US system by essentially foreign debtors. Chapter 15's adoption of the "centre of debtor's main interests" language from UNCITRAL's "Model Law on Cross-Border Insolvency"⁹ is supposed to provide a stricter rule to guide courts in resolving cross-border bankruptcy issues, and, as a threshold matter, should work to limit the access to US courts which had previously been available to foreign debtors. Further, the revisions to the US bankruptcy code which are presented by Chapter 15's terms are intended to bring the US laws into greater concert with international trends.

The reform act is now in its second year of enactment, and two questions remain for scholars focusing on the development of international insolvency regimes and the progress of UNCITRAL's work: Will the reforms of Chapter 15 work towards the stated goals of greater efficiency and certainty of contract? And if so, what empirical means may be proposed to gauge that success?

Based on the history of existing precedent in this area, the researcher hypothesized that the "success" of Chapter 15 might actually be most readily observed before the new law went into effect. This notion is somewhat counter-intuitive with regard to accepted principles of empirical research, because, in this case, the "effect" is expected to precede the "treatment".

The reasoning is as follows: Since adoption of the Model Law by US lawmakers in some form had been anticipated since at least year 2000 by all

⁹ Model Law on Cross-Border Insolvency, G.A. Res. 52/158, ¶16, U.N. Doc. A/RES/52/158 (Jan. 30, 1997).

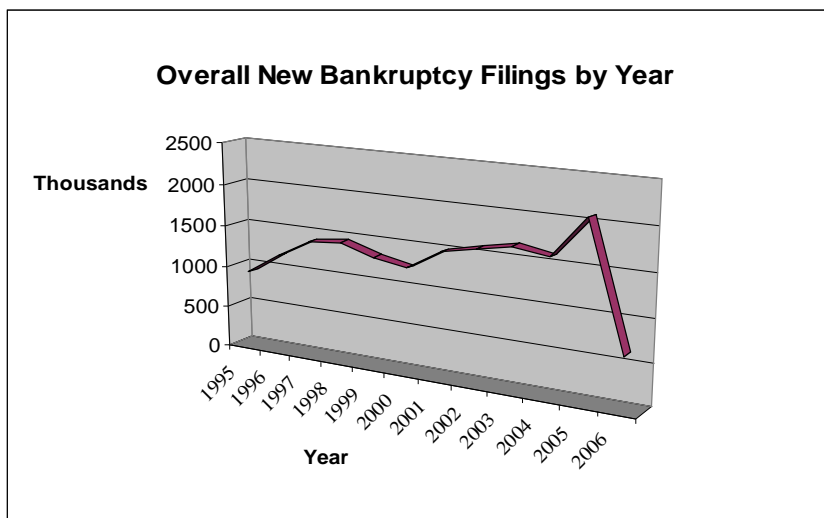
concerned,¹⁰ international insolvency cases citing to §304 and §109 should show a marked increase in US bankruptcy courts as year 2005 approached. This trend was expected because the new legislation would foreclose those Code sections as avenues into the court system; thus any potential debtors not clearly qualified under the “centre of debtor’s main interests” requirement would feel a greater urgency to file for protection before enactment of Chapter 15.

In order to make a first address of the hypothetical issues raised above, a study was undertaken of published opinions in the field of international insolvency. A discussion of the design of the study follows.

METHOD

The research method selected here consisted of: (1) a statistical analysis of the time period surrounding the adoption of Chapter 15, and (2) a case study high-lighting the reasons for reform as well as the nature of the liminal time period between UNCITRAL’s issuance of the final version of the Model (1997) and the passage of the US reform act (2005).

The data for this study was drawn from research conducted on the LexisNexis database of reported bankruptcy cases over a 12 year period beginning in 1995 and running through the available data for 2006. LexisNexis is a commercially available service providing several databases of reported



¹⁰ Mexico, Japan and South Africa were among the first nations to adopt versions

cases covering several court systems in the US. The service is updated on a continuous basis, and the publication of cases therein is at least contemporaneous with all reported cases reachable by any other method (e.g. slip-opinions, loose-leaf amendments to case reporter volumes, etc.).

A search of the pertinent database available from “LexisNexis Academic” research service indicates that for the first half of 2006, the monthly average number of published opinions issued by the bankruptcy courts was around 250. Similarly, the number of cases for calendar year 2001 totaled more than 2000. This means that the total number of published opinions for each year in the selected groups may range anywhere from 2000-, to over 3000 per year. This number may be contrasted with the much greater number of cases which are filed each year.¹¹

Still, the use of reported cases as a source from which representative data may be drawn is not unprecedented, and neither are the limitations inherent in doing so unrecognized.¹² The main problem presented by the use of published opinions is embodied by an axiomatic truth of common law jurisdictions such as the United States: a unique point of law, once decided, ought not to be revisited unless (1) unforeseen factual situations emerge which provide grounds for expansion or rejection of the established precedent, or (2) there is legislative action which creates uncertainty in the law.

In the common law tradition, published opinions exist precisely for the purpose of setting precedent and avoiding uncertainty in the administration of justice. However, this also suggests that studies of published cases ought to be especially useful in tracking changing aspects of legal codes and interpreted law.¹³ In this instance, published opinions are useful in tracking these changes since the law of international insolvency was in a state of flux and there existed great uncertainty in the time period under consideration here.

“Reported cases” is a per se subset of the larger body of decided cases, as well as the even-larger universe of cases filed. Sources estimate that even appellate courts report, on average, only about 10% of the cases filed

of the Model Law beginning in 2000 and continuing through the present.

¹¹ For example, in year 2005—just prior to the adoption of the Reform Act—the total number of new filings in US bankruptcy courts was just over 2 million. See US Bankruptcy Court Statistics, <http://USCourts.gov/bnkrctystats/statistics.htm> (last visited June 5, 2007).

¹² See Peter Siegelman & John J. Donohoe, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24(5) Law & Soc’y Rev. 1133-71 (1990).

¹³ See Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases*, 53 UCLA L. REV. 357 (2003).

with their respective scheduling clerks.¹⁴ In the case of appellate courts, it might actually be expected that the percentage is higher than trial courts because appellate decisions become precedent and it is important for that precedent to be preserved and cataloged as reference material.

The bankruptcy courts, however, like the US Tax Court or Federal Claims Court, are courts of special jurisdiction. This means that these are courts of first impression because they make findings of fact, yet their rulings are due at least some deference as precedent without appellate review.

Most significant here is the implication that that the bankruptcy courts are also considered to be “expert” in the interpretation of legal issues specific to bankruptcy. In that regard, decisions of the bankruptcy courts seem to be on par with decisions of the US district courts, though their published opinions may also have the influence of opinions issued by the circuit judges (albeit within the relatively narrow sphere of their expertise).

Because the bankruptcy court system straddles these two judicial functions, at the very least, the number of published cases is arguably more directly related to cases filed than at other federal levels. As a consequence of this unique status, it may be argued that the body of published opinions of the bankruptcy courts, particularly within the time-frame selected for study, while not purely a statistical representation of the universe of all filings, may still be a cognate for the most active issues within the courts’ purview.

The database of reported bankruptcy cases used here presents, for each recorded case, the official citation, the published opinion, a proprietary “procedural history and status,” and other information useful for referencing a particular opinion. For this study, the research focused on the text of the published opinions and other matters of public record with regard to the selected cases.

The twelve year period chosen for the study—1995 to 2006 inclusive—is significant for two reasons. First, this period of time includes several years when the EU had already adopted a reformed regulation on international insolvency but the US had not. Second, it also encompasses a full decade leading up to the passage of the reform act in this country. As such, the cases reported during this time period may reveal the strategies and preferences of parties in light of the changes in legal regime both overseas and domestically.

¹⁴ See generally Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733 (2005) (For a relevant discussion of the factors impacting this estimate.)

By 2000, the EU had adopted its own Regulation on Insolvency. The new law imposed a more stringent eligibility requirement in keeping with the Model Law's "center of [debtor's] main interests," essentially foreclosing the EU and its members (with some exclusions) as possible forums for multi-national interests to declare bankruptcy. However, that option still existed at that time for such international debtors to seek protection under US law by meeting the low bar of §109 (and often raise issues and arguments from US-based creditors under §304). This created a period of over-lap from 2000 to 2005 when the protections and options of US bankruptcy law, including reorganization, were available to many multi-national entities on an "on-demand" basis. After 2005 (and an appropriate "grandfather" period), this option was foreclosed by Chapter 15.

It is reasonable to believe that if any evidence of a significant change in the pattern of such cases were to be seen, it should be discernible from a few years prior to 1997 through the several years following. On that basis, the research focuses on cases from 1995 to 2006.

Though, as noted above, each of the pertinent sections of the Code has been either superseded or supplanted by the terms of Chapter 15 in the post-reform version, the published cases selected for study were those which implicated §§109 and 304 of the Code. Prior to the Reform Act of 2005, §304 was the section of the Code treating the question of cases ancillary to main proceedings and §109 covers eligibility to file in US courts. Together, these are the two code sections most distinguishing of cases of cross-border insolvency adjudicated to any extent in US bankruptcy courts (even given the presumptive universal applicability of §109). These are also the main targets of reform and the operation of the law as it existed prior to Chapter 15.

Amongst the cases where §304 was discussed were those where foreign representatives—acting in a role roughly analogous to that of trustee—would have sought to have the US court recognize any actions before it as "ancillary to" a concurrent (or anticipated) "main" proceeding in a foreign jurisdiction. Another common type of §304 case involved a petition for ancillary status where the debtor had filed in a foreign jurisdiction and, not bound by the automatic stay present in the US Code, US creditors had attempted domestic collection action. For this particular study, the difference was not relevant, but in general, opinions discussing §304, and §304(c) were expected to increase over time, mainly due to changes in overseas insolvency laws and the anticipated adoption of Chapter 15 in the US.

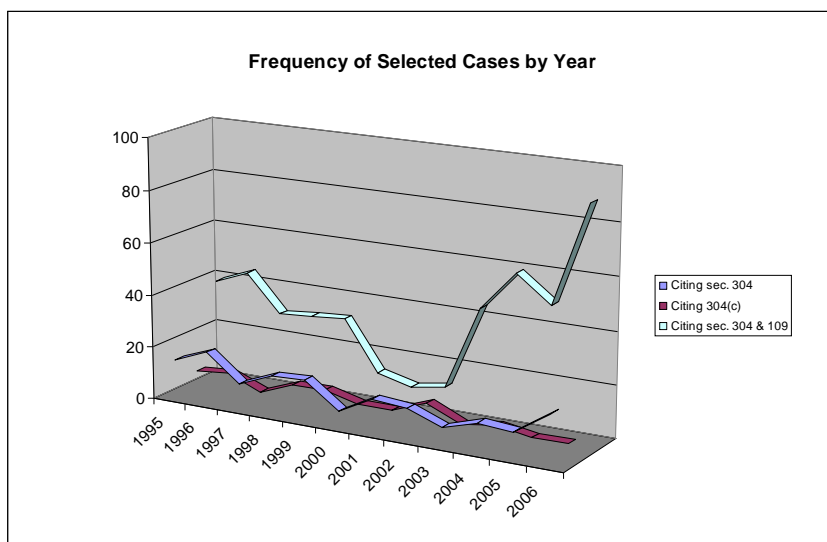
Opinions citing §109 indicate some eligibility analysis in the final ruling which, while not solely the purview of cross-border cases, when used in conjunction with other search terms, might reveal a coincident pattern with the

§304 cases. While all debtors must clear §109, it is most often raised in objection with regard to cases that may otherwise be termed “cross-border” for one reason or another, thereby often raising §304 arguments on the appropriateness of the US as a forum for a given proceeding. Logic also dictates that as overseas avenues became foreclosed to debtors, the §109 cases with cross-border implications should have increased as well.

This study focuses mainly on tracking the number of cases citing both pertinent sections within the text of the published opinion. It is anticipated that such cases will increase over the course of the selected time period, and the increase will be particularly pronounced over the final five years.

The intention of this study is to characterize the interpretation of the law by the courts during this period of change. Though the research is empirical in nature, it is not intended for the results to be generalized to other periods of time; that is, they are not predictive in a strict sense. However, the results are predictive in the sense that the generally observed trends should indicate what scholars of international law may expect as more nations adopt whatever version of the Model Law that they might choose.

RESULTS



As the table above reveals, cases were selected on the basis of several different criteria. In the first instance, selection was strictly determined by a citation in the text of the published opinion to §304, then again for that citation

to §109. Finally, the selection criteria were expanded to include all cases involving a foreign party and citing to §§109 and 304 in combination.

The chart reveals a “valley” trend over the 12 year time period in the group of published opinions which cite both pertinent Code sections. The variation across the years in the number of cases meeting those criteria represented a three-fold swing from high to low for a given data point.

The number of cases citing solely to §304 varied little over the 12 year time period, as did those citing to subsection 304(c). The latter was used as a supplementary search because it represents the (non-conclusive) list of factors which might be weighed in a court’s decision to dismiss a case as more properly ancillary to a foreign main proceeding.

Searching purely on §109 was determined early on to be inconclusive on its own owing to the fact that it was too commonly cited in a perfunctory way. In every search it returned more than 1000 cases per year.

The results returned using §§304 and 109 in combination showed the greatest change over time. In fact, this pattern of citation showed a nearly 400% increase between 2002 and 2003 alone, and a 66% decline from 1999-2000. The latter coincides with the enactment of the new regulation in the EU, while the former is roughly concurrent with the anticipated adoption of Chapter 15 in this country.

As a result of observing these general trends, a hypothetical relationship emerged, implicit in the analyses to this point: That the US courts would see a statistically significant increase in foreign filings after the EU law went into effect. To facilitate statistical analysis, the cases in the sample could be grouped in two time periods: (A) 1995-2000 and (B) 2000-2006. The two groups were divided at the important “moment” of the changing relationship between EU regulation and the US law with regard to international insolvencies.

The time periods are hypothesized as differentiated on the basis of whether the US law was an option, and then compared in terms of the number of cases drawn for each selection criterion. Procedurally, this kind of nonparametric statistical analysis requires the assumption of a null hypothesis running counter to theoretical relationships. In this case the null hypothesis assumed is that there would be no evidence of significant difference in the numbers of cases drawn regardless of the state of the law.

A nonparametric test was selected for the following reasons: (1) The assumptions necessary to use parametric tests, e.g. normal distributions,

cannot be made here; and (2) the variable of whether cross-border law was in place is a qualitative one—0 for no cross border option and 1 for cross-border option—thus precluding common regression analysis without more quantitative data retrieval. For purposes of determining whether or not the cross-border law has an impact on US bankruptcy cases, the nonparametric chi square test will yield the most meaningful analysis in this context.

To begin, we compute the expected frequency of the variable: from the sample of 451 cases over the ten year period we would expect that the number of cases with an option be equal to the number if there is no option, thus establishing the null hypothesis that the option has no effect. The expected frequencies would be 225 cases. We then determine the observed frequencies, the number of cases that occurred while a cross-border option existed and those that occurred while it did not: a simple table demonstrates that 189 cases of the sample were observed with no option while 262 were observed with the option. Then, the computation of the Chi statistic involves taking the expected frequency less the observed, taking the square of that product, and dividing by the expected frequency (see diagram below).

Numbers of §§ 109 & 304 Cases Before and After Reform Act

Optional period (pre-EU Regulation)

1995	1996	1997	1998	1999	2000	Total
39	44	30	31	32	13	189

No-option period (post-EU Regulation)

2001	2002	2003	2004	2005	2006	Total
10	12	44	59	49	88	262

To interpret this statistic, we look to a chi square distribution table and at one degree of freedom (one less the number of variables used); we see that at a .10 level of significance the chi square is 2.71, while at .005 level of significance the value is 7.88. Therefore, we can conclude that our test statistic of 11.84 compels the dismissal of the null hypothesis that the cross border law option has no effect. It is important to note here that the rejection of the null does not imply any support for any or all possible contrary hypotheticals in this case. That is, we cannot conclude positively from this result that the cross-border law did impact the number of bankruptcy cases filed in the US; the only conclusory statement which can be made here is that this particular evidence

does not support the notion that changes in EU regulation had no effect on US bankruptcy court cases.

Chi-Square Analysis:

$$\begin{aligned} X^2 &= \Sigma [(fo - fe)^2 / fe] \\ &= (189 - 225)^2 / 225 + (262 - 225)^2 / 225 \\ &= (5.76) + (6.08) \\ &= 11.84 \end{aligned}$$

DISCUSSION

Although a full analysis of the content of the opinions drawn into the sample is still wanting, some were notable, if for no other reason than the roles those may have played in supporting argument in favor of reform in the first place.

A good example of this is the *Aerovias* case.¹⁵ The *Aerovias* court denied efforts by US creditors to forcibly remove the debtor airline's reorganization to its "center of main interests," Columbia, where the automatic stay against collections provided by §362 would not apply under the then newly-adopted, local insolvency laws.¹⁶ The court explicitly chose to ignore the center of "gravity" of the main debtor-airline and held that a main action in the US was proper under §109(a) given the "substantial property" owned by that debtor in the US.¹⁷ In dicta, however, the court pointed out that in "a perfect world" a multi-national's "center of debtor's main interest" would be determinative in deciding under which nation's laws eligibility was proper.¹⁸

The cases citing both §§304 and 109 also revealed the willingness of parties to avail themselves of US law prior to reform regardless of their status vis a vis nationality, or as creditor or debtor. One of the most infamous examples of this type of case is *In re National Warranty Ins. Risk Retention Group* ("National Warranty").¹⁹ There, the court's decision to grant a US creditor relief under §304 was again resisted by the largest creditor in the action. The latter, pretenders to a class action law suit against the reinsurer,

¹⁵ *In re Aerovias Nacionales de Colombia S.A. Avianca and Avianca, Inc.*, 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

¹⁶ *Id.* at 16.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *In re National Warranty Ins. Risk Retention Group*, 306 B.R. 614 (B.A.P. 8th Cir. 2004), *aff'd*, 384 F.3d 959 (8th Cir. 2004).

argued that the debtor's actions in attempting to establish domicile outside of the US, coming as it did just prior to declaring bankruptcy, invalidated the application of §304.

In both *Aerovias* and *National Warranty*, the critical issue was the claim of the objecting creditor group with reference to §362. In *Aerovias*, the US creditors wanted to be free of § 362's bar, while in *National Warranty*, similarly situated creditors wanted it to apply since their own claim could eventually be prosecuted despite §362. The particulars of these decisions reveal the flexible nature of a party's preference with regard to the "center of debtor's main interests" rule given their own interests, and gives a clue as to legislative interest in formalizing the rule.

IN RE YUKOS

Perhaps the state of law which prompted the reform of Chapter 15 is best exemplified by *In re Yukos Oil Co.*,²⁰ a case filed with the US bankruptcy court just months before the reform.

Ruling on the December 2004 bankruptcy filing of Russian petroleum giant, Yukos, the bankruptcy court found itself having to include politics and economics in its eligibility analysis. In that case Yukos had engaged in some rather overt prepetition activities in an effort to create eligibility to file in US court. The lone US subsidiary officer, along with the parent corporation's acting CEO, testified before the bankruptcy court in Texas to the effect that, while the company's attempts to bring itself within the jurisdiction of US courts were openly manipulative, the company was motivated by egregious actions against it by the Russian government, which held a considerable stake in Yukos.²¹ The government's actions, the CEO alleged, were "illegal" and intended to forcibly re-nationalize an industrial giant that had only been privatized for a short time.²²

The court found that Yukos' prepetition action, in particular the transfer of \$480,000 to a Texas bank as payment for legal fees likely to be incurred as a matter of filing for Chapter 11 reorganization in the US, satisfied the property requirement of §109(a) and granted eligibility.²³ The *Yukos* court,

²⁰ *In re Yukos Oil Co.*, 321 B.R.396, (Bankr. S.D. Tex. 2005).

²¹ On July 25, 2006, the Yukos conglomerate was liquidated by action of a Russian bankruptcy court. Mr. Steven Theede, the acting CEO mentioned here, had resigned prior to the ruling of that court, citing creditors'—mainly the Russian government's—unwillingness to consider reorganization in the face of the huge tax debt levied in 2005, the same which prompted Yukos to seek protection in US courts.

²² *In re Yukos Oil Co.*, 321 B.R.at 400-2.

²³ *Id.* at 407.

however, acknowledged as many others had before, that it granted eligibility mainly because “there is virtually no formal barrier to having federal courts adjudicate foreign debtors’ bankruptcy proceedings” presented by §109(a).²⁴ The court noted, but generally ignored, Yukos’ other actions designed to bolster its argument for eligibility; including creating a US-based subsidiary in order to establish “a place of business” just one day before filing in Texas, and transferring to that subsidiary \$20 million and other various monies which amounted to a tiny portion of the conglomerate’s net worth, also within one week of filing.²⁵

As the debtor had overcome the question of eligibility, the court proceeded to analyze Yukos’ petition and creditors’ objections to it, as a matter of good faith and fairness. In all cases brought under the terms of the Code, the issues of bad faith and fairness are intended to act as final checks on the question of whether a debtor may proceed to discharge or reorganization regardless of their eligibility. Sections 707(a) and 1112(b) of the Code grant the court the power to dismiss for cause cases brought under Chapters 7 and 11, respectively, and provide non-exhaustive lists of possible reasons for dismissal upon motion, both of which courts have interpreted to include “bad faith.”

Good faith, or at least the absence of bad faith, is a determination that a bankruptcy judge must make on the basis of facts. Fairness in cross-border insolvency cases, such as *Yukos*, is more often a matter of comparing legal regimes and anticipated outcomes of parallel proceedings, along with assessing the likelihood of any extraterritorial enforcement of domestic court orders which those might ultimately require.²⁶ Prior to the incorporation of Chapter 15 into the Code, the question before a court in dealing with a debtor such as Yukos—having so many possible jurisdictional claims on its property—was which of the parallel proceedings that may have been instituted against it, could fairly be judged “main.”

In the end, the *Yukos* court dismissed the petition not as a matter of creditor’s, or even debtor’s best interests, but simply because it had insufficient recognized authority; that is, the debtor was eligible under a US law which a US court could not apply.²⁷ Thus, the ruling clearly demonstrated the difficulties inherent in a world economy with inconsistent rules on

²⁴ *Id.*

²⁵ *Id.* at 406-7. Oddly, the creditor bringing the motion to dismiss—a German bank—did not raise the issue of bad faith in this case, choosing instead to rely on more diplomatically oriented grounds for dismissal including “international comity”, and “act of state doctrine”. *Id.* at 399-400.

²⁶ 11 U.S.C.A. §304(c) (repealed April 20, 2005).

²⁷ *In re Yukos Oil Co.*, 321 B.R. at 411.

eligibility to seek-, or grant bankruptcy protection. The main consequence of this ambiguity is a diminution of law before politics and resulting increase in contractual uncertainty, precisely that state of things which UNCITRAL is charged with ameliorating.

CONCLUSIONS

The factors involved in any scholarly assessment of the state of cross-border insolvency under the US Bankruptcy Code do not lend themselves to particularly straight-forward operationalizations, or traditional statistical analyses. Such factors may include: (1) eligibility under the Code which, as discussed above, has generally been such a simple matter under §109 as to negate its usefulness as an analytical “variable” (though it may be said to retain its usefulness, as here, as one of a selection criterion used in combination with others), or (2) the global political situation and existing relationships between individual governments (the content of which is nearly entirely subjective in nature and unmanageably fluid over time), or even (3) the intricate nature of corporate structuring (characterized by such great variability that there is likely no workable typology that could be proposed to categorize it). All of those may be further confounded by the rapid development of international financial practice and the comparatively slowpace of coincident data collection and analysis. Simply put, it is hard to say exactly what the relationship between the law and practice “is” in the area of international finance and debtor-creditor relations, much less to be able to predict what the nature of that relationship will become in the future with sufficient accuracy to form a definite line of scholarly investigation or to provide reliable business advisement.

The method for selecting the included cases used here involved searching for any mention of the pertinent sections in the text of published opinions, no assertion has been made that the given section(s) constitute the dispositive point(s) of law or legal precedent in a given court’s ruling. That is, in authoring an opinion a court may address several points of law (or sections of the Code as is the case with bankruptcy), and the court’s analysis of those points often delves into alternative interpretations and possible findings, and does so in some detail. The same courts, however, will generally only rely on the least quantum of rationale necessary in rendering their judgments in order to avoid setting precedent in an unclear fashion. Nonetheless, future research must take account of more variables including selecting out the dispositive rule of law.

Other variables which might be included in future research include amount in controversy, diversity of parties (not always a foregone conclusion

in cross-border insolvencies), nationalities of parties, and presence of Model Law in the several involved jurisdictions.

All of these additional factors are, of course, the stuff of content analysis and much more qualitative methodologies. It is the nature of such analyses to be imposed on data—here cases and opinions—previously observed and selected on some basis. It is hoped that the current study has contributed most to defining the latter process as a bridge toward undertaking the former.

Such a bridge between legal research—characterized as it is by qualitative analysis and rhetorical methodology—and empirical research is significant beyond the scope of international insolvency of course. It is a worthwhile end unto itself if the economic stability offered by international regulation is to remain an attainable goal.